THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2010-CP-40-4244

RECEIVED
SEP 19 2013
SC Court of Appeals

Melissa Anne York and
Olga Joanne Cristy,

Appellants,

v.

Dodgeland of Columbia, Inc. and
Jim Hudson Automotive Group,
and Jim Hudson Superstore,
a/k/a Jim Hudson Hyundai

Respondents.

PETITION FOR REHEARING & PETITION FOR EN BANC

William A. McKinnon
Susan F. Campbell
MCGOWAN HOOD & FELDER, LLC
1539 Healthcare Drive
Rock Hill, South Carolina 29732
(803) 327-7800

Patrick E. Knie
PATRICK E. KNIE, PA
250 Magnolia Street
Spartanburg, SC 29306
(864) 582-5118

ATTORNEYS FOR APPELLANTS

Appellants Melissa York and Olga Cristy petition the Court for rehearing and reconsideration of Opinion No. 5169 filed September 4, 2013, pursuant to Rule 221(a), SCACR. Appellants specifically ask the Court to address three issues: (1) Appellants' alleged abandonment of the issue of whether arbitration discovery should have been allowed, (2) the factual finding of the sequence of Cristy's signing of the Buyers Order and Installment Contract, and (3) the interpretation that Ms. Cristy's Buyers Order and Installment Contract should not be construed together. In support of the petition, Appellants respectfully submit the following:

I. Abandonment

This Court erred in finding that the issue concerning arbitration related discovery was abandoned when Appellants' argument on this issue spanned three pages. Respectfully, Appellants submit they did not abandon this issue because (1) case law was cited for the issue, (2) more than a mere conclusory statement was made, and (3) this issue was addressed at oral argument.

Abandonment is not appropriate because Appellants thoroughly addressed the need for discovery at all phases of the case, throughout the appeal, and at oral argument. (Plaintiffs' Omnibus Memorandum in Opposition to All Motions R. 74-96; Plaintiff's Motion to Reconsider, Alter and Amend Judgment R. 153-157; Transcript of Oral Argument at Hearing held on March 10, 2011, R.211, R.214; Transcript of Oral Argument at Hearing held on May 18, 2011, R. 250, R. 252; Appellant's. Brief pg. 7, 9, 15, 18). Our courts have previously held that abandonment is appropriate only in certain instances. For example, in *State v. Cutro*, 332 S.C. 100, 504 S.E.2d 324 (1998) the court held that a one sentence argument is too conclusory to present any issue on appeal. The Supreme Court in *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 327, 730 S.E.2d 282, 284 (2012), found that an issue was abandoned because it was "devoid

of *any* citation to legal authority, with the summary conclusion that Atlantic breached the lease." (emphasis added). In *Doe v. Doe*, 370 S.C. 206, 634 S.E.2d 51 (Ct. App. 2006), this Court found that a mere statement that an "accountant's fee was incorrect and did not explain why it was not correct." In *Butler v. Butler*, 385 S.C. 328, 343, 684 S.E.2d 191, 199 (Ct. App. 2009), this Court found abandonment appropriate because "the appellant cited no statute, rule or case in support of his arguments in either the argument section or 'Background Legal Principles' section of brief."

These cases, along with a line of other cases on abandonment, demonstrate egregious errors that have properly resulted in abandonment. They are nothing like the situation in the instant appeal.

The opinion states, "Appellants summarily argue the trial court erred in upholding the validity of the arbitration agreements without first allowing discovery. Yet Appellants' brief fails to cite any law or authority that supports this particular proposition and, instead, relies upon an attenuated argument and a summary conclusion." However, Rule 208(b)(1)(D), SCACR, states:

> The brief shall be divided into as many parts as there are issues to be argued. *At the head of each part, the particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority.* A party may also include a separate statement of facts relevant to the issues presented for review, with reference to the record on appeal, which may include contested matters and *summarize* the party's contentions.

(emphasis added).

Appellants plainly set forth their first issue on appeal: "BECAUSE THE FACTS OF EACH CASE MUST BE EXAMINED TO DECIDE THE ARBITRATION ISSUE, THE CONSUMERS WERE ENTITLED TO ARBITRATION-RELATED DISCOVERY." Opening Brief of Appellants at 7. Appellants provided one citation to the S.C.R.C.P., two footnotes,

seven case citations, one citation to the South Carolina Code, and two citations to the lower court order in making this argument. It is quite plain from Appellants' Initial Brief that Appellants contended they should have been granted discovery. The argument was neither conclusory nor devoid of citations, and was therefore not abandoned.

This Court has previously criticized litigants for unnecessarily long briefs. *See, e.g., State ex rel. McLeod v. C & L Corp., Inc.,* 280 S.C. 519, 526, 313 S.E.2d 334, 339 n.2 (Ct. App. 1984) ("This type of advocacy by both sides contributed to the excessively voluminous briefs and transcript and a great deal of unnecessary work for the Court"); *abrogated on other grounds by Murphy v. Owens-Corning Fiberglas Corp.*, 346 S.C. 37, 550 S.E.2d 589 (Ct. App. 2001).

Further, Chief Justice Toal in *Atlanta Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 332-33, 730 S.E.2d 282, 287 (2012), has warned "an over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice." She suggested that "where the question of preservation is subject to multiple interpretations, any doubts should be resolved in favor of preservation." *Id.*

In this appeal, this Court has done exactly what Chief Justice Toal has warned against. Characterizing a three-page argument with seven case citations as an "abandoned" issue is "an over-zealous application of appellate preservation rules denigrat[ing] the primary purpose of the judiciary." *Id.* Appellants have complied with the standard for preservation, and this issue should have been addressed by this Court on the merits.

II. THE COURT ERRED IN MAKING A FACTUAL FINDING REGARDING THE SEQUENCE IN WHICH THE BUYERS ORDER AND INSTALLMENT CONTRACT WERE SIGNED.

The Court found that if Cristy's Buyers Order and Installment Contract were constructed together, Term 14 of the Buyers Order negates the existence of any inconsistent terms because it expressly permits modification of the Buyers Order's terms by the Installment Contract. In so holding, the Court made a factual finding that Cristy and Jim Hudson Hyundai executed the Installment Contract after they had already executed the Buyers Order. Appellants argue that this factual finding is erroneous because the Record is devoid of any facts to support the sequence in which the contracts were signed, and no discovery was allowed to address this factual finding.

While this Court is properly seated under a *de novo* review and has the authority to make a finding of fact, there is no evidence to support a finding of fact as to the sequence in which the documents were signed. *Nationwide Mut. Ins. Co. v. Prioleau*, 359 S.C. 238, 244, 597 S.E.2d 165, 168-69 (Ct. App. 2004) (holding the record revealed no evidence which reasonably supports the factual finding). Specifically, there is no time stamp on the documents to demonstrate such a finding, and nor was any testimony provided by either side. Therefore, Appellants respectfully request this Court to reconsider this factual finding pursuant to Rule 221(a), SCACR, because this material fact has been overlooked.

III. THE COURT ERRED IN FINDING CRISTY'S BUYERS ORDER AND INSTALLMENT CONTRACT SHOULD NOT BE CONSTRUED TOGETHER.

The Court erred in determining that Cristy's Buyers Order and Installment Contract should not be construed together because the parties stated their intent to consider them separately. The court based its holding on the following language:

> This contract for sale is entered into between Jim Hudson Hyundai, hereafter called Dealer, and Customer, as identified below. *Any retail installment contract* or other document executed by Customer in connection herewith *is*

> *simply a means of satisfying* the Customer's obligations under this Contract of Sale . . . .

(emphasis added). (R. 151). The Court contends that this "language demonstrates Cristy and Jim Hudson Hyundai explicitly intended a demarcation between the two contracts." Appellants respectfully disagree.

South Carolina case law along with the language of the two adhesion contracts fail to support a theory of demarcation. The "common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement." *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989). No meeting of the minds occurred between these parties, because the terms of the contracts are contradictory. No limits can be established if controlling terms are in opposition of each other. For example, the Retail Installment agreement requires all disputes be arbitrated, but the Sales Contract excludes "repossession, injunctive relief, or monies owed." The Sales Contract prohibits punitive damages, but the Retail Installment contract specifically permits them. The Retail Installment agreement provides the dealer will advance the fees, yet the Contract of Sale does not.

These distinct contradictions demonstrate that no limitation could have been intended or established by the parties because no consensus was reached on the specific limiting language between Cristy and Jim Hudson Hyundai. There is no doubt that the parties intended to enter into a purchase agreement, however it cannot be implied that a demarcation was intended by Cristy. Furthermore, both contracts in question were adhesion contracts arising out of the same transaction. Cristy had no control over contractual terms or any inconsistencies between the form language in the contracts.

South Carolina law is clear that in the event of two contracts being executed at the same time on the same subject, they are treated as unitary. "The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the courts of the same transaction, the Court will consider and construe them together." *Harris v. Ideal Solutions, Inc.*, 385 S.C. 74, 79, 682 S.E.2d 523, 526 (Ct. App. 2009) (citing *Cafe Assocs. v. Gerngross,* 305 S.C. 6, 10, 406 S.E.2d 162, 164 (1991). In *Café Associates*, the dispute arose over an Asset Purchase Agreement and a Covenant Not to Compete. *Id.* The Supreme Court found the agreements were "substantially the same, covered the same subject matter, and were executed during the course of the same transaction," and as such should be read together. *Id.* In this case, the contracts cover the same transaction, same parties, and occurred at the same time.

In *Harris*, Judge Short analyzed a similar situation by examining the contracts at issue and the supporting testimony of both parties to answer the question of intent. *Id.* 385 S.C. at 82, 682 at 528. Testimony in *Harris* revealed that there was a change of circumstances over the course of the execution of multiple contracts and a contradiction in the purpose of the contract, thereby justifying the need to review the contracts separately. No such circumstance exists in this case. Respondent Hudson relies on two contracts in support of its assertion that arbitration must be compelled. There has been no evidence which would support a change of circumstances over the course of the execution of multiple contracts nor has there been any proof of a contradiction in the purpose of the contract. Therefore, there is no evidence which would justify reviewing the contracts separately. The Buyers Order and the Installment Contract were created and imposed by Jim Hudson Hyundai for the purpose of selling to all potential customers. These contracts, like the contracts in *Café Associates,* are an extension of one another. They were

created for the sole purpose of the purchase and finance of a vehicle. For Cristy to purchase the vehicle, the signing of both documents was necessary. In *Harris*, the contradiction existed over how prior liability and debt of the partnership would be split, which was the purpose of the contract. In this instance, there is no contradiction surrounding the purpose of the contracts, rather the contradiction exists in a term of the contract.

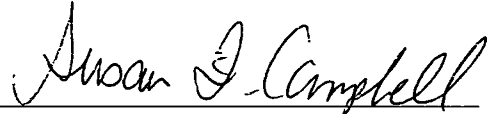
Based on this distinction this Court should rely on the general rule to view these contracts as a unitary contract. The nature of the contracts and the fact that these contracts arose from the same transaction supports a reliance on *Harris v. Ideal Solutions* and a finding that a unitary contract exists.

CONCLUSION

For the foregoing reasons, Appellants request this Court to grant this Petition for Rehearing and Petition for En Banc.

Respectfully submitted,

September 19, 2013



MCGOWAN HOOD & FELDER, LLC
Susan F. Campbell
1517 Hampton Street
Columbia, South Carolina 29201
Telephone: (803) 779-0100
Facsimile: (803) 256-0702
Email: scampbell@mcgowanhood.com

MCGOWAN HOOD & FELDER, LLC
William A. McKinnon
1539 Health Care Dr.
Rock Hill, SC 29732
Telephone: (803) 327-7800
Facsimile: (803) 328-5656
Email: bmckinnon@mcgowanhood.com

PATRICK E. KNIE, PA
Patrick E. Knie
Post Office Box 5159
Spartanburg, South Carolina 29304-5159
Telephone: (864) 582-5118
Facsimile: (864) 585-1615
Email: pknie@knielaw.com

ATTORNEYS FOR APPELLANTS

RECEIVED
SEP 19 2013
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2010-CP-40-4244

Melissa Anne York and
Olga Joanne Cristy,

Appellants,

v.

Dodgeland of Columbia, Inc. and
Jim Hudson Automotive Group,
and Jim Hudson Superstore,
a/k/a Jim Hudson Hyundai

Respondents.

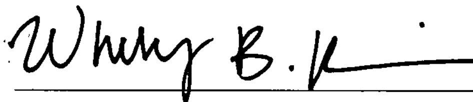
CERTIFICATE OF SERVICE

I, Whitney B. Harrison, Attorney with McGowan, Hood & Felder, LLC do hereby certify that on September 19, 2013, I served a copy of the following ***Petition for Rehearing and Petition for En Banc*** by depositing in the United States mail in Columbia, South Carolina with proper postage prepaid to the following:

Steven W. Hamm
C. JoAnne Wessinger Hill
RICHARDSON PLOWDEN &
ROBINSON, P.A.
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400

C.E. "Skip" Hardin, Jr.
MERRITT, FLEBOTTE, WILSON, WEBB &
CARUSO, PLLC
P.O. Box 11879
Columbia, South Carolina 29211
(803) 255-0620

Rebecca Laffitte
J. Michael Montgomery
SOWELL GRAY STEPP &
LAFFITTE, L.L.C.
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400



Whitney B. Harrison
MCGOWAN HOOD & FELDER
1517 Hampton Street
Columbia, South Carolina 29201
Telephone: (803) 779-0100
Facsimile: (803) 256-0702
Email: wharrison@mcgowanhood.com

RECEIVED
SEP 19 2013
SC Court of Appeals

McGowan, Hood & Felder, LLC

Chad A. McGowan (SC,GA,NC)
S. Randall Hood
John G. Felder, Jr.
W. Jones Andrews, Jr.
Jordan C. Calloway
Susan F. Campbell
Ashley White Creech
Ruskin C. Foster
Lara Pettiss Harrill

Whitney Harrison
Patrick M. Killen William A.
McKinnon (SC,DC)
Daniel "Ernie" Peagler
Robert V. Phillips
Seth Rose
James Stephen Welch* (SC,OK)
Joseph G. Wright, III*
Of Counsel*

Writer's Email: wharrison@mcgowanhood.com

September 19, 2013

VIA Hand Delivery
The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

69822
RECEIVED
SEP 19 2013
SC Court of Appeals

Re: *York v. Dodgeland of Columbia*
Lower Court Case No. 2010-CP-40-4244
Appellate Case No. 2011-199006

Dear Ms. Kitchings:

Enclosed please find Appellants' Petition for Rehearing/Petition for Enbanc and a filing fee of $25. Pursuant to Rule 240(d), SCARC, six copies have been provided to the Court. Please let me know if you have any questions or concerns.

Sincerely,

Whitney B. Harrison

Whitney Boykin Harrison

WBH/

Enclosure
cc: William A. McKinnon
Susan F. Campbell
Patrick E. Knie
Steven Hamm
C. JoAnn Wessinger Hill
C.E. "Skip" Hardin, Jr.
Rebecca Laffitte
J. Michael Montgomery