THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Daniel Coble, Circuit Judge

Appellate Case No. 2023-001034

Ethan Tyler Vanfossen and Corey J. Davis, on behalf of themselves and all others similarly situated,.....Respondents,

v.

Love Chevrolet Company,.....Appellant.

PETITION FOR REHEARING OR REHEARING *EN BANC*

Respondents Ethan Tyler Vanfossen and Corey J. Davis, on behalf of themselves and all others similarly situated (hereinafter "the truck buyers"), hereby respectfully move and petition, pursuant to Rules 219 and 221(a), SCACR, as well as all other applicable law, for an order granting rehearing or rehearing *en banc* in this case and submit the memorandum below in support of the same.

ARGUMENT

In its opinion issued January 2, 2025, Vanfossen v. Love Chevrolet Co., 2025-UP-003, this court reversed the trial court's decision to deny Appellant ("Love Chevrolet")'s motion to compel arbitration. This court held that the decision of whether the claimed arbitration agreement was enforceable after Love Chevrolet's assignment of all its rights in the parties' contract was for the arbitrator as a categorical

matter of law. The opinion issued in this case treats Sanders v. Savannah Hwy. Auto Co., 440 S.C. 377, 892 S.E.2d 112 (2023), as having announced a categorical rule:

> We read our supreme court's opinion in Sanders as holding that challenges pertaining to "whether [a] contract continued to exist after a certain point in time" are issues for the arbitrator to decide. Id. at 389–91, 892 S.E.2d at 118–19. This includes a challenge as to whether the party seeking to compel arbitration assigned and thereby lost its right to compel arbitration. Id. at 391, 892 S.E.2d at 119 ("Prima Paint requires the arbitrator to decide whether [a party] retained the right to compel arbitration after assignment [of the container contract]."). Here, the circuit court found Love's right was extinguished when it assigned the financing agreements to GM Financial. Because we understand Sanders as holding this determination should have been reserved for the arbitrator, we reverse.

Vanfossen v. Love Chevrolet Co., 2025-UP-003.

Respectfully, the court's decision is grounded in a misapprehension of the scope and meaning of the Supreme Court of South Carolina's decision in Sanders. In light of the recency of that decision and some phrasing in it that is perhaps less clear than practitioners and lower courts would desire, that misapprehension is understandable. It remains, however, a misapprehension, and one that has produced an incorrect decision here.

Rehearing is warranted. Given the potential for future erroneous decisions if this misapprehension of Sanders is applied by this court going forward, especially when appeals of the grant or denial of motions to compel arbitration are so ubiquitous, rehearing *en banc* is warranted. Rehearing *en banc* would allow the full court to assess this reading of Sanders and to clarify how this court interprets the holding of that Supreme Court case.

I. Sanders does not announce the rule that this opinion states it does and did not hold such a category of decision must always be for the arbitrator. What the parties' arbitration agreement says about what gateway matters, if any, are for the arbitrator makes a great deal of difference.

In Sanders, our Supreme Court did *not* hold that there is a general rule that "challenges pertaining to 'whether [a] contract continued to exist after a certain point in time' are issues for the arbitrator to decide." Vanfossen v. Love Chevrolet Co., 2025-UP-003 (quoting Sanders, 440 S.C. at 389–91, 892 S.E.2d at 118–19).[1] The Supreme Court, rather, determined that particular enforceability question was within the scope of what was *in that case, under the language of that arbitration agreement*, delegated to the arbitrator for decision. Sanders, 440 S.C. at 380, 388-91.

The truck buyers' brief set out how the Supreme Court analyzed Sanders and how what was delegated to the arbitrator in the instant case is materially different:

> In reversing this court's Sanders opinion, the Supreme Court did not determine this court was wrong in its reasoning about whether the parties who sought to compel arbitration retained any rights under the contract that provided for arbitration. Sanders, 440 S.C. at 379-92. **The Supreme Court just drew an important distinction between the questions of whether an agreement to arbitrate was entered into by the parties *at all* and whether the admittedly existing agreement was still *enforceable* by a party that had assigned away its rights under the agreement. Id. at 386-91. The Court decided the latter question is different from the first and can, if it has been delegated to an arbitrator by agreement, be decided by that arbitrator. Id. at 388-91. Based on the scope of the arbitration agreement at issue in Sanders, which specifically provided for the arbitrator to decide "the arbitrability of the claim or dispute[,]" id. at 380, the**

[1] Respectfully, the truck buyers note that the question on which the trial judge here ruled was not a challenge to a contract's continued existence but was, rather, the question of whether a contract was enforceable by an entity that was no longer a party to it. (R. pp. 4-8.)

> **Supreme Court determined that the question this court had addressed in its Sanders opinion was a question for the arbitrator. Id. at 388-91.**
>
> **Here, the language in the clause delegating certain "gateway matters" to the arbitrator was different from the all-encompassing arbitrability language in Sanders and did not include delegation to the arbitrator to decide the enforceability of the supposed arbitration agreement. (R. pp. 141, 142.)** This court's reasoning in Sanders, with the exception of whether the issue was one for the court or the arbitrator under the circumstances of that case, was not reversed. Sanders, 440 S.C. at 379-92. This court's Sanders decision was reversed on other grounds than whether this court's analysis of the effect of the assignment was a correct analysis. Id. at 388-91. This court's decision in Sanders about whether a party retains any rights in a contract it has assigned without qualification remains the law. See id.; Sanders, 432 S.C. 332-34.

(Final Brief of Respondents pp. 8-9 (emphasis added in bold).)

> **Here, what the arbitration agreement document states is that "[a]ll 'gateway matters' concerning the existence, applicability, and validity of this Agreement shall be resolved by the arbitrator." (R. pp. 141, 142.) One of those "gateway matters" purported to be delegated to the arbitrator is *not* the *enforceability* of the supposed arbitration agreement.** (R. pp. 141, 142.) There is not "clear and unmistakable evidence" of agreement that the *enforceability* of the arbitration agreement was to be decided by an arbitrator.

(Final Brief of Respondents p. 7 (emphasis added in bold).)

Passages from the Supreme Court's Sanders opinion illustrate that the decision there was driven by the particular contractual language at issue and not by a rule that enforceability challenges based on assignment are always, or even usually, the purview of an arbitrator. The Sanders opinion notes the generally applicable law is as follows:

> Under the FAA, the presumptive answer is that the court—rather than the arbitrator—resolves gateway

> questions of arbitrability such as whether an arbitration provision is enforceable and whether the provision applies to a particular dispute. Doctor's Assocs., Inc. v. Alemayehu, 934 F.3d 245, 250-51 (2d Cir. 2019) ; see Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) ("The question of the arbitrability of a claim is an issue for judicial determination, unless the parties provide otherwise.").

Sanders, 440 S.C. at 384 (emphasis in original).

> [T]he Supreme Court [of the United States] "has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by 'clear and unmistakable' evidence." Henry Schein, Inc. v. Archer & White Sales, Inc., —— U.S. ——, 139 S. Ct. 524, 530, 202 L.Ed.2d 480 (2019) (quoting First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)).

Sanders, 440 S.C. at 384.

The conclusion of the Court's Sanders opinion further reveals that the decision in that case was the product of its particular facts – the all-encompassing delegation to the arbitrator of "the arbitrability of the claim or dispute[.]" Id. at 380. Per the Court, "[t]he Prima Paint doctrine is not the model of clarity; however, ***as applied to this case***, the doctrine requires us to hold that the arbitrator must decide the gateway question of whether Petitioners retained the right to compel arbitration after assignment of the RISC." Sanders, 440 S.C. at 392 (emphasis added). If that were not because the Sanders parties delegated *all* arbitrability matters, including enforceability post-assignment, to the arbitrator, rather than because of a generally applicable rule about assignment-related challenges, the Sanders opinion would be internally inconsistent. Id. at 384, 392. In that same opinion, the Supreme Court observed that "the presumptive answer is that the court—rather than the arbitrator—resolves gateway

questions of arbitrability such as whether an arbitration provision is enforceable[.]" Id. at 384 (emphasis in original). The facts of Sanders – that the parties delegated to the arbitrator *all* questions relating to "the arbitrability of the claim or dispute" were just such that they rebutted the generally applicable presumption. Id. at 380, 384.

In its reasoning here, the court has misapprehended the law. Our Supreme Court could have been clearer in Sanders about how much its decision was driven by the particular language of the particular arbitration agreement in question; however, an examination of that opinion, especially against the background of preexisting law, reveals that it announced no such categorical rule about enforceability challenges as this court interpreted. That question was for the arbitrator in Sanders because that is what the arbitration agreement provided. Sanders, 440 S.C. at 380 (agreement provided for arbitrator to decide "the arbitrability of the claim or dispute").

Here, the language at issue is materially different: "[a]ll 'gateway matters' concerning the existence, applicability, and validity" – but not the enforceability – "of this Agreement shall be resolved by the arbitrator." (R. pp. 141, 142.) Given that the entirety of this court's decision in the instant case hangs upon an erroneous reading of Sanders, rehearing should be granted to change this court's decision.

II. The issue upon which the court reversed is not preserved for review.

As noted at oral argument in this case, Love Chevrolet (the Appellant here) did not preserve for review the issue of whether the arbitrator, rather than the court, should determine the effect of the assignment. The issue was raised in the initial hearing, but the trial court did not rule on it, and it was not raised in Love Chevrolet's motion under Rule 50(e), SCRCP. (R. pp. 4-8, 75-86.) To be preserved for appellate review, an

argument must have been both raised to and ruled upon by the trial court. E.g., Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998). "Where a matter is not ruled on by the circuit court, the issue is not preserved for appellate review unless the complaining party moves to amend the judgment pursuant to Rule 59(e)." Vespazziani v. McAlister, 307 S.C. 411, 413, 415 S.E.2d 427, 428 (Ct. App. 1992). An appellant's unpreserved arguments cannot prevail on appeal. E.g., Hatfield v. Hatfield, 327 S.C. 360, 367, 489 S.E.2d 212, 216 (Ct. App. 1997).

The court must have misapprehended the record (or perhaps the law, though the former seems more likely) to reach the result it did. The conclusion reached on the issue is wrong, as noted above, but the issue was never preserved so that this court might reach its merits.

III. The court misapprehended one of Respondents' arguments in its opinion.

The court here wrote that the truck buyers "argue that the Federal Arbitration Act (FAA) does not apply because these transactions supposedly did not involve interstate commerce." Vanfossen v. Love Chevrolet Co., 2025-UP-003. Respectfully, that was not the truck buyer's argument on that point. The argument, an additional sustaining ground, was that, in light of Love Chevrolet's failure to put any evidence before the court that the transaction did in fact involve interstate commerce, Love Chevrolet failed to carry its burden to *prove* that the transaction involved interstate commerce (Final Brief of Respondents pp. 21-24) – and, just as it did in Hicks Unlimited, Inc. v. UniFirst Corp., 439 S.C. 623, 889 S.E.2d 564 (2023), that consigned Love Chevrolet's motion to failure.

That is right. Love Chevrolet did not put any such evidence in the record. Under Hicks, the decision to deny the motion to compel arbitration should have been affirmed. Id.

The court's existing opinion here has misapprehended both the Respondent's argument on this point and the law. See id. Rehearing should be granted to correct this.

IV. No preservation of the Respondents' arguments was required, and the court should have reached the additional sustaining grounds.

In its opinion, the court stated that the Respondents had failed to preserve an issue and that, "[a]ccordingly, this issue is not properly before us." Vanfossen v. Love Chevrolet Co., 2025-UP-003. The court also declined to address any of the Respondents' other additional sustaining grounds arguments.

Respectfully, there are two major misapprehensions in this area. First, there is no preservation requirement for an argument made on appeal *by a respondent*, which is what the truck buyers are here. E.g., Dreher v. S.C. Dept. Health & Environmental Control, 412 S.C. 244, 250, 772 S.E.2d 505, 508 (2015). All issues raised to the court by the truck buyers were before the court for review. Preservation is an *appellant's* requirement. Id.

Second, it is not correct that the court's decision on the interpretation of Sanders and its scope was dispositive of the additional sustaining grounds noted by the truck buyers. Those additional grounds were noted precisely because each of them show that affirming the trial court was the correct decision, regardless of how this court sussed out the issue upon which Judge Coble based his ruling. They reveal that there are a

number of independent reasons why the decision to deny Love Chevrolet's motion was correct.

The court misapprehended the law, the arguments, and the effect of the additional sustaining grounds argued by the truck buyers. Rehearing should be granted so that they may be addressed and ruled upon. If they are addressed consistently with the law, the outcome will be very different.

V. A reversal should mean *remand*, not sending to the arbitrator.

In its opinion, the court simply reversed and, apparently, sent the case to the arbitrator. Though reversal is the wrong decision, if reversal remains the court's decision, the case should be remanded for the trial judge to rule on the truck buyers' other grounds opposing the motion, such as unconscionability.

The Supreme Court in Sanders reminds us that, presumptively, "the court—rather than the arbitrator—resolves gateway questions of arbitrability such as whether an arbitration provision is enforceable[.]" Sanders, 440 S.C. at 384 (emphasis in original). Even if this court's view of Sanders remains the same in ruling on this petition, the thing to do will be to change the court's action to remand for a decision on the truck buyers' *other* grounds for why Love Chevrolet's motion should be denied. Those alternate grounds to affirm are gateway questions of arbitrability themselves, including questions of unconscionability and whether an agreement to arbitrate was formed, which are always matters for the court, not an arbitrator. Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 296, 130 S.Ct. 2847, 177 L.Ed.2d 567 (2010); Damico v. Lennar Carolinas, LLC, 437 S.C. 596, 879 S.E.2d 746 (2022); Simmons v. Benson Hyundai, LLC, 438 S.C. 1, 4-5, 881 S.E.2d 646, 648 (Ct. App. 2022).

Especially because the decision on the Sanders issue is *not* dispositive of the other grounds argued by the truck buyers, a reversal should be accompanied by a remand for a decision on those other grounds.

VI. Rehearing *en banc* would be proper.

"A hearing or rehearing en banc is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Rule 219(a), SCACR.

Here, consideration by the full court is warranted. The decision issued here is grounded in an incorrect reading of the Supreme Court's Sanders opinion. As appeals from the grant or denial of motions to compel arbitration are brought frequently before this court, uniformity of decisions in this area is important. Whether Sanders announced a new categorical rule or simply applied existing arbitration law to produce a decision dependent upon the specific facts of that case is a question of exceptional importance. If the Supreme Court announced a categorical rule like what the instant case's opinion states, the Court has issued a self-contradictory opinion. (Contrast this court's panel's reading of Sanders with the statement in Sanders that "the presumptive answer is that the court—rather than the arbitrator—resolves gateway questions of arbitrability such as whether an arbitration provision is enforceable[.]" 440 S.C. at 384 (emphasis in original).)

This full court deserves a chance to weigh in on this question and clarify what this court's position is on a heavy question that is likely to recur in future cases.

WHEREFORE, Respondents pray for an order granting rehearing or rehearing *en banc* in this case.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the foregoing petition for rehearing on the date given below by emailing it to opposing counsel at the addresses noted below.

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January 16, 2025