

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Daniel Coble, Circuit Court Judge

Appellate Case No. 2023-001034
Case No. 2022-CP-40-00654

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

v.

Love Chevrolet Company Appellant,

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the circuit court err by failing to apply the *Prima Paint* doctrine and compel the matter to arbitration for the arbitrator to decide gateway issues such as arbitrability?
- II. Did the circuit court err by determining that Appellant could not enforce the Arbitration Agreements following their incorporation into Retail Installment Contracts?
- III. Did the circuit court err by finding that the Arbitration Agreements were assigned where there was no manifestation of intent by Appellant to do so?
- IV. Did the circuit court err by finding that Respondents' claims arise under their Retail Installment Contracts rather than their Records of Purchase?
- V. Did the circuit court err in refusing to compel arbitration of Respondent Davis's claims where Plaintiff provided no evidence supporting the terms of his Retail Installment Contract and his contention that it was assigned?

STATEMENT OF THE CASE AND FACTS

On August 29, 2020, Plaintiff Ethan Tyler Vanfossen (“Vanfossen”) came to Defendant Love Chevrolet Company’s (“Love”) automobile dealership in Columbia, South Carolina. (Compl. ¶ 12; R. 29.) Vanfossen alleges that he informed a Love salesperson that he needed a truck with the ability to pull a large trailer. (*Id.*) Vanfossen claims he purchased a 2020 Chevrolet Silverado 1500 that Love advertised and represented as having a towing capacity of 12,000 lbs. (*Id.* ¶¶ 13-14; R. 29). According to Vanfossen, he later discovered that the actual towing capacity of the truck he purchased was 6,600 lbs. (*Id.* ¶ 15; R. 29.) Vanfossen claims he experienced “significant difficulties” when he attempted to use the purchased truck to pull his trailer. (*Id.* ¶ 16; R. 29.)

Similarly, on September 7, 2020, Plaintiff Corey J. Davis (“Davis,” and collectively with Vanfossen, “Plaintiffs”) came to Love in need of a truck capable of pulling a trailer with livestock. (*Id.* ¶ 19; R. 30.) Davis alleges he purchased a 2020 Chevrolet Silverado based on Love’s advertisements and representations of the truck’s 12,000-lb. towing capacity. (*Id.* ¶¶ 20-21; R. 30.) According to Davis, when he attempted to use the truck to pull a trailer with livestock, the truck “was not capable of towing it.” (*Id.* ¶ 22; R.30.)

In purchasing their vehicles, each Plaintiff signed a Record of Purchase¹ for the truck and a Retail Installment Sale Contract (“RISC”) to finance the truck.² (*See* Vanfossen and Davis Records of Purchase, Ex. A to Am. Answer; R. 15.) Plaintiffs also both executed standalone

¹ The Record of Purchase contains an additional arbitration clause that was separately initialed and acknowledged by Plaintiffs. (*See* Vanfossen and Davis Records of Purchase, Ex. A to Am. Answer; R. 15)

² As detailed below, the RISC for Plaintiff Davis is not part of the Record.

Arbitration Agreements. (*See* Arbitration Agreements, Ex. A to Aff. in Supp. of Motion to Stay and Compel Arb.; R. 147.)

Both Arbitration Agreements provided that they “evidence[] a transaction involving interstate commerce,” and the parties acknowledged and agreed that the Federal Arbitration Act would apply and preempt state law. (Aff. & Exhibit; R. 145.) Moreover, the Arbitration Agreements provided that “[a]ll ‘gateway matters’ concerning the existence, applicability, and validity” of the Arbitration Agreements “shall be resolved by the arbitrator.” (*Id.*) Each Arbitration Agreement further states that it is “incorporated into and made a part of all Contract(s) as defined in th[e Arbitration] Agreement.” (*Id.*) Finally, “Contract(s)” is defined within the Arbitration Agreement as “any agreement(s) between [Vanfossen or Davis] and [Love] regarding the sale, lease, financing, service or maintenance of the Vehicle.” (*Id.*)

Plaintiffs initiated the underlying action by filing their Complaint on February 7, 2022. In their Complaint, the Plaintiffs allege Love misrepresented the towing capacity of the 2020 Chevrolet Silverado 1500 pickup trucks that they purchased from Love.³ Plaintiffs assert claims for violation of the Dealers Act, breach of express and implied warranties, and negligent misrepresentation. (*See generally* Compl.; R. 26)

On April 13, 2022, Love filed an Answer denying the material allegations of the Complaint. (*See* Answer; R. 21.) Love reserved its right to move to stay and to compel arbitration.

On April 14, 2022, Love filed a Motion to Stay and to Compel Arbitration with a supporting affidavit attaching the Arbitration Agreements that Plaintiffs executed. (Mot. to Compel; Aff. in Supp. & Exhibit; R. 143, 145.) On November 7, 2022, Love filed a Memorandum in Support of

³ This appeal is limited to Vanfossen and Davis’s transactions with Love only, as Vanfossen and Davis are the only named Plaintiffs. Although they seek to serve as representatives of those similarly situated, the circuit court has not yet determined whether a class should be certified.

its Motion to Compel Arbitration. (Mem. in Supp.; R. 128.) In its memorandum, Love argued that because it had entered into binding Arbitration Agreements governed by the Federal Arbitration Act with both Plaintiffs and the Arbitration Agreements were not substantively unconscionable, its motion should be granted. (*Id.* at 5-9; R. 132-136.)

On November 9, 2022, Plaintiffs filed a Response in Opposition to Motion to Stay & Compel Arbitration. (Resp. in Opp'n; R. 111.) Plaintiffs argued, *inter alia*, that Love had assigned all its rights to compel arbitration when Love assigned the RISCs to GM Financial. (*Id.* at 5-6; R. 115-116.) Plaintiffs highlighted the Arbitration Agreements' "incorporation" language and asserted that the definition of "contracts" included the RISC. Plaintiffs submitted a copy of the RISC between Love and Vanfossen as an exhibit to their memorandum. (Vanfossen RISC, Ex. B to Resp. in Opp'n; R. 109.) However, they *never* submitted the RISC between Davis and Love (and thus there is no such RISC in the Record). Nevertheless, they contended that the Vanfossen RISC identified Love as the Seller-Creditor and stated that it "contains the entire agreement between [buyer] and [Love] relating to this contract," and that since the RISC was assigned to GM Financial, this extinguished Love's rights to compel arbitration under the Arbitration Agreement.

The circuit court held a hearing on the motion to compel arbitration on April 17, 2023. On May 12, 2023, court issued an Order Denying Defendant's Motion to Stay and Compel Arbitration. The circuit court held that Love had assigned its rights to compel arbitration of Plaintiffs' claims when it assigned the subject RISCs to GM Financial, which extinguished its right to enforce the Arbitration Agreements. (Order Denying Mot. to Stay and Compel Arbitration; R. 4.)

On May 22, 2023, Love filed a Motion to Alter or Amend Love asserting, *inter alia*, that: (1) no evidence of assignment had been presented as to Davis; (2) the standalone Arbitration Agreements had not been assigned; and (3) Love retained contracts with Vanfossen and Davis into

which the standalone Arbitration Agreements had been incorporated. (Mot. to Alter or Amend; R. 75.) On June 6, 2023, the circuit court issued an Order denying Love’s motion. (Order Denying Mot. to Alter or Amend; R. 1.) This appeal followed.

STANDARD OF REVIEW

“Arbitrability determinations are subject to de novo review.” *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014) (citing *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012)). “[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.” *Id.* (quoting *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000)). The court must honor “**factual findings** of the circuit court pertinent to its arbitration ruling **if** those findings are reasonably supported by evidence in the record.” *Sanders v. Savannah Highway Auto. Co.*, 440 S.C. 377, 382, 892 S.E.2d 112, 115 (2023) (emphasis added).

ARGUMENT

I. The circuit court erred by failing to apply the *Prima Paint* doctrine and compel this matter to arbitration for the arbitrator to decide gateway issues such as arbitrability.

The circuit court denied Love’s motion to compel arbitration “based on assignability and *Sanders v. Savannah Highway Auto. Co.*, 432 S.C. 328, 332, 852 S.E.2d 744, 746 (Ct. App. 2020).” (Order at 2; R. 5.) As the circuit court explained, in *Sanders* this Court held that once a dealer assigns a contract containing an arbitration clause, it may no longer rely on that clause to compel arbitration. (*Id.* at 3; R. 6.)

However, the Supreme Court recently reversed *Sanders*, finding that the circuit court should have applied the *Prima Paint* doctrine and compelled arbitration to allow an arbitrator to determine whether the dealer retained the right to compel arbitration after assignment of the RISC. *Sanders*, 440 S.C. at 392, 892 S.E.2d at 119-20. Therefore, regardless

of whether the purported assignments may have extinguished Love's right to compel arbitration, the circuit court erred in denying Love's motion because the parties' agreements contemplated that an arbitrator would decide issues of arbitrability.

In *Sanders*, the plaintiff alleged that a motor vehicle dealer made misrepresentations about the plaintiff's income, which led to the lender accepting assignment of the RISC. *Sanders*, 440 S.C. at 381, 892 S.E.2d at 113. As a result of the dealer's misrepresentations, the plaintiff alleged that he received high monthly payments and eventually had his vehicle repossessed by the RISC's assignee due to untimely payments. *Id.* Plaintiff filed suit and the dealer moved to compel arbitration. A central issue became whether the assignment prevented the dealer from compelling arbitration. Ultimately, the Supreme Court held "the *Prima Paint* doctrine **requires** the arbitrator to decide whether the assignment extinguished [defendant's] right to compel arbitration." *Id.* at 383, 892 S.E.2d at 115 (emphasis added).

In *Prima Paint*, the plaintiff alleged the defendant fraudulently induced it to enter into a contract containing an arbitration provision. The plaintiff did not challenge the arbitration provision directly, but rather claimed the provision was void because the encompassing contract was void. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 338 U.S. 395 (1967). The defendant moved to stay pending arbitration, which the lower court granted. The matter eventually made its way to the Supreme Court, which held that "the arbitrator had to resolve the plaintiff's claim" because the FAA restricts the judiciary's role and "a court may consider only issues relating to the making and performance of the agreement to arbitrate." *Sanders*, 440 S.C. at 385, 892 S.E.2d at 116 (quoting *Prima Paint Corp.*, 338 U.S. at 404). Against this backdrop, the *Sanders* court found an arbitrator "**must** decide the gateway question of whether [defendant] retained the right to compel arbitration after assignment of the RISC." *Id.* at 392, 892 S.E.2d at 120 (emphasis added).

Here, just like *Sanders*, the Arbitration Agreements expressly provide that the arbitrator will determine all gateway matters regarding arbitrability. The holding of *Sanders* is on all fours with this case and **requires** reversal (even if Plaintiffs were correct about the effect of the alleged “assignment” here, which they are not).

II. The circuit court erred by determining that the Arbitration Agreements’ independent function was extinguished upon their incorporation into the RISC.

The mere fact that a separate contract incorporates another agreement by reference does not extinguish the incorporated agreement. This is especially true where, as here, the incorporated agreement is incorporated into multiple contracts. The circuit court’s conclusion that Love’s assignment of the RISC to GM Financial caused Love to be stripped of all rights to compel arbitration is grounded in a misapprehension of the phrase “incorporated into and made a part of.”

“Incorporation by reference” is defined as a “method of making a secondary document part of primary document by including in the primary document a statement that the secondary document should be treated as if it were contained within the primary one.” Black’s Law Dictionary (11th ed. 2019). South Carolina law is clear that one contract may incorporate another by reference. *Shaw v. East Coast Builders of Columbia*, 291 S.C. 482, 354 S.E.2d 392 (1987) (citing *Twiggs v. Williams*, 98 S.C. 431, 82 S.E. 676 (1914)). Where this occurs, the contract serving as the secondary document is not deprived of independent existence, extinguished, or otherwise changed by virtue of incorporation into the primary document. The secondary document is simply treated as if contained within the primary document, providing additional terms to that primary document.

In this instance, the Arbitration Agreements provided the incorporation language, stating that they were incorporated and made part of “all Contract(s)” between Love and Vanfossen or Davis. The definition of “Contracts” included as “any agreement . . . regarding the sale, lease,

financing, service or maintenance of the Vehicle.” (Aff. & Exhibit; R. 143, 145.) The Arbitration Agreement was, therefore, intended to provide additional terms *to the RISC, the Record of Purchase, and any other agreement* between Love and Vanfossen or Davis.

When the Arbitration Agreement was incorporated and made a part of all contracts between Love and Vanfossen or Davis, the Arbitration Agreement was not rendered a nullity, but remained in full force and effect. Indeed, the parties do not dispute that the Arbitration Agreement was incorporated into the RISCs. Love’s argument, however, is that the Arbitration Agreement was equally incorporated into the Records of Purchase, which the lower court erred in refusing to consider.

Kennamer v. Ford Motor Credit Co., 153 So.3d 752, 762-63 (Ala. 2014), cited by this Court in its *Sanders* opinion, involved similar facts and is instructive. *Kennamer*, like this case, involved both a RISC and a standalone arbitration agreement between the dealer and the purchasers. The court explained that the dealer’s assignment of all of its rights under the installment contract did extinguish any rights it had under that RISC. *Id.* at 762. **However**, the purchasers had also entered into a separate arbitration agreement with the dealership, and the Alabama Supreme Court affirmed the lower court’s compelling of arbitration of the purchasers’ claims against the dealership in light of that agreement. *Id.* at 763.

The same circumstances are present here. Love retained standalone Arbitration Agreements which were incorporated into both the RISCs and the Records of Purchase. Love relied on those Arbitration Agreements in seeking to compel arbitration, not the RISC. By incorporation of the standalone Arbitration Agreement into all contracts, the parties’ intent plainly was to reserve the parties’ ability to compel arbitration to the maximum extent possible. When Love assigned the RISC to GM Financial, Love may have lost its ability to compel arbitration

under the RISC, but that assignment did not affect in any way Love's ability to compel arbitration under the Arbitration Agreement or any of the contracts it did not assign, including the Records of Purchase. *See, e.g., Harnden v. Ford Motor Co.*, 408 F. Supp. 2d 300, 306 (E.D. Mich. 2004) (explaining that the subject standalone arbitration agreement could be enforced by dealer since the plaintiff was asserting warranty claims, not suing to enforce the retail installment contract).

Therefore, this Court should find that the circuit court erred in denying Love's motion to compel arbitration on the basis that assignment of the RISC affected Love's rights to compel arbitration under the Arbitration Agreement and/or Record of Purchase.

III. The circuit court erred by finding the Arbitration Agreement was assigned where there was no manifestation of intent by Love to do so.

The circuit court also erred because neither the Arbitration Agreement between Love and Vanfossen nor the RISC include a manifestation of an intent by Love to transfer the Arbitration Agreement to a third party.

When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense. *C.A.N. Enters., Inc. v. South Carolina Health and Human Services Fin. Com'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). Where an agreement is clear and capable of legal construction, the court's only function is to interpret its lawful meaning and the parties' intent as found within the agreement and give effect to it. *Ebert v. Ebert*, 320 S.C. 331, 338, 465 S.E.2d 121, 125 (Ct. App. 1995).

An assignment of a right is a manifestation of the assignor's intention to transfer performance to an assignee and extinguish in whole or in part the assignor's right to that performance. *Moore v. Weinberg*, 373 S.C. 209, 219–20, 644 S.E.2d 740, 745 (Ct. App. 2007) (quoting Restatement (Second) of Contracts § 317(1) (1981)). For an assignment to occur, in

addition to intent, there must be “(1) an assignor; (2) an assignee; and (3) transfer of control of the thing assigned from the assignor to the assignee.” *Donahue v. Multimedia, Inc.*, 362 S.C. 331, 338, 608 S.E.2d 162, 165 (Ct. App. 2005).

The Arbitration Agreements between Love and the Plaintiffs contain no terms suggesting that Love intended to assign the Arbitration Agreements to any other party. (Aff. in Supp. & Exhibit; R. 145.) They do not list Love as an assignor, do not list an assignee, and do not indicate any intent by Love to transfer control of the Arbitration Agreement to any party. (*Id.*)

The RISC that Love and Vanfossen executed, by way of contrast, clearly and conspicuously provides: “Seller assigns its interest in *this contract* to GM Financial.” (Vanfossen RISC, Ex. B to Resp. in Opp’n; R. 109) (emphasis added). The RISC, then, plainly indicates an assignor (“Seller”), an assignee (“GM Financial”), and the contract assigned from the assignor to the assignee (“this contract”). (*See id.*) The words “this contract,” construed in their “plain, ordinary, and popular sense,” can only refer to the RISC. Therefore, under the terms of the assignment of the RISC, only the RISC was assigned. There is no such intent manifested in the Arbitration Agreements and the lower court erred in holding to the contrary.

IV. The circuit court erred by finding Plaintiffs’ claims arise under the RISC, not the Records of Purchase.

Vanfossen and Davis both executed several documents (“transaction documents”)⁴ to effectuate the purchase of their Silverados from Love. The primary transaction documents that

⁴ *See Tripp v. Charlie Falk’s Auto Wholesale Inc.*, 290 F. App’x 622, 623 (4th Cir. 2008) (identifying the primary transaction documents in the purchase of a 1994 Ford Taurus to include “the Buyer’s Order [equivalent to the Record of Purchase in this case]; the Motor Vehicle Installment Sale Contract, which included the Truth-in-Lending Disclosures, the Promissory Note, and the Security Agreement (the ‘credit contract’); the Re-Assignment of Title by Virginia Motor Vehicle Dealer Form (the ‘Re-Assignment Form’); a document entitled ‘Important Notice;’ and the Application for Certificate of Title and Registration.”).

were presented to the circuit court for consideration, however, were the Records of Purchase for the trucks along with Vanfossen’s RISC to finance his truck. Without citation to case law, statute, or any evidentiary support, and without any analysis, Plaintiffs and the circuit court assumed the RISC governs the underlying case: “As in nearly every vehicle transaction in this state where financing is involved, the primary contract document is a [RISC]. The RISC contains all terms of the purchase and financing.” (Pls.’ Resp. at 5; *see also* Order at 2 (adopting Plaintiffs’ self-serving statement almost verbatim, stating “[a]s customary in vehicle transactions in South Carolina, the primary contract document for the vehicle purchases is a [RISC].”); R. 91; 5.) The circuit court erred by failing to consider and address whether the Records of Purchase are the governing contracts.

A. Plaintiffs’ claims against Love do not arise out of a RISC.

While Love does not dispute that Plaintiffs financed the purchase of their trucks, Plaintiffs’ claims against Love do not arise out of Plaintiffs’ financing and therefore do not implicate the RISC. To the contrary, Plaintiffs claims arise out of the Records of Purchase. Unlike a RISC, a contract of sale—Records of Purchase—must be executed in every vehicle transaction regardless of the need for financing.

This Court’s holding in *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 749 S.E.2d 139 (Ct. App. 2013) strongly suggests that, contrary to the circuit court’s statement, the ***contract of sale*** is the primary contract document in a motor vehicle sale. In that case, this Court identified the distinction between a contract of sale (designated therein as a “buyer’s order”) and a RISC (designated therein as an “installment contract”): “While Cristy’s Buyers Order **evidenced the actual sale and purchase of the vehicle**, her Installment Contract memorialized the terms of the financing arrangement (i.e., the BB & T loan) procured to satisfy the balance owed under the

aforementioned Buyers Order.” *Id.* at 76, 749 S.E.2d at 144 (emphasis added). Here, the RISC signed by Vanfossen clearly indicates that it is required *only* when a vehicle is financed and memorializes the terms of the financing arrangement. The RISC would therefore only be the governing contract if Plaintiffs’ claims *arise out of their financial obligations*, which they do not. *See Harnden*, 408 F. Supp. 2d at 306.

Plaintiffs claim Love violated the Dealers Act, breached express and implied warranties, and engaged in negligent misrepresentation regarding the Silverados’ towing capacity. (*See generally* Compl.; R. 26.) Plaintiffs do not claim, for instance, that Love misrepresented the terms of their financing contract. Plaintiffs’ claims *entirely* arise out of the Silverados’ towing capacity, which has nothing to do with Plaintiffs’ obligations under a financing agreement. The circuit court therefore erred by concluding that the RISC governed Plaintiffs’ claims.

B. Plaintiffs’ claims arise out of the Records of Purchase.

Plaintiffs assert three causes of action against Love: violation of the Dealers Act, breach of express and implied warranties, and negligent misrepresentation. (*See generally* Compl.; R.26.) It is clear from Plaintiffs’ allegations that their claims arise out of the Records of Purchase, not the RISC. Plaintiffs even acknowledge their claims arise out of the Records of Purchase in their Response in Opposition to Love’s Motion to Compel Arbitration: the introduction states that Plaintiffs signed “Records of Sale” “when they traded in their respective vehicles to purchase 3.0 Silverado 1500 RST trucks. *Love Chevrolet Company gained Plaintiffs’ agreement after representing to each of them that the truck had a towing capacity of 12,000 pounds.*” (Resp. in Opp’n; R. 87; 111) (emphasis added). The Records of Purchase expressly state they are contracts subject to arbitration. (*See* Vanfossen and Davis Records of Purchase, Ex. A to Am. Answer; R. 15.) The Records of Purchase outline the agreement between the parties regarding the purchase

of the Silverados such as delivery of the Silverados, a description of any trade-ins and provisions governing a trade-in, and an entire agreement provision. (*Id.*) The root of Plaintiffs' claims is that Love misrepresented the Silverados' towing capacity (a vehicle specification), causing Plaintiffs to purchase said trucks; as such, Plaintiffs' claims arise out of the Records of Purchase.

In a relatable case, a plaintiff contracted with a defendant to purchase a custom-built home. *See Mart v. Great S. Homes, Inc.*, 441 S.C. 304, 307-08, 893 S.E.2d 360, 361-62 (Ct. App. 2023) (analyzing the arbitration clause under the Sales Contract, not the other contracts executed between the parties that contained arbitration provisions, because plaintiff did not assert any claims against defendant that arise out of or relate to the other agreements). The plaintiff asserted claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. *Id.* Plaintiff did not allege a construction defect or any other issue with the house, and plaintiff did not assert that defendant defaulted on any warranty claim. *Id.* As such, despite separately executed contracts that contained arbitration provisions, including an express limited warranty agreement, the defendant moved to compel arbitration based on the arbitration language in the Sales Contract. *Id.* at 311-12, 893 S.E.2d at 363-64.

After applying the governing decisions in *Damico* and *Prima Paint*, this Court reversed the circuit court's order because a court is not permitted to consider language of other agreements between the parties when "analyzing the standalone arbitration language of the Sales Contract." *Id.* at 315-16, 893 S.E.2d at 365-66 ("Because an arbitration provision is often one of many provisions in a contract covering many other aspects of the transaction, the first task of a court is to separate the arbitration provision from the rest of the contract. This may seem odd, but it is the law, known as the *Prima Paint* doctrine." (quoting *Doe v. TCSC, LLC*, 430 S.C. 602, 607, 846 S.E.2d 874, 876 (Ct. App. 2020))); *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d

746 (2022), *cert. denied*, 143 S. Ct. 2581 (2023). Here, the circuit court should have analyzed the arbitration clause contained in the Records of Purchase along with the standalone Arbitration Agreement.

C. The Arbitration Agreement was incorporated into the Records of Purchase to the same extent as the RISC.

The Arbitration Agreements expressly state they are “incorporated into and made a part of all Contract(s)” between Love and Vanfossen or Davis. (Aff. in Supp. & Exhibit; R. 145.) “Contract(s)” is defined in the Arbitration Agreement to mean any agreement between Love and Vanfossen or Davis “regarding the sale, lease, financing, service or maintenance of the Vehicle.” (*Id.*) Both Vanfossen and Davis executed contracts entitled Record of Purchase for the sale of their respective Silverados, and the Arbitration Agreements were incorporated by reference into those respective Records of Purchase. As noted above, the circuit court erroneously failed to consider what contract between the parties gave rise to Plaintiffs’ claims and whether the arbitration agreement pertaining to *that* contract was assigned.

If the circuit court had properly determined that the Record of Purchase governs Plaintiffs’ claims, then it would have granted Love’s motion and compelled arbitration. Plaintiffs have not, and cannot, argue that Love assigned the Records of Purchase to a third party such that Love’s right to compel arbitration under those agreements was extinguished. Therefore, Love retains the right to compel arbitration under those contracts and the circuit court committed reversible error in denying Love’s motion.

V. The circuit court erred in refusing to compel arbitration on Davis’s claims where Plaintiff provided no evidence supporting the terms of his Retail Installment Contract and his contention that it was assigned.

Finally, as to Plaintiff Davis, the circuit court further erred because it was never presented with any evidence that *any* contract between Love and Davis was assigned to a third party. The

only evidence before the Court as to Plaintiff Davis was that he executed a valid and enforceable Arbitration Agreement. Although Plaintiffs argued that Davis also entered into a RISC, that document was not submitted to the Court and Davis did not establish this fact via verified pleading or affidavit testimony.

While the validity of an assignment of a contract is a question of law, the question of whether a purported assignment occurred is a question of fact. *See PCS Nitrogen, Inc. v. Continental Casualty Co.*, 436 S.C. 254, 260, 871 S.E.2d 590, 593 (2022). Therefore, a finding as to whether a contract has been assigned must be supported by evidence, and an abuse of discretion occurs when the conclusions of the circuit court lack evidentiary support. *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

The circuit court's finding as to Plaintiff Davis was error due to the lack of any supporting evidence. (*See Order Denying Def.'s Mot. to Stay & Compel Arb. at 2 n.2 (finding "Love assigned its interest to GM Financial regarding both plaintiffs"); R. 5.*) Yet, the circuit court only cites to Plaintiffs' Response in Opposition Exhibit B, which is Vanfossen's RISC only. Therefore, at a minimum, this Court must reverse the circuit court's holding as to Plaintiff Davis.

CONCLUSION

For the reasons stated above, the Court should reverse the lower court's order denying Love's motion to stay pending arbitration and remand with instruction that the matter be compelled to arbitration.

Signature on Following Page

Respectfully submitted,

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March 11, 2024

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Daniel Coble, Circuit Court Judge

Appellate Case No. 2023-001034
Case No. 2022-CP-40-00654

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

v.

Love Chevrolet Company Appellant,

CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellant’s final briefs comply with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, the undersigned Paralegal of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Love Chevrolet Company, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified, pursuant to the Supreme Court Order 2022-05-06-04.

Pleading(s): Final Brief of Appellant
 Final Reply Brief of Appellant

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