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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 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.

FINAL BRIEF OF RESPONDENTS

Andrew S. Radeker
S.C. Bar No. 73743
Radeker Law, P.A.
Post Office Box 6903
Columbia, South Carolina 29260
(803) 500-0891
drew@radekerlaw.com
and
David A. Maxfield
S.C. Bar No. 7163
Post Office Box 11865
Columbia, South Carolina 29211-1865
(803) 509-6800
dave@consumerlawsc.com
Attorneys for Respondents

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STATEMENT OF ISSUES

I. Did the judge commit reversible error in denying Appellant's motion to compel arbitration?

STATEMENT OF THE CASE

This is an appeal from the denial of Appellant (hereinafter "Love Chevrolet")'s motion to compel arbitration. (R. pp. 4-8.) The trial court concluded that assignment of the contract at issue meant Love Chevrolet was no longer a party to it and, therefore, could not enforce the claimed arbitration agreement. (R. p. 7.) The trial court did not rule on the other arguments that the Respondents (hereinafter "the truck buyers") advanced for why Love Chevrolet's motion should be denied. (R. p. 7.)

This suit is a class action filed on February 7, 2022, brought by the truck buyers against Love Chevrolet for violation of the South Carolina Motor Vehicle Dealer's Act, S.C. Code Ann. §§ 56-15-10, *et seq.*, breach of express and implied warranties, and negligent misrepresentation, asserting those causes of action based on Love Chevrolet's widespread misrepresentation of the towing capacity of Chevrolet Silverado 1500 trucks. (R. pp. 26-40.) (The class has not yet been certified.) The crux of the complaint is that Love Chevrolet "routinely and in the regular course of its business overstates the towing capacity of the Silverados in its advertising and other representations to its customers, upon which it intends they rely[.]" (R. p. 29, ¶ 9.) A copy of Love Chevrolet marketing material overstating the towing capacity of such a truck is an exhibit to the complaint. (R. pp. 36-40.)

Love Chevrolet answered on April 13, 2022, and claimed in its answer that "[e]ach of the Plaintiffs entered into binding arbitration agreements governed by the Federal Arbitration Act in connection with their respective transaction." (R. p. 21.) The next day, Love Chevrolet filed a motion to stay and to compel arbitration, along with an affidavit of Love Chevrolet's "executive manager and custodian of records" that attached "copies of Arbitration Agreements between each Plaintiff and Love Chevrolet Company in connection with each transaction." (R. pp. 143-48.)

Except for the dates and the buyers' names, the pre-printed arbitration agreement documents are identical and are one-page pre-printed forms, in eight-point font, authored by Love Chevrolet. (R. p. 57 ln. 1-2, pp. 147-48.)

On September 7, 2022, Love Chevrolet refiled the same motion, adding language to note that pre-motion consultation with the truck buyers' counsel had been held. (R. pp. 137-42.)

Love Chevrolet filed a memorandum in support of its motion on November 7, 2022, and the truck buyers filed a memorandum in opposition to the motion on November 9, 2022. (R pp. 111-36.) On April 17, 2023, the truck buyers refiled their memorandum, attaching one of the truck buyers' retail installment sale contract with Love Chevrolet and Love Chevrolet marketing material overstating the towing capacity of a Silverado. (R pp. 87-110.) The retail installment sale contract contains a provision in which Love Chevrolet assigned its interest in the contract to GM Financial. (R p. 109.)

The trial court heard Love Chevrolet's motion on April 17, 2023. (R pp. 41-70.) The trial court denied the motion in an order filed May 12, 2023, finding as follows:

> Here, the Arbitration Agreement relied on by Love expressly states:
>
> "This Agreement is incorporated into and made a part of all Contract(s) as defined in this Agreement." "Contracts" as defined in the agreement refers to "any agreement(s) between you and us regarding the sale, lease, financing, service or maintenance of the vehicle." "Contracts" thus clearly includes the RISC [an abbreviation of retail installment sale contract], which Defendant Love indisputably has assigned to GM Financial. Nothing in the Arbitration Agreement reserves or carves out from the assignment a right for the Love to "hold onto" a right to arbitrate.
>
> Having thus incorporated its Arbitration Agreement into the RISC, which it then assigned away, Love has nothing left to enforce under South Carolina law. "[A] corollary to the principle that an assignee is bound by the arbitration clause in an assigned contract is that "an assignment ordinarily extinguishes the right [of the assignor] to compel arbitration." Sanders[v. Savannah Highway Auto. Co., 432

> S.C. 328, 332, 852 S.E.2d 744, 746 (Ct. App. 2020),] citing HT of Highlands Ranch, Inc.[v. Hollywood Tanning Sys., Inc., 590 F. Supp. 2d 677, 684 (D.N.J. 2008), *aff'd*, 850 F.3d 344 (8th Cir. 2017)].
>
> Thus, the Court finds that having chosen to incorporate its Arbitration Agreement without reservation into the RISC, which it then assigned, its motion must be denied.
>
> The Court does not find that the Arbitration Agreement is unenforceable because it was procured by fraud, is unconscionable, or violates public policy. However, because Defendant's Motion is denied based on assignability, this Court does not address these claims any further.

(R pp. 6-7.)

On May 22, 2023, Love Chevrolet filed a motion to alter or amend. (R. pp. 75-86.) In it, Love Chevrolet advanced an argument it had not made previously, that the assigned retail installment sale contract was not "the primary contract document for the vehicle purchases" and that another, purportedly unassigned document, the "Record of Purchase," was. (R. p. 76.) Love Chevrolet also first raised there an argument that the court should not have considered the documents the truck buyers submitted with their refiled memorandum. (R. pp. 84-85.)

On the same day it filed its motion to alter or amend, Love Chevrolet also filed a motion to amend its answer and a proposed amended answer. (R. pp. 9-20, 73-74.) Submitted as exhibits to the proposed amended answer were record of purchase and vehicle trailering and towing disclaimer documents for each plaintiff, none of which had been previously presented to the court. (R. pp. 15-20.)

The trial court judge denied the motion to alter or amend by order filed June 6, 2023. (R. pp. 1-3.)

This appeal followed.

STANDARD OF REVIEW

"Arbitrability determinations are subject to de novo review." Smith v. D.R. Horton, Inc., 417 S.C. 42, 47, 790 S.E.2d 1, 3 (2016). "However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." Id. at 48.

ARGUMENT

The trial court judge reached a decision that is correct. It is correct for a number of reasons, including the reasoning he settled upon in his order – but also including other bases to deny Love Chevrolet's motion.

This court may affirm the trial court for any ground appearing in the record, even if under different reasoning than that used by the trial court. Leggett v. Smith, 386 S.C. 63, 77 n. 4, 686 S.E.2d 699, 707 n. 4 (Ct. App. 2009) (noting that trial court reached right decision for reasons other than those used by appellate court). The question of reversal depends on whether the trial court was wrong for the specific reasons argued below and on appeal by the appellant. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716, 724 (2000). If the trial court made the right decision – regardless of how it reasoned that out – the judgment should be affirmed. Id.; Leggett, 386 S.C. at 77 n. 4.

Love Chevrolet observes that the trial court judge used this court's opinion in Sanders v. Savannah Hwy. Auto Co., 432 S.C. 328, 852 S.E.2d 744 (Ct. App. 2020), as authority to support his reasoning. (R. pp. 5-7.) Love Chevrolet correctly points out that the Supreme Court reversed this court's opinion in Sanders. Sanders v. Savannah Hwy. Auto Co., 440 S.C. 377, 892 S.E.2d 112, (2023). Love Chevrolet does not address the several other bases on which the judge might have correctly denied its motion. This brief undertakes to do so, as well as pointing out why the trial court judge's reasoning was correct despite the Supreme Court's reversal of Sanders.

I. No one agreed that the gateway matters that were before the judge would be decided by an arbitrator, and it was proper for the judge to rule on the enforceability of the agreement.

Unless the parties have agreed otherwise, what are known as "gateway matters" in arbitration jargon – such as the validity, scope, or enforceability of an agreement – are matters for a court to decide if they are contested. E.g., Doe v. TCSC, LLC, 430 S.C. 602, 608, 846 S.E.2d 874, 877 (Ct. App. 2020). But one "gateway matter," whether the claimed agreement even exists, is *always* for the court. Simmons v. Benson Hyundai, LLC, 438 S.C. 1, 4-5, 881 S.E.2d 646, 648 (Ct. App. 2022), *cert. denied*. Our state supreme court, distilling jurisprudence in this area, has recently observed that "the court is always the proper body to determine whether the parties agreed to arbitrate in the first instance." Sanders, 440 S.C. at 388. "The issue of the agreement's 'validity' is different from the issue whether any agreement between the parties 'was ever concluded[.]'" Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 70 n.2, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010) (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444 n.1, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006)).

> Because arbitration under the FAA rests entirely upon consent, it is always up to the court to determine if the parties have an agreement to arbitrate. Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) ("[T]he FAA does not require parties to arbitrate when they have not agreed to do so."). Arbitration may not be compelled unless the court is satisfied "the making of the agreement for arbitration ... is not in issue." 9 U.S.C § 4. The "making" or formation of—in the sense of the very existence of—the agreement to arbitrate is always a question for the court, not the 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) (noting it is "well settled that where the dispute at issue concerns contract formation, the dispute is generally for courts to decide"); Henry Schein, Inc. v. Archer & White Sales, Inc., —— U.S. ——, 139 S. Ct. 524, 530, 202 L.Ed.2d 480 (2019) ("To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists."); Rowland v. Sandy Morris Fin. & Est. Plan. Servs., LLC, 993 F.3d 253, 257–58 (4th

> Cir. 2021). An arbitration agreement cannot prove itself, so a court necessarily must determine if an agreement has been made according to law, for only then does the jurisdiction of the FAA emerge and allow a court to stay the court action pursuant to § 3 and compel arbitration pursuant to § 4.
>
> . . .
>
> The United States Supreme Court has held "courts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement *nor* (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue." Granite Rock Co., 561 U.S. at 299, 130 S.Ct. 2847.

Simmons, 438 S.C. at 4-5, 6 (emphasis in original).

Other than whether an agreement to arbitrate exists at all, the parties may agree to the delegation of these "gateway matters," questions of arbitrability, to an arbitrator. See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 115 S.Ct. 1920 (1995). "[T]he question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter[,]" and "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." Id. (emphasis in original, internal quotation marks omitted).

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. First Options, 514 U.S. 938. The primary questions before the trial court were whether an agreement to arbitrate exists – always a question for the court, no matter what a claimed arbitration agreement document states – and whether any such

agreement is enforceable. Id.; Simmons, 438 S.C. at 4-5. Those were proper questions for the trial court to decide.

The trial court judge did not err by making a decision about whether the agreement is enforceable by Love Chevrolet. As discussed below, the decision he made was not error, either.

II. The judge did not commit reversible error.

If the trial court judge was correct to deny Love Chevrolet's motion to compel arbitration, whether for the grounds he articulated or for others, his decision must be affirmed. See I'On, 526 S.E.2d at 724; Leggett, 386 S.C. at 77 n. 4. The denial of Love Chevrolet's motion was correct.

a. The judge's analysis is sound.

Now that we are past the question of who – a court or an arbitrator – should be doing the deciding of the questions here at issue, we may turn to whether the trial court judge's reasoning in his order is sound. It is.

The judge's reasoning tracked that of this court in Sanders, 432 S.C. 328-35, an opinion the Supreme Court reversed, 440 S.C. at 379-92. Love Chevrolet would have that be the end of the inquiry. It is not.

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 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.

That reasoning – the law – is as follows:

> The circuit court found that although the RISC was governed by the Federal Arbitration Act (FAA), state law governed the issue of assignment as to the enforceability of the arbitration clause. Applying South Carolina law, the court next found "once a contract is properly assigned[,] the assignor retains no interest in the right transferred." Finally, the court found "an assignor's right to compel arbitration is lost once it assigns a contract containing an arbitration clause."
>
> Any rights of Appellants based on the arbitration clause, including the right to arbitrate and the right to have the issue of arbitrability decided by an arbitrator, arise from the RISC, which Rick Hendrick Dodge assigned to Santander. We find no error in the circuit court's finding that the assignment extinguished Appellants' rights under the RISC.
>
> Three elements constitute an assignment: "(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). "An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such 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)), *aff'd* , 383 S.C. 583, 681 S.E.2d 875 (2009). "The principle is well settled that a valid assignment operates to pass the whole right of the assignor, and that thereafter the assignee stands in the place of the assignor, possessing all rights or remedies available to the assignor." duPont de-Bie v. Vredenburgh, 490 F.2d 1057, 1061 (4th Cir. 1974). "[W]here a party assigns agreements that include an arbitration clause, the assignor's 'right to compel arbitration under those agreements is extinguished.'" In re Wholesale Grocery Prods. Antitrust Litig., 97 F. Supp. 3d 1101, 1106 (D. Minn. 2015) (quoting HT of Highlands Ranch, Inc. v. Hollywood Tanning Sys., Inc., 590 F. Supp. 2d 677, 684–85 (D.N.J. 2008) (internal quotation omitted)), *aff'd* , 850 F.3d 344 (8th Cir. 2017), *amended* (May 1, 2017).

In HT of Highlands Ranch, the district court of New Jersey explained as follows the extinguishment of the right to arbitrate when the contract containing the arbitration clause is assigned:

> In light of the fact that, prior to the commencement of this action, [the defendant] assigned its rights and obligations under the franchising agreements …, the Court cannot, at this stage, conclude that "a valid agreement to arbitrate [presently] exists" …. "[W]hen an assignee assumes the liabilities of an assignor, it is bound by an arbitration clause in the underlying contract. Because "an assignment cannot alter a contract's bargained-for remedial measures," … a corollary to the principle that an assignee is bound by the arbitration clause in an assigned contract is that "an assignment ordinarily extinguishes the right [of the assignor] to compel arbitration."

590 F. Supp. 2d at 684 (second and fourth alterations in original) (internal citations omitted); see Kennamer v. Ford Motor Credit Co., 153 So.3d 752, 762–63 (Ala. 2014) (explaining that because of a car dealership's assignment of a sales contract containing an arbitration clause to Ford Credit, Ford Credit could enforce the arbitration clause, but the dealership could not). Because Rick Hendrick Dodge assigned the RISC to Santander, we find all alleged rights arising from the contract, including the right to have an arbitrator determine

> the arbitrability of the action and the right to arbitrate, were extinguished as to Appellants.

Sanders, 432 S.C. 332-34 (footnote omitted).

Here, the record reflects that Love Chevrolet assigned its interest in the retail installment sale contracts, into which the purported arbitration agreements were incorporated, to GM Financial, without qualification or retention of any rights, to arbitration or anything else.[1] (R p. 109.) As discussed above, enforceability of the purported arbitration agreement, including whether it is enforceable by Love Chevrolet post-assignment, was, unlike in Sanders, not a question delegated to an arbitrator. (R. pp. 141, 142.)

The trial court judge correctly applied the law to reach the correct decision.

b. The "arbitration agreement" does not contain necessary terms to be an agreement to arbitrate.

There is not one thing called *arbitration*, but many. Arbitration is an umbrella term for any kind of agreed-upon quasi-judicial alternative dispute resolution that proceeds according to some agreed-upon rules and procedures and in which a person (or group of people) chosen to be the arbitrator (or arbitrators) makes a merits-based decision of a controversy. See Black's Law Dictionary (9th ed), def. of *arbitration*. The breadth of the term *arbitration* matters to whether the parties here ever agreed to arbitration at all.

[1] Love Chevrolet argued in its motion to alter or amend that other contracts, not the retail installment sales contracts, were the controlling agreements, and it tried at that time to put those other contract documents before the court. (R. pp. 15-20, 73-74.) Neither this argument nor these documents was before the trial court at the time it ruled on Love Chevrolet's motion to compel arbitration. (R. pp. 4-8, 15-20, 73-74.) They cannot be considered now, and this argument by Love Chevrolet is not preserved for review. See Johnson v. Sonoco Prods. Co., 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) ("An issue may not be raised for the first time in a motion to reconsider."); Jones v. Builders Inv. Grp., LLC, 415 S.C. 321, 330 n. 7, 781 S.E.2d 737, 742 n. 7 (Ct. App. 2015) (trial court and Court of Appeals refused to consider evidence only presented with motion under Rule 59(e), SCRCP); Brailsford v. Brailsford, 380 S.C. 443, 669 S.E.2d 342, 344 (Ct. App. 2008) (party cannot use motion to alter or amend to present an issue that could have been raised before judgment but was not); Spreeuw v. Barker, 385 S.C. 45, 68-69, 682 S.E.2d 843, 855 (Ct. App. 2009) (stating evidence that first appeared as attachment to a Rule 59(e), SCRCP motion cannot be considered on appeal).

The party seeking to enforce an agreement to arbitrate has the burden of establishing the existence of a valid, enforceable arbitration agreement between the parties that covers the dispute at issue. See Aiken v. World Finance Corp. of S.C., 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007); MBNA America Bank, N.A. v. Christianson, 377 S.C. 210, 659 S.E.2d 209 (Ct. App. 2008). It is well established that "where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place. If no agreement is found to exist, the court must deny any application to arbitrate." Simpson v. MSA of Myrtle Beach, 373 S.C. 14, 644 S.E.2d 663, 667 (2007) (internal citation omitted).

"Under South Carolina law, a contract cannot be formed without a meeting of the minds between the parties as to all essential and material terms." Simmons, 438 S.C. at 7; accord Doe, 430 S.C. at 611. This principle is just as applicable to contracts to arbitrate as it is to other contracts. Simmons, 438 S.C. at 7; Doe, 430 S.C. at 611.

Here, as the truck buyers' counsel pointed out at the hearing, we do not really have that. (R p. 57 ln. 8 through p. 60 ln. 10, pp. 141, 142.) Our Supreme Court has said that contracts that purport to agree to a decision-making process that has no standards are too vague to be enforceable. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 363 S.E.2d 891 (1987). That is what we have here. (R. pp. 141, 142.)

Actual arbitration agreements either create and delineate the terms of an arbitration process or, more commonly, establish what the process will be by agreeing to a set of rules that someone else has already created, such as the rules of the American Arbitration Association (AAA) or Judicial Arbitration and Mediation Services, Inc. (JAMS). See, e.g., Aiken, 644 S.E.2d at 707 (example of such, agreeing to AAA commercial arbitration rules); Simpson, 644 S.E.2d at 666

(same). There are a bevy of common variations of arbitration processes, and the parties are, of course, free to agree to use any of them or to agree on a process of their own making. What they cannot do is have an agreement to arbitrate without defining what arbitration is going to *be* under that agreement. Simmons, 438 S.C. at 7; Doe, 430 S.C. at 611. Merely agreeing to arbitration or binding arbitration is not enough. Simmons, 438 S.C. at 7; Doe, 430 S.C. at 611. Arbitration is an entire *kind* of dispute resolution process, of which there are infinite possible variations. It is as general a term as *fistfight* or *boxing*. (Bareknuckle? Queensbury Rules? To first blood? To the death? What about technical knockouts – even possible? Is kicking okay? Eye gouging? How about below the belt?) *Arbitration* is less specific than rock, paper, scissors, which at least has widely understood rules.

Here, there is no agreement to what the procedures of the arbitration shall be. (R. pp. 141, 142.) The closest this document comes is a statement that "[t]o the extent that the South Carolina Court-Annexed Alternative Dispute Resolution (ADR) Rules can be applied to binding arbitration, the parties and the arbitrator shall be guided by the processes of said ADR rules." (R. pp. 141, 142.) But the ADR Rules do not set out procedures for arbitration. Rules 1-24, S.C. ADR Rules. The agreement references the Federal Arbitration Act (FAA), 9 U.S.C. § 1, *et seq.*, but, as our state Supreme Court has recently noted, "the FAA does not furnish a set procedure for how the arbitration should go[.]" Hicks Unlimited, Inc. v. UniFirst Corp., 439 S.C. 623, 630, 889 S.E.2d 564, 567 (2023).

The document warns that "THE INFORMATION YOU AND WE MAY OBTAIN IN DISCOVERY FROM EACH OTHER IN ARBITRATION IS GENERALLY MORE LIMITED THAN IN A LAWSUIT." (R. pp. 141, 142.) If nothing else has pointed out that parties to this document never actually agreed on an arbitration process, this should do it. What are the limits on

discovery under this arbitration agreement? Are there any? Is there going to be any discovery at all? This remains unsettled.

The document also states that "OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION." (R. pp. 141, 142.) What rights? Procedural rights? Substantive rights? Are these unspecified rights actually going to be available, unavailable, or what? No one knows, and there is nothing to which the parties can refer to find out. (R. pp. 141, 142.)

There is also no agreement to how the arbitrator is to be selected – also a typical term in an arbitration agreement, and for good reason – only that "[t]he arbitrator shall be an attorney or retired judge." (R. pp. 141, 142.) What if the parties do not agree on who the arbitrator will be? How is the arbitrator to be chosen then? Does the arbitration just never happen, while the parties remain locked out of court? The arbitration agreement document does not say. (R. pp. 141, 142.)

Essential terms are missing. No "meeting of the minds between the parties as to all essential and material terms" of an arbitration agreement has been shown. Simmons, 438 S.C. at 7; accord Doe, 430 S.C. at 611. Love Chevrolet failed to carry its burden to establish the existence of an agreement to arbitrate, most glaringly because one was never struck. See Aiken, 373 S.C. at 149. "If no agreement is found to exist, the court must deny any application to arbitrate." Simpson, 644 S.E.2d at 667.

Love Chevrolet's failure to prove a meeting of the minds as to arbitration provides another reason why the trial court judge made the right decision.

c. To enforce the "agreement" would be unconscionable and violate public policy.

In the event that this court finds an agreement to arbitrate actually existed, the uncertainties created by the missing important terms noted above, coupled with some quite troubling terms of

the agreement and its nature as an adhesion contract, point to the unconscionability of this agreement between a large retailer of automobiles and the ordinary citizens who are the truck buyers.

> At its core, unconscionability is defined "as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1996); 17A Am. Jur. 2d Contracts § 272 (2016) (characterizing these two prongs as procedural and substantive unconscionability, respectively); see also id. § 271 ("Generally, the doctrine of unconscionability protects against unfair bargains and unfair bargaining practices ...."). This general description of unconscionability applies to all contract terms, not merely arbitration provisions. . . .
>
> A determination of whether a contract is unconscionable depends upon all the facts and circumstances of the case. S.C. Farm Bureau Mut. Ins. Co. v. Kennedy, 398 S.C. 604, 614, 730 S.E.2d 862, 867 (2012) (citation omitted). Indeed, we have previously emphasized the importance of a case-by-case analysis in order to address the unique circumstances inherent in the various types of consumer transactions. In analyzing claims of unconscionability in the context of arbitration agreements, the United States Court of Appeals for the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker.

Damico v. Lennar Carolinas, LLC, 437 S.C. 596, 611-12, 879 S.E.2d 746, 754-55 (2022) (some internal citations and citation-related punctuation omitted).

"Whether one party lacks a meaningful choice . . . typically speaks to the fundamental fairness of the bargaining process." Id. at 613 (quoting D.R. Horton, 417 S.C. at 49). There are a number of factors our state Supreme Court has said should be taken into account "in determining whether an absence of meaningful choice taints a contract term, such as an arbitration provision, courts must consider, among all facts and circumstances, the relative disparity in the parties' bargaining power, the parties' relative sophistication, and whether the plaintiffs are a substantial

business concern of the defendant." Id. "[C]ourts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." Simpson, 644 S.E.2d at 669.

Here, factors our appellate courts have examined point toward an absence of meaningful choice. This is a consumer transaction, and consumer transactions receive heightened scrutiny in this context (for both prongs of the unconscionability analysis). See Damico, 437 S.C. at 621; Simpson, 644 S.E.2d at 674.

This purported arbitration agreement arose out of individuals' purchases of personal automobiles, and "automobiles are a common and necessary adjunct of daily life[.]" Simpson, 644 S.E.2d at 674 (quoting Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A2d 69, 85 (1960)). They are "critically important in modern day society." Id. at 670. The consumer's *need* for the product subject of a transaction weighs significantly in the unconscionability analysis. Simpson, 644 S.E.2d at 669-70; see Damico, 437 S.C. at 621 (heightened scrutiny warranted for contract to sell home to consumer).

The relative sophistication of the parties also points toward a lack of meaningful choice. Love Chevrolet is in the business of automobile sales on a large scale; the truck buyers are just ordinary guys. (R. pp. 27-34.) Our Supreme Court considered similar situations indicative of no meaningful choice on the part of consumers. Damico, 437 S.C. at 614-15; Simpson, 644 S.E.2d at 670.

Love Chevrolet's pre-printed form, presented as required for the automobile purchase, in small print (R. pp. 141-42), is an adhesion contract, defined as "a standard form contract offered

on a 'take-it-or-leave it' basis with terms that are not negotiable." Simpson, 644 S.E.2d at 669. Adhesion contracts are not *per se* unconscionable, but they do usually point to an absence of meaningful choice by the party to whom they were presented. Damico, 437 S.C. at 613-14; Simpson, 644 S.E.2d at 669. "[G]iven that one party to an adhesion contract has virtually no voice in the formulation of the terms and language used in the contract, courts tend to view adhesive arbitration agreements with considerable skepticism, as it remains doubtful any true agreement ever existed to submit disputes to arbitration." Damico, 437 S.C. at 613 (internal citations and quotation marks omitted).

There is no evidence here that *does* point to the truck buyers having had a meaningful choice about whether to enter into the claimed arbitration agreements, and there is a whole lot of evidence that they had none.

That does not end the inquiry, as "*adhesive contracts are not unconscionable in and of themselves* ***so long as the terms are even-handed***." Damico, 437 S.C. at 614 (emphasis in original). Here, they are not.

Let us look at these terms and see whether they are "so oppressive that no reasonable person would make them and no fair and honest person would accept them." Damico, 437 S.C. at 611.

First, we point out the nebulous nature of this "agreement." If it is actually an agreement, the consumer has signed on to a vague process, in which he does not know and does not control who the decisionmaker will be, in which he may not have all the rights he would have in court but cannot know all the rights he has waived, in which his discovery rights will probably be limited to an uncertain extent, and in which his right to appeal is limited to some unknown degree – if the arbitration ever happens, which it easily could not if the parties do not agree on an arbitrator. (R.

pp. 141, 142.) What reasonable person would sign on to such an agreement? No reasonable person would.

The document provides that the arbitration hearing "will be conducted exclusively in Dealer's county of residence" – no matter where the customer may be or where the conduct giving rise to the dispute occurred. (R. pp. 141, 142.) Since it will conducted *exclusively* in that county, it cannot be held elsewhere, even if there are compelling reasons to do so. (R. pp. 141, 142.)

Further, woe betide the customer who initiates arbitration of a dispute, especially a complicated one, as that is going to get expensive. If the customer initiates the process (to the extent we can determine what that process is), Love Chevrolet will pay the portion of the filing fee (unknown) that exceeds the fee for filing in court. (R. pp. 141, 142.) After that, Love Chevrolet is on the hook only for up to $1,500 of the arbitrator's fees – upon which this "agreement" sets no limits. (R. pp. 141, 142.) To quote the truck buyers' counsel below:

> Well, arbitration costs $25,000. So the consumer, in a case like this, is subject to really an open-ended fee number and that's what the dealers want to avoid because typically they want – they'll have to pay about $4,000 in the first 60 days of the case and they're trying not to have that happen to them. And the same thing with JAMS except it's about $7,000.

(R. p. 58 ln. 16-21.)

The supposed agreement contains a jury trial waiver provision. (R. pp. 141, 142.) South Carolina courts have held that "[t]he right of trial by jury is highly favored[.]" Keels v. Pierce, 315 S.C. 339, 342, 433 S.E.2d 902, 904 (Ct. App. 1993); accord Broome v. Watts, 319 S.C. 337, 340, 461 S.E.2d 46 (1995) (same principle, different context); North Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc., 307 S.C. 533, 535, 416 S.E.2d 637 (1992) (same principle, different context); Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863 (Ct. App. 2002) (same principle, different context). Indeed, the right to trial by jury is constitutionally enshrined.

S.C. Const. art. I, § 14. Terms that get rid of such a right, even without other oppressive terms, already fly close to the unconscionability sun.

Similarly, the arbitration agreement document purports to disallow class actions. (R. pp. 141, 142.) Class actions serve important purposes. See O'Quinn v. Beach Assocs., 272 S.C. 95, 249 S.E.2d 734, 738 (1978). Among those purposes are the efficient and just handling of numerous claims that may be too small individually to warrant individual proceedings to obtain redress. Cf. id. A consumer with such a claim is stuck, under the terms of this document, with the choice of pursuing a vague, uncertain, and expensive arbitration process to adjudicate such a claim or doing nothing at all – which, of course, the automobile dealer would very much like. (R. pp. 141, 142.)

These terms are "so oppressive that no reasonable person would make them and no fair and honest person would accept them." Damico, 437 S.C. at 611.

The claimed arbitration agreement is unconscionable at common law.

Further, the court should not ignore that Love Chevrolet's conduct has endangered not just the truck buyers but also the public at large. "The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions." White v. J.M. Amusement Co., Inc., 360 S.C. 366, 601 S.E.2d 342, 345 (2004). Secreting away the adjudication of this dispute – and preventing it from going forward as a class action – would undermine the public policy of promoting safety, allowing Love Chevrolet's dangerous misconduct to remain hidden from view. After all, a misrepresentation of towing capacity can lead to quite unsafe circumstances on our state's roads, particularly when a heavy trailer rips off part of a Silverado's undercarriage and sends that jagged hunk of metal *and* the trailer careening unsteered into moving traffic.

Unconscionability and public policy provided plenty of grounds for the denial of Love Chevrolet's motion.

d. Love Chevrolet's fraud provides grounds to deny its motion.

Had the trial court judge denied Love Chevrolet's motion on the grounds that its fraudulent representations of towing capacity made the contended arbitration agreement unenforceable, he would not have been wrong.

> In general, we refuse to enforce contracts based on fraudulent conduct because a party should not retain the benefits of an agreement that he knowingly and *intentionally* entered into though deceptive means. Moreover, beyond the patent unfairness inherent in enforcing a contract induced through intentional fraud, giving legal effect to such a contract violates a fundamental principle of contract law: there must be a meeting of the minds. By its very nature, there can be no union of purpose where one party is intentionally deceiving the other through fraud.

Maybank v. BB&T Corp., 416 S.C. 541, 577-78, 787 S.E.2d 498, 517 (2016) (emphasis in original, internal citation omitted).

That is what happened here. Love Chevrolet fraudulently induced the truck purchases *and* the signing of the arbitration agreement documents. (R. pp. 27-40.) Love Chevrolet's counsel below contended this issue was not properly before the court, stating that "[t]he word fraud does not appear in the complaint at all" and conflating that with the notion that "[t]here has been no attack on the validity of the arbitration agreement, itself, on the grounds of fraud. So that challenge, we contend, is not valid." (R. p. 46 ln. 10-14.) But this mixes things up. The truck buyers do not have to *sue* Love Chevrolet for fraud for this supposed arbitration agreement to have been *procured* by fraud. Maybank, 416 S.C. at 577-78. Never have our courts required a plaintiff opposing a motion to compel arbitration to have even sued about the arbitration agreement at all.

e. The outrageous nature of Love Chevrolet's bait-and-switch conduct provides grounds for the denial of its motion.

In 2007, our Supreme Court

> pronounce[d] a . . . definitive rule for determining whether a significant relationship exists between a dispute between parties to a contract and the underlying contract, thereby implicating an arbitration agreement in the contract. Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings.

Aiken, 644 S.E.2d at 709.

In 2010, in Partain v. Upstate Automotive Group, the Court held that an automobile bait-and-switch (in which a car dealer replaced the car it led its customer to believe he was buying with a different vehicle) fell within the ambit of this rule. 386 S.C. 488, 689 S.E.2d 602, 603, 605 (2010).

How is this case different from that bait and switch? Materially, it is not. Love Chevrolet sold these truck buyers on trucks with one towing capacity and then actually provided them with trucks that only have a much lower towing capacity. (R. pp. 27-40.) That was a bait and switch. As in Partain, this was unforeseeable to a reasonable consumer in the context of ordinary business dealings.

f. Love Chevrolet failed to show involvement of interstate commerce, and the "agreements" fail to meet the requirements of the South Carolina Arbitration Act.

Love Chevrolet points to the arbitration agreement document stating that the transaction involved interstate commerce and is, thus, subject to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* As our Supreme Court recently observed, Love Chevrolet had to do better than that to demonstrate that the transaction involved interstate commerce.

In Hicks, the Supreme Court noted that "[a] provision in an arbitration agreement declaring that the FAA applies is not a *fait accompli*." 439 S.C. at 630. That case involved an arbitration agreement concerning the rental of uniforms. Id. at 628-29. The defendant sought to compel arbitration under an agreement that did not comply with the notice requirements under the South Carolina Arbitration Act, S.C. Code Ann. § 15-48-10, but which did state it involved interstate commerce and was subject to the FAA. Hicks, 439 S.C. at 628, 634.

> What UniFirst is really asking us to do is to bless the principle that parties may agree-preemptively-that a court may apply the FAA's federal preemption power to their contract without first peeking behind the curtain to ensure interstate commerce is involved.
>
> This we cannot do. The FAA is a sequential whole whose enforcement and preemption power may only be called upon when the dispute arises against the backdrop of a written provision in a "maritime transaction or a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. The Supreme Court long ago announced that the FAA menu is not a la carte.
>
> . . .
>
> We hold that a party seeking to compel arbitration under the FAA must demonstrate that the contract implicates interstate commerce. Just as the parties may not prove the requisite connection to interstate commerce by agreeing their transaction or relationship "contemplates" interstate commerce, they may not make the connection by declaring or contemplating the FAA will govern. . . . To the extent Munoz v. Green Tree Fin. Corp. and Damico v. Lennar Carolinas, LLC have been read as allowing parties to agree the FAA preempts South Carolina law without an accompanying demonstration the contract involves interstate commerce, we clarify now they do not.
>
> . . .
>
> The inquiry is fact dependent and focuses on what the specific contract terms require for performance. The party claiming the FAA preempts state law bears the burden of proving the contract involves interstate commerce.

Hicks, 439 S.C. at 630, 632, 633.

Love Chevrolet put nothing before the court indicating that interstate commerce was actually involved in either of the truck buyers' transactions. Love Chevrolet will likely counter that the transactions of course involved interstate commerce because automobiles were sold.

Not so fast. A look at how the Supreme Court dealt with the issue in Hicks is instructive here. Id. at 632-35. The defendant in Hicks did not put forth evidence showing that interstate commerce was involved. Id. at 634. The Court refused to assume it or to accept assumptions about it. Id. That evidence may have actually *existed* – but the defendant's failure to put it before the court in the proceedings seeking to compel arbitration prevented it from being a proper subject of consideration. Id. at 632-35.

It is the same here.

That is important because, if the FAA does not apply – and the court cannot assume it does – the purported arbitration agreement is simply unenforceable from the jump. It fails to meet a requirement for enforceability under the South Carolina Arbitration Act, which governs in this state when the FAA does not.

> Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.

S.C. Code Ann. § 15-48-10.

The document at issue here does not contain this notice. (R. pp. 141, 142.) Our Supreme Court has held that the plain meaning of this language is to be enforced, and that plain meaning provides an arbitration provision in a contract that does not meet these requirements is unenforceable under S.C. Code Ann. § 15-48-10. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001); Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 457,

476 S.E.2d 149, 151 (1996); The Richland Horizontal Prop. Regime Homeowners Ass'n Inc. v. Sky Green Holdings Inc., 392 S.C. 194, 196-97, 708 S.E.2d 225, 226 (Ct. App. 2011).

This provides another ground for the denial of Love Chevrolet's motion.

CONCLUSION

Love Chevrolet has not shown the circuit judge's decision was reversible error. This court should affirm.

Respectfully submitted,

/s/ Andrew S. Radeker
Andrew S. Radeker
S.C. Bar No. 73743
Radeker Law, P.A.
Post Office Box 6903
Columbia, South Carolina 29260
(803) 500-0891
drew@radekerlaw.com
and
David A. Maxfield
S.C. Bar No. 7163
Post Office Box 11865
Columbia, South Carolina 29211-1865
(803) 509-6800
dave@consumerlawsc.com
Attorneys for Respondents

March 11, 2024

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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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.

CERTIFICATE OF COUNSEL
REGARDING COMPLIANCE WITH RULE 211(b), SCACR

I certify that the foregoing final brief complies with Rule 211(b), SCACR.

Respectfully submitted,

/s/ Andrew S. Radeker
Andrew S. Radeker
S.C. Bar No. 73743
Radeker Law, P.A.
Post Office Box 6903
Columbia, South Carolina 29260
(803) 500-0891
drew@radekerlaw.com
and
David A. Maxfield
S.C. Bar No. 7163
Post Office Box 11865
Columbia, South Carolina 29211-1865
(803) 509-6800
dave@consumerlawsc.com
Attorney for Respondents

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PROOF OF SERVICE

I certify that I have served the foregoing final brief of respondents on the date given below by emailing it to opposing counsel at the addresses noted below.

J. Gregory Studemeyer, Esq., at greg@studemeyerlawfirm.com
Sarah T. Eibling, Esq., at sarah.eibling@nelsonmullins.com
Blake T. Williams, Esq., at blake.williams@nelsonmullins.com

Respectfully submitted,

/s/ Andrew S. Radeker
Andrew S. Radeker
S.C. Bar No. 73743
Attorney for Respondents

March 11, 2024