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IN THE STATE OF SOUTH CAROLINA
Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Jennifer B. McCoy, Circuit Court Judge
Case No.: 2024-VP-10-00180

APPELLATE CASE NO.: 2025-000526

Michael Bolmer, — Respondent

v.

Charleston, ANUSA, LLC d/b/a AutoNation USA Charleston and Westlake Services, LLC d/b/a Westlake Financial Services, — Appellant

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INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Bolmer (Respondent herein) takes exception with a few purported facts in Appellant, AutoNation's, Brief. First, with respect to AutoNation's statement that it "inadvertently missed the deadline to pay and mistakenly failed to remit payment for the filing fee" (App. Br., p. 5), Bolmer does not agree that AutoNation's failure to pay was inadvertent or the result of a mistake, nor is there factual support in the record for AutoNation's conclusory statement.

Pursuant to the terms of the arbitration agreement, Bolmer's arbitration filing fee was "limited to the amount of the filing fee in effect for the Federal District Court in the District in which the arbitration takes places [sic], at the time the demand is filed." (Def. Motion to Arbitrate, Exhibit A, p. 5). AutoNation was then required to "pay all arbitration costs and Arbitrator's fees in excess of that amount, unless the Arbitrator later shifts responsibility for fees under applicable law" (Def. Motion to Arbitrate, Exhibit A, p. 5). The AAA mailed multiple letters to AutoNation in which it instructed AutoNation to pay its share of the filing fee. AutoNation admits it received the notices from AAA (Transcript of Hearing at p. 5, lines 1-10). *See also* App. Br., p. 5. On September 27, 2023, when it had not heard from AutoNation, the AAA sent a letter to AutoNation in which it notified AutoNation:

> As of this date we have not received the required fees from AutoNation USA Charleston in this matter. Accordingly, we must decline to administer this case and have closed our file. According to R-1(d) of the Consumer Arbitration Rules, should the AAA decline to administer an arbitration, either party may choose to submit its dispute to the appropriate court for resolution.
>
> Additionally, and because AutoNation USA Charleston [sic] failure to remit the foregoing constitutes a failure to adhere to our policies regarding consumer claims, we may decline to administer future consumer arbitrations involving AutoNation USA Charleston.

(Complaint, pp. 8-10, ¶ 19).

Bolmer further takes exception to the Statement of the Case as set forth on page 6 of Appellant's Brief. Specifically, when AutoNation contacted its counsel, how long after the AAA closed its file for AutoNation's non-payment that AutoNation's counsel contacted the AAA, and what the AAA told AutoNation, is not evidence in the case. AutoNation's representations in this respect are not part of the record but, instead, only appear as part of AutoNation's argument in support of its motion to compel arbitration. *See* App. Br., p. 6 (citing its Motion to Compel as authority for these representations).

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN DENYING AUTONATION'S MOTION TO COMPEL ARBITRATION BECAUSE AUTONATION (A) CANNOT COMPEL ARBITRATION WHEN IT DEFAULTED IN THE PRIOR ARBITRATION AND/OR (B) WAS NOT AN "AGGRIEVED PARTY" ENTITLED TO COMPEL ARBITRATION.

The arbitration agreement is contained in a contract executed by Appellant AutoNation and Respondent Bolmer for the purchase of a vehicle. The arbitration agreement provides that it "shall governed by the Federal Arbitration Act (9 U.S.C. § 1, et seq.)" ("FAA") (Def. Motion to Arbitrate, Exhibit A, p. 5). Although not a part of the record on appeal, there is also a finance contract containing an arbitration provision which is also governed by the FAA and contains a separate arbitration permitting arbitration through the American Arbitration Association ("AAA"). The parties do not dispute that the FAA and the AAA rules apply. *See* App. Br., p. 5 ("In June 2023, Bolmer filed a demand for arbitration with the American Arbitration Association (the "AAA") as provided in the Retail Purchase Agreement.").

Two sections of the FAA are at issue in this appeal – 9 U.S.C. §§ 3 and 4. Section 3 pertains to stays of litigation pending arbitration while § 4 addresses motions to compel arbitrations. Sections 3 and 4 of the FAA provide "parallel devices for enforcing an arbitration agreement." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983). A party desiring arbitration of a dispute first brought in court can seek a stay of the court proceedings under § 3, and a concurrent order under § 4 compelling arbitration. *Sink v. Aden Enters., Inc.,* 352 F.3d 1197, 1201 (9th Cir. 2003). That is what AutoNation did in this case. The trial court denied AutoNation's motion to stay litigation and motion to compel arbitration (Form 4 Order). AutoNation appeals only the denial of its motion to compel.

AutoNation cannot compel arbitration for numerous reasons. First, because it defaulted within the meaning of § 3, it cannot compel arbitration under § 4. Second, it is not an aggrieved party as defined by § 4. The first two reasons are discussed under this response to AutoNation's Point I. Third, even if AutoNation was not in default and was an "aggrieved party," it waived its right to arbitrate under § 4 (discussed in Bolmer's response to AutoNation's Point II).

A. AutoNation cannot compel arbitration because it defaulted in arbitration within the meaning of 9 U.S.C. § 3.

9 U.S.C. § 3 authorizes the stay of litigation pending arbitration "until such arbitration has been had in accordance with the terms of the agreement, **providing the applicant for the stay is not in default in proceeding with such arbitration**" (emphasis added). "Section 3 of the FAA 'provides that a court must stay litigation upon being satisfied that the issue is referrable to arbitration under the agreement,' **so long as** 'the applicant for the stay is not in default in proceeding with such arbitration.'" *SZY Holdings, LLC v. Garcia,* No. 23-1305, 2024 WL 3983944, at *2 (4th Cir. Aug. 29, 2024) (citing *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 69 (2019)). *See also Bedgood v. Wyndham Vacation Resorts, Inc.,* 88 F.4th 1355, 1363 (11th Cir. 2023) (Section 3 of the FAA entitles a party to stay the litigation of an action that falls within an arbitration agreement's terms unless the party is "*in default* in proceeding with such arbitration.") (emphasis in original).

Because AutoNation defaulted within the meaning of 9 U.S.C. § 3, it could not compel arbitration under 9 U.S.C. § 4. *Sink,* 352 F.3d at 1200-1201.

The arbitration agreement provides, *inter alia*,

> Your [Bolmer's] portion of the cost of arbitration itself and/or the Arbitrator's fees shall be limited to the amount of the filing fee in effect for the Federal District Court in the District in which the arbitration takes places [sic], at the time the demand is filed. Dealer [AutoNation] shall pay all arbitration costs and Arbitrator's fees in

> excess of that amount, unless the Arbitrator later shifts responsibility for fees under applicable law.

(Def. Motion to Arbitrate, Exhibit A, p. 5). Bolmer paid the necessary filing fee. AutoNation did not.

On August 16, 2023, the AAA mailed a letter to AutoNation at the address AutoNation identified in its contract (Compare Def. Motion to Arbitrate, Exhibit A, p. 5 with Complaint, pp. 5-7, ¶ 18). The AAA notified AutoNation that Bolmer had paid his portion of the filing and asked AutoNation to remit its share of the fees by August 30, 2023 (Complaint, pp. 5-7, ¶ 18). The August 16, 2023 letter also directed AutoNation "to submit its current consumer arbitration clause for inclusion on the Registry" and for due process review (Complaint, pp. 5-7, ¶ 18). AutoNation admits it received this correspondence (Transcript of Hearing at p. 5, lines 1-5; App. Br., p. 5).

After receiving no response from AutoNation, and giving AutoNation a week grace period, on September 08, 2023, the AAA sent a second letter to AutoNation, again mailed to the address AutoNation had identified in its contract with Bolmer (Compare Def. Motion to Arbitrate, Exhibit A, p. 5 with Complaint, pp. 7-8 ¶ 19). In the AAA's September 08, 2023 letter, AutoNation was advised that: (1) Bolmer had paid his filing fee; (2) AutoNation was required to remit payment by September 22, 2023; (3) if AutoNation did not pay the fee, the AAA would administratively close the case; and (4) if AutoNation needed an extension, it should contact the AAA (Complaint, pp. 7-8, ¶ 19).[1] AutoNation admits it received the September 08, 2023 correspondence from the AAA (Transcript of Hearing at p. 5, lines 1-5). *See also* App. Br.,

[1] AAA's September 27, 2023 letter mentioned only AutoNation's failure to pay. It is unknown whether AutoNation submitted its "current consumer arbitration agreement" to the AAA as requested on August 16, 2023.

p. 5 ("On September 8, 2023, the AAA notified AutoNation that the filing fees were due on September 22, 2023.").

On September 27, 2023 (after a second grace period), AAA sent a letter to AutoNation in which it notified AutoNation:

> As of this date we have not received the required fees from AutoNation USA Charleston in this matter. Accordingly, we must decline to administer this case and have closed our file. According to R-1(d) of the Consumer Arbitration Rules, should the AAA decline to administer an arbitration, either party may choose to submit its dispute to the appropriate court for resolution.
>
> Additionally, and because AutoNation USA Charleston failure to remit the foregoing constitutes a failure to adhere to our policies regarding consumer claims, we may decline to administer future consumer arbitrations involving AutoNation USA Charleston.

(Complaint, pp. 8-10, ¶ 19).

AutoNation's failure to pay the required filing fee was a default within the meaning of 9 U.S.C. § 3. In *Pre-Paid Legal Servs., Inc. v. Cahill*, one party refused to pay his share of arbitration costs despite repeated requests from the AAA. 786 F.3d 1287, 1294 (10th Cir. 2015). The Court held that, "by refusing multiple requests to pay, he allowed arbitration to terminate" and "[f]ailure to pay arbitration fees constitutes a "default" under § 3." *Id. See also Rapaport v. Soffer,* 2:10–CV–00935–KJD–RJJ, 2011 WL 1827147, at *2 (D. Nev. May 12, 2011) (unpublished) (finding the defendant defaulted under § 3 because the AAA "closed" or "terminated" the case because the defendant failed to pay fees).

Because AutoNation defaulted within the meaning of 9 U.S.C. § 3, it cannot compel arbitration under 9 U.S.C. § 4. In *Sink,* the party who failed to pay arbitration fees sought to stay subsequent litigation and compel an order returning the case to arbitration. 352 F.3d at 1199. The Court held that failure to pay arbitration fees resulted in "default in the arbitration proceeding" within the meaning of § 3. *Id.* The party in *Sink* who sought to compel arbitration in the face of

its prior default in arbitration argued the Court was still required to compel arbitration pursuant to § 4 even if it could not stay litigation pursuant to § 3. The Court rejected this argument, holding:

> It cannot sensibly be maintained that a district court is required to enter an order under § 4 compelling parties to return to arbitration under circumstances where § 3 precludes the district court from staying its own proceeding.
>
> The interdependent nature of these two sections would be undermined if a party unable to stay litigation under § 3 because of a prior default in proceeding with arbitration could nonetheless compel a return to arbitration under § 4.
>
> One purpose of the FAA's liberal approach to arbitration is the efficient and expeditious resolution of claims. … This purpose is not served by requiring a district court to enter an order returning parties to arbitration upon the motion of a party that is already in default of arbitration. Another, and preeminent, purpose of the FAA is to ensure judicial enforcement of privately made agreements to arbitrate… But this purpose also is not served by returning parties to arbitration upon the motion of a party that is in default of arbitration. [The defendant's] failure to pay required costs of arbitration was a material breach of its obligations in connection with the arbitration.
>
> We hold that a party to an arbitration agreement may not compel arbitration of claims under FAA § 4 where a prior default in arbitration of those claims precludes that party from obtaining a stay of litigation pending arbitration under § 3. … Because [the movant] is in default, and the FAA no longer permits a stay of the court proceedings in favor of arbitration, the FAA commensurately does not require the district court to order the parties to return to arbitration.

Sink, 352 F.3d at 1201-1202.

"Failure to pay arbitration fees constitutes a 'default' under § 3," so the court "cannot order the plaintiffs to go back to arbitration. *Quizinsight.com P'ship v. Tabak*, No. 18-CV-1878 (DLF), 2022 WL 18401758, at *2 (D.D.C. May 17, 2022). "When [non-payment] occurs, the party in default can no longer require the opposing party to proceed in arbitration (or be entitled to an order staying the case); instead, the action must proceed in court." *Id. See also Hernandez v. Acosta*

Tractors, Inc., 898 F.3d 1301, 1303-1305 (11th Cir. 2018) ("Once [the defendant] defaulted in the arbitration [by failing to pay the required arbitration fees], the [d]istrict [c]ourt would have been within its power to find that [the defendant] could no longer require [the employee] to proceed in arbitration."); *Souffrant v. First Choice Med. Grp. of Brevard, LLC,* 6:23-cv-1003-PGB-EJK, 2024 WL 4433459, *2 (M.D. Fla. Oct. 7, 2024) ("Defendant failed to pay the filing fee, so the AAA administratively closed the file on the matter. … Consequently, the arbitration proceeding is in default [under § 3], and thus, the Court is no longer required to compel arbitration under the FAA.");

Similar to *Sink,* in *Garcia v. Mason Cont. Prods., LLC,* the defendant did not pay its share of the arbitration fee which resulted in the arbitrator closing its file. 08–23103–CIV, 2010 WL 3259922, *1 (S.D. Fla. Aug. 18, 2010). Mere days after the arbitrator closed its file, the defendant "tried to cure its default on payment to the arbitrator" and argued the plaintiff was preventing the defendant from curing its default. *Id.* at *1, 3. The *Garcia* Court held:

> Defendant is now in default. Plaintiff could absolve the Defendant of that default but chooses not to. Therefore, the FAA no longer compels us to dismiss or stay this case for arbitration. And we choose not to.
>
> ***
>
> By failing to timely pay its share of the arbitration fee, Defendant materially breached its obligations, thereby "scuttling" that opportunity. … [T]he FAA under these circumstances does not require a district court to return the parties once more to arbitration, whether under sections 3 or 4 of the FAA.
>
> ***
>
> "[T]his default was ... an intentional and/or reckless act because the AAA provided repeated notices to the Defendant that timely payment of the fee had not been received.... There is no other description the Court can find for this self-created situation other than 'default.'"
>
> ***

> Absent Plaintiff's agreement, which is clearly not forthcoming, Defendant has forfeited its right to proceed with arbitration

Id. at *2-4.

AutoNation clearly defaulted when it refused to pay its share of arbitration filing fee despite receiving "several" notices from the AAA demanding AutoNation's pay its share of the arbitration filing fee. At the hearing on AutoNation's motion to compel, it admitted:

> In August of 2023, the AAA sent correspondence to Auto Nation and the other parties informing of Bolmer's demand for arbitration. It -- the AAA did mail out the demand directly to Auto Nation's dealership. **Admittedly, several additional notices were sent to Auto Nation** at that the dealership.

Transcript of Hearing at p. 5, lines 2-7 (emphasis added).

Because AutoNation defaulted within the meaning of § 3, it could not compel arbitration pursuant to § 4. *Cahill*, 786 F.3d at 1294; *Sink,* 352 F.3d at 1201-1202; *Quizinsight.com*, 2022 WL 18401758, at *2; *Souffrant,* 2024 WL 4433459, at *2; *Garcia*, 2010 WL 3259922, at *1.

B. AutoNation is not an "aggrieved party" who may compel arbitration.

Even if AutoNation could show it did not default on its agreement to arbitrate, it cannot establish the elements of 9 U.S.C. § 4 to compel arbitration. Pursuant to § 4, an "aggrieved party" may petition for arbitration if it establishes:

> (1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) **the failure, neglect or refusal of the [claimant] to arbitrate the dispute**.

American General Life & Accident Ins. Co. v. Wood, 429 F.3d 83, 87 (4th Cir. 2005) (internal quotations omitted) (emphasis added) (citing 9 U.S.C. § 2 which has since been renumbered to 9 U.S.C. § 4, but without substantive changes to the language of the statute).

The parties do not dispute the first element (the existence of a dispute between the parties). Respectfully, the next two elements of § 4 do not be addressed because, even if accepted as true, AutoNation did not, and cannot meet the fourth element. AutoNation was not aggrieved by Bolmer's alleged failure, neglect, or refusal to arbitrate, so AutoNation's claimed right to compel arbitration fails under the fourth element.

To be entitled to relief pursuant to § 4, AutoNation must establish that it is an "aggrieved party" which contains "two conditions to relief." *Bedgood,* 88 F.4th at 1362.

> [The two conditions] are separate, but they are causally related: first, the party resisting arbitration must have "fail[ed], neglect[ed], or refus[ed]" to arbitrate; and second, the party seeking to direct arbitration must have been "aggrieved" *by* that failure, neglect, or refusal.

Id. (emphasis in original).

A party who attempts to arbitrate but is thwarted in that attempt by the conduct of another party does not fail, neglect, or refuse to arbitrate. In *Bedgood,* the parties signed contracts containing arbitration clauses that were governed by the FAA and designated the AAA as the administrator. *Id.* at 1360. After a dispute arose, certain plaintiffs filed petitions to arbitrate with the AAA pursuant to the terms of the purchase agreement with the defendants, but the AAA dismissed the petitions and closed its file because the defendants had failed to comply with the AAA's policies. The plaintiffs then sued in court and the company moved to compel arbitration under the FAA. *Id.* "The defendants' response? You guessed it: They moved to stay the litigation and direct arbitration." *Id.* at 1359.

Bedgood held the defendant was "*ineligible* to move to direct arbitration under Section 4 because it hasn't been 'aggrieved' by any 'failure, neglect, or refusal' on the part of [the plaintiffs]" where the "AAA had closed its doors … because of [the defendants] refusal to comply with AAA policies." *Id.* at 1366-1367 (emphasis in original).

> To put the matter plainly, because each of the Group (1) plaintiffs attempted to arbitrate, there was no "failure, neglect, or refusal" by which [the defendants] could have been "aggrieved." [The plaintiffs] filed petitions with the AAA to pursue their claims in accordance with their contracts, and their actions and representations in this Court evince a genuine desire to arbitrate. They were thwarted in that pursuit by Resorts' own conduct.

Id. at 1366. *See also Merritt Island Woodwerx, LLC v. Space Coast Credit Union,* 137 F.4th 1268, 1275 (11th Cir. 2025) (the plaintiff filed an arbitration claim, but the defendant did not pay the required arbitration fees. Held: "Because [the plaintiff] attempted to arbitrate, there was no 'failure, neglect, or refusal' by which [the defendant] could have been 'aggrieved.'") (internal quotations omitted); *Noble Capital Fund Mgmt., L.L.C. v. US Capital Glob. Inv. Mgmt., L.L.C.,* 31 F.4th 333, 336 (5th Cir. 2022) ("[P]arties may not avoid resolution of live claims through compelling a new arbitration proceeding after having let the first arbitration proceeding fail. Therefore, the district court properly denied [the defendant's] motion to stay judicial proceedings and compel arbitration.").

Bolmer did not fail, neglect, or refuse to arbitrate. To the extent AutoNation is aggrieved, it is aggrieved through its own failure to comply with requests to arbitrate, not by Bolmer's conduct. The fact that it later attempted to comply with the AAA policies does not resurrect the waived right to arbitrate. "'[O]nce a right is waived it is gone forever and it cannot be reclaimed [,] ... recaptured[,] ... retracted, recalled, or expunged, even in the absence ... of any change in position by the party in whose favor the waiver operates.'" *State v. Battle,* 304 S.C. 191, 195, 403 S.E.2d

331, 333 (Ct. App. 1991) (quoting 92 C.J.S. *Waiver,* at 1069 (1955)). *See also See Merritt Island,* 137 F.4th at 1276 ("the fact that [the defendant] later attempted to comply with the AAA policies doesn't resurrect the waived contractual right to arbitrate.").

"Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012). Here, the trial court had "reasonable support" for denying AutoNation's motion to compel arbitration because (1) AutoNation defaulted in arbitration and a party cannot compel arbitration pursuant to the FAA § 4 when it defaults under FAA § 3, and/or (2) AutoNation is not an "aggrieved party" within the meaning of FAA § 4, it could not compel arbitration pursuant to § 4.

II. THE CIRCUIT COURT DID NOT ERR IN DENYING AUTONATION'S MOTION TO COMPEL ARBITRATION BECAUSE AUTONATION WAIVED ITS RIGHT TO ARBITRATE.

AutoNation's Point II focuses on the issue of waiver. However, because AutoNation defaulted within the meaning of 9 U.S.C. § 3, it cannot compel arbitration under 9 U.S.C. § 4 (*see* discussion under Point I(A). Moreover, AutoNation cannot compel arbitration because it is not an "aggrieved party" within the meaning of § 4. *See* discussion at Point I(B). Therefore, Point I is dispositive and the Court need not reach Point II. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (an appellate court need not address the remaining issues on appeal when resolution of a prior issue is dispositive). Even if AutoNation survived its Point I, because AutoNation waived its claimed right to arbitrate, the trial court did not err in denying AutoNation's motion to compel arbitration.

A. Bolmer did not waive his arguments on appeal.

AutoNation first contends that Bolmer did not preserve in the lower court his argument that AutoNation waived its right to arbitrate because the trial court's order denying AutoNation's motion to arbitrate did not mention waiver, but Bolmer is not the Appellant. AutoNation, as Appellant, is the party required to preserve issues for appeal, not Bolmer, the Respondent.

> [A] respondent – the "winner" in the lower court – may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000).

If AutoNation – the Appellant – wanted clarification of the basis for the trial court's denial of its motion to compel arbitration, it was AutoNation's responsibility to make a motion pursuant to SCRCP 59(e). *See Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (an issue is not preserved for appellate review if the trial court did not explicitly rule on the *appellant's* argument and *appellant* failed to file a Rule 59(e) motion to amend or alter the judgment) (emphasis added); *I'On,* 338 S.C. at 419, 526 S.E.2d at 723 ("[**T]he losing party** generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.") (emphasis added).

Appellant, AutoNation, did not file a Rule 59(e) Motion so, if the trial court's denial of arbitration can be sustained on any grounds, the order must be affirmed. *See* Rule 208(b)(2), SCACR ("Respondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)"); Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record

on Appeal."). Here, waiver issue was presented to the trial court and justified the denial of AutoNation's motion to compel.

B. AutoNation waived its purported right to arbitrate.

Arbitration agreements are a matter of contract and must be enforced according to their terms. *American Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013). "There is, however, no public policy—federal or state—'favoring' arbitration." *Sanders v. Savannah Highway Auto. Co.,* 440 S.C. 377, 382, 892 S.E.2d 112, 114 (2023) (internal quotations omitted)). As with any other contract, "the right to enforce an arbitration clause may be waived." *Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co*., 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003).

Historically, the party asserting waiver was required to show prejudice by the conduct of the party who sought to enforce arbitration, but the United States Supreme Court struck down the prejudice requirement. *Morgan v. Sundance, Inc.*, 596 U.S. 411, 417-419 (2022). "[W]aiver does not include a prejudice requirement." *Id.* at 419. Instead, "default or waiver occurs when a party took action inconsistent with the right to arbitration." *SZY Holdings,* 2024 WL 3983944, at *2 (internal quotation marks omitted). *See also Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 928 (Ct. App. 1994) ("Acts that are inconsistent with the continued assertion of a right may also give rise to a waiver."). The relevant question is whether the party requesting arbitration "knowingly relinquish[ed] the right to arbitrate by acting inconsistently with that right." *Morgan*, 596 U.S. at 419.

1. AutoNation knew it had the right to arbitrate.

The first test for determining waiver is whether AutoNation possessed "actual or constructive knowledge of [its] rights." *Janasik v. Fairway Oaks Villas Horizontal Prop.*

Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 387-388 (1992). Here, AutoNation admits it had knowledge of its rights.

AutoNation admits it received multiple letters from the AAA in which AutoNation was notified of the requirement to pay the arbitration filing fees by a date certain (Compare Def. Motion to Arbitrate, Exhibit A, p. 5 with Complaint, pp. 5-8, ¶¶ 18, 19; Transcript of Hearing at p. 5, lines 1-5; App. Br., p. 5). AutoNation admits it did not pay the filing fee by the deadlines set by the AAA (Transcript of Hearing at p. 5, lines 13-14).

AutoNation argues that, even though it refused to participate in the very arbitration it now seeks to compel, its previous refusal should not be held against it because the AAA's letters demanding payment were sent to AutoNation's dealership who did not forward the AAA's letters to legal counsel (App. Br., p. 14). That argument should be summarily rejected for at least two reasons.

First, the AAA's Rule R-4(b)(iii)(a) provides that "Any documents, notices, or process necessary for the filing of an arbitration under this Rule may be served on a party … by mail addressed to the party or its authorized representative at their last known address" (https://www.adr.org/media/yawntdvs/2025_consumer_arbitration_rules.pdf). The contract containing the arbitration agreement identifies AutoNation's address as "AutoNation USA Charleston 2250 Savannah Highway Charleston, SC 29414" which is the exact address to which the AAA mailed all correspondence (Compare Def. Motion to Arbitrate, Exhibit A, p. 5 with Complaint, pp. 5-8, ¶¶ 18, 19). AAA's Rule R-4(b)(iii) is consistent with Rule 5(b)(1), SCRCP, which provides that "[s]ervice upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address."

Second, AutoNation does not deny it timely received the letters from the AAA requiring AutoNation to pay its fees. AutoNation merely argues it did not send the letters to its legal counsel. It refers to this as "human error," (App. Br., p. 14). AutoNation did not just ignore or mishandle one letter. It ignored "several additional letters" from the AAA (Transcript of Hearing at p. 5, lines 6-7). AutoNation's reasons for not remitting payment would be insufficient to set aside a default judgment, so it should not be considered sufficient to set aside its waiver of the right to arbitrate.

In *McCall v. A-T-O, Inc.,* the defendant was served but "did not even forward the pleadings to his company counsel." 276 S.C. 143, 146, 276 S.E.2d 529, 530 (1981). When the defendant did not answer, default was entered. *Id.* The Court of Appeals held the failure to forward the pleadings to counsel was not excusable neglect sufficient to set aside a default. *Id.* It did not matter that the employee who failed to forward the pleadings was not an attorney and did not recognize the significance of the pleading. *Id. See also Little v. Orkin Exterminating Co.,* 270 S.C. 305, 307-308, 241 S.E.2d 909, 910 (1978) (branch manager's failure to properly forward pleadings to attorneys was not mistake, inadvertence, or excusable neglect sufficient to set aside default judgment); *McAuley v. Sunshine 11, LLC,* No. 2023-001173, 2025 WL 1250444, at *1 (S.C. Ct. App. Apr. 30, 2025) (no excusable neglect where the defendant's employee did not read or write English, was confused regarding the legal proceeding, and, therefore, did not file an answer). AutoNation is not entitled to greater deference than it would be under a default judgment.

AutoNation knew it had the right to arbitrate. Indeed, it does not even attempt to establish it was unaware of its right to arbitrate, because it cannot. It admits it received multiple letters from AAA demanding payment and requiring its contract be submitted for due process review.

2. AutoNation acted inconsistent with its right to arbitrate.

In *Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC,* the defendant was served with the summons and complaint, but did not file an answer. 444 S.C. 328, 336-337, 907 S.E.2d 129, 133 (Ct. App. 2024). After a default order was entered against the defendant, the defendant obtained counsel and moved to set aside the default judgment and filed a motion to compel arbitration. *Id.* The trial court denied both motions. *Id.* The Court of Appeals upheld the trial court's refusal to set aside the default judgment because "[a]ppellant's misunderstanding of the legal process … [is] not sufficient good cause to excuse their failure to answer." *Id.* at 136. The Court of Appeals also upheld the trial court's denial of the motion to compel arbitration, finding the defendant was given notice of the claim, but failed to timely answer or respond to the claims. *Id.* at 138. The appellant's failure to timely answer or respond to the claims after receiving notice "effectively waived their right to assert enforcement of the arbitration provision." *Id.*

The *Palmetto* Court further noted the policy reasons for finding waiver supported its decision. Arbitration is designed to provide "speedy, cost-effective resolution of disputes .. [and] [t]o allow a party to 'cry arbitration' in order to undo the consequences of its own errors would turn the rationale of arbitration on its head." *Id.* at 137-138 (internal quotations omitted). The doctrine of waiver of arbitration should be "stringently enforced … to prevent parties from asserting arbitration as a cover for their own mistakes or tactical errors." *Id.* The same policy reasons support a finding of waiver in the case *sub judice*. Bolmer first attempted to arbitrate his claims in August 2023 – two years later and he still has not had his matter resolved. Allowing AutoNation to "cry arbitration" under these circumstances subverts the purpose of arbitration.

The result reached in *Palmetto* is compelled here. Appellant AutoNation admits it received multiple notices of the claim Bolmer had filed with the AAA. AutoNation admits it received

multiple letters from AAA demanding AutoNation's share of the arbitration fees. The AAA warned AutoNation that, if it "[did] not timely receive the business' portion of the filing fees, we will notify the parties that we have administratively closed this case" (Complaint, pp. 7-8, ¶ 19). AutoNation contends it contacted the AAA after the file had been closed in an attempt to resurrect the arbitration claim, but there is no *evidence* in the record (only AutoNation's argument) that it took any action whatsoever. Even if AutoNation did make a belated attempt to reopen the arbitration matter, its conduct does not rescind its waiver. *See Battle,* 304 S.C. at 195, 403 S.E.2d at 333 ("[O]nce a right is waived it is gone forever and it cannot be reclaimed [,] ... recaptured[,] ... retracted, recalled, or expunged,") (internal quotations omitted); *Merritt Island,* 137 F.4th at 1276 ("the fact that [the defendant] later attempted to comply with the AAA policies doesn't resurrect the waived contractual right to arbitrate.").

Numerous courts have held the failure to pay arbitration fees are inconsistent with the right to arbitrate and results in a waiver of the right to compel arbitration. *See Freeman v. SmartPay Leasing, LLC,* 771 F. App'x 926, 932-933 (11th Cir. 2019) (defendant "acted inconsistently with its contractual right to arbitrate when it refused to pay the initial filing fee … [and] therefore waived its right to arbitration by failing to pay arbitration fees."); *Brown v. Dillard's, Inc.*, 430 F.3d 1004, 1013 (9th Cir. 2005) (litigant's refusal to pay the arbitration filing fee constituted an act inconsistent with the right to arbitrate); *Musharbash v. JPMorgan Chase Bank,* No. 222-CV-02320-DAD-KJN, 2024 WL 919186, at *4 (E.D. Cal. Mar. 1, 2024) ("Defendant also acted inconsistently with that right to arbitrate by failing to pay the filing fee required to initiate the arbitration for nearly two months. Accordingly, defendant waived its right to arbitrate."); *Figueredo-Chavez v. RCI Hosp. Holdings, Inc.,* 574 F. Supp. 3d 1167, 1171-1172 (S.D. Fla. 2021) ("Defendants have clearly waived their right to arbitrate as to all Plaintiffs, … by failing to comply

with the AAA's rules and procedures governing fee allocation."); *Mason v. Coastal Credit, LLC,* No. 3:18-CV-835-J-39MCR, 2018 WL 6620684, at *7-8 (M.D. Fla. Nov. 16, 2018) (where AAA closed its file and declined to administer the case because the plaintiff paid its portion of AAA's fees, but the defendant did not, the defendant "acted inconsistently with its right to arbitrate" and "waived its right to arbitrate this dispute."); *Stanley v. A Better Way Wholesale Autos, Inc.,* Case No. 3:17cv1215-MPS, 2018 WL 3872156, at *6 (D. Conn. Aug. 15, 2018) (defendant waived right to compel arbitration when it refused to pay AAA's required fees and "to play by the rules that it had itself agreed to").

"Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings." *Pearson*, 400 S.C. at 286, 733 S.E.2d at 599. Here, the trial court had "reasonable support" for denying AutoNation's motion to compel arbitration based on waiver where the undisputed evidence was that AutoNation did not pay the fees required to arbitrate, the AAA closed the arbitration matter because of AutoNation's non-payment, the AAA stated it may decline any future arbitration matters involving AutoNation, and AAA notified Bolmer that he may proceed in court because of AutoNation's failure to comply with AAA rules.

The trial court did not err in denying AutoNation's Motion to Compel Arbitration.

CONCLUSION

The district court did not err in denying AutoNation's motion to stay litigation and compel arbitration. The Order denying AutoNation's motion to stay litigation and compel arbitration should be affirmed.

Respectfully submitted:

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IN THE STATE OF SOUTH CAROLINA
Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Jennifer B. McCoy, Circuit Court Judge
Case No.: 2024-VP-10-00180

APPELLATE CASE NO.: 2025-000526

Michael Bolmer, — Respondent

v.

Charleston, ANUSA, LLC d/b/a AutoNation USA Charleston and Westlake Services, LLC d/b/a Westlake Financial Services, — Appellant

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PROOF OF SERVICE

I certify that RESPONDENT'S INITIAL BRIEF was served upon counsel for Appellant by electronic mail only to: awilliams@hsblawfirm.com and hharrington@hsblawfirm.com on the 24th day of July, 2025.

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