THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Case No.: 2024-CP-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, Appellants.

FINAL BRIEF OF APPELLANTS

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

s/ Sarah A. Hodges
James Y. Becker, SC Bar No. 64991
Sarah A. Hodges, SC Bar No. 106253
1201 Main Street, 22nd Floor (29201-3226)
Columbia, South Carolina
Telephone: (803) 779-3080
jbecker@hsblawfirm.com
shodges@hsblawfirm.com
Attorneys for Appellants

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STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court err in denying AutoNation's motion to stay the litigation and compel arbitration?

II. Has the issue of AutoNation's waiver of its right to compel arbitration been preserved for appellate review, and if so, is a finding of waiver appropriate based on the undisputed facts and applicable law regarding waiver of arbitration rights?

STATEMENT OF CASE

Respondent Michael Bolmer ("Bolmer") purchased a 2012 Ford Focus, VIN #1FAHP3K2XCL273616 (the "Ford Focus") from Charleston ANUSA, LLC d/b/a AutoNation USA Charleston ("AutoNation") in March of 2023. (R. 4). At the time of the sale, Bolmer executed a Retail Purchase Agreement, which contained a mandatory arbitration provision. (R. 21-22). Bolmer financed the purchase (the "Loan") through Westlake Services, LLC d/b/a Westlake Financial Services ("Westlake"). (*See* R. 4). Bolmer later returned the Ford Focus under AutoNation's return policy and then purchased a different vehicle through a different lender. (R. 6). Despite returning the vehicle and rescinding the Loan, Bolmer alleges that Westlake demanded Loan payments from Bolmer and reported missed loan payments to credit reporting bureaus. (*Id.*).

In June 2023, Bolmer filed a demand for arbitration with the American Arbitration Association (the "AAA") as provided in the Retail Purchase Agreement. (*Id.*). In August 2023, the AAA sent AutoNation notice of Bolmer's demand for arbitration. In the correspondence, the AAA also requested that AutoNation pay the requisite filing fee. (R. 6-7). Evidently, the AAA mailed the Demand and all subsequent notices directly to AutoNation's dealership location rather than its registered agent. (*Id.*). On September 8, 2023, the AAA notified AutoNation that the filing fees were due on September 22, 2023. (R. 8-9). Unfortunately, the appropriate AutoNation personnel—the employees who handle legal claims—did not timely receive the notice. (R. 31). AutoNation inadvertently missed the deadline to pay and mistakenly failed to remit payment for the filing fee. (*Id.*). But AutoNation did not intentionally refuse to participate in the arbitration. (*Id.*).

In fact, AutoNation contacted the undersigned counsel on or about October 4, 2023, requesting legal representation for the arbitration demand filed by Bolmer. (*Id.*). The next day, AutoNation's counsel contacted the AAA and filed a notice of appearance in the matter. (*Id.*).

Shortly after filing the notice of appearance, the AAA notified AutoNation's counsel that the case was administratively closed on September 27, 2023. (*Id.*). The AAA informed AutoNation that it could re-open the case with Bolmer's consent. (*Id.*). To that end, AutoNation's counsel requested Bolmer's consent to re-open the case, (*Id.*), but Bolmer's counsel, refused, alleging that AutoNation had waived its rights to arbitration. (*Id.*). Bolmer subsequently filed this action on January 12, 2024, (R. 4-13), and AutoNation moved to compel the parties to arbitration on September 4, 2024. (R. 21-29). After receiving briefing and a hearing, the trial court denied AutoNation's motion without explanation by a Form 4 Order on February 14, 2025. (R. 1-3).

STANDARD OF REVIEW

A decision on a motion to stay litigation and compel arbitration is a "legal conclusion subject to *de novo* review." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 663–64, 521 S.E.2d 749, 752 (Ct. App. 1999). Appellate courts must give reasonable deference to the circuit court's findings of fact underlying their legal conclusion. *Id.*

ARGUMENT

I. The circuit court erred in denying AutoNation's motion to compel because Bolmer's lawsuit is subject to mandatory arbitration under the Federal Arbitration Act.

The Retail Purchase Agreement contains an arbitration provision. (R. 21). The arbitration provision states that arbitration "will be the sole method of resolving any claim, dispute, or controversy [] that either party has" and any arbitration "shall be governed by the Federal Arbitration Act" (the "FAA"). (R. 21-22). The FAA requires courts to stay "'any suit or proceeding' pending arbitration of 'any issue referable to arbitration under an agreement in writing for such arbitration.'" 9 U.S.C. § 3. "This stay-of-litigation provision is mandatory," *Adkins v. Lab. Ready, Inc.*, 303 F.3d 496, 500 (4th Cir. 2002), and the "court therefore has no choice but to grant a motion to compel arbitration where a valid arbitration agreement exists and the issues in a case fall within its purview." *Id.* (citing *United States v. Bankers Ins. Co.*, 245 F.3d 315, 319 (4th Cir.2001)).

Both South Carolina courts and the Fourth Circuit compel arbitration under the FAA when a litigant can demonstrate:

> (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 [litigant] to arbitrate the dispute.

Adkins, 303 F.3d at 500–01; *see Episcopal Hous. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 637, 239 S.E.2d 647, 650 (1977) (applying the same elements); *Circle S. Enterprises v. Stanley Smith & Sons*, 288 S.C. 428, 343 S.E.2d 45 (Ct.App.1986). Each element was met here.

A. The arbitration provision covers the dispute between AutoNation and Bolmer.

The first two elements outlined in *Adkins* were clearly met: (1) there is a dispute between AutoNation and Bolmer; and (2) there is a written agreement that includes an arbitration provision covering the dispute. First, there is a dispute between AutoNation and Bolmer because Bolmer filed this lawsuit alleging negligence and a violation of the unfair trade practices act concerning the sale and financing of the Ford Focus. Bolmer does not dispute this element. (R. 43-51; *see also* R. 64-75).

Second, the arbitration provision covers the allegations and causes of action in the Complaint. *See Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (Ct. App. 1999) ("An arbitration clause is a contractual term, and general rules of contract interpretation must be applied to determine a clause's applicability to a particular dispute.") In relevant part, the arbitration provision provides that the parties are required to participate in arbitration to resolve certain claims:

> Claims include, but are not limited to the following: Claims in contract, tort, regulatory, statutory, equitable, or otherwise; Claims relating to any representations, promises, undertakings, warranties, covenants or service; Claims regarding the interpretation, scope, or validity of this Agreement, or arbitrabiltiy of any issue; Claims between You and Dealer Parties; and **Claims arising out of or relating to Your application for credit, this Agreement, and/or any and all documents executed, presented or negotiated during Purchaser/ Dealer Party Interactions, or any resulting transaction, service, or relationship**, including that with Dealer Parties, or any relationship with third parties who do not sign this Agreement that arises out of the Purchaser/Dealer Party Interactions.

(R. 33). Bolmer alleges that Westlake erroneously reported missing payments to credit bureaus after Bolmer returned the Ford Focus and canceled the Loan. (R. 4; R. 15). These allegations arise out of the Retail Purchase Agreement, Bolmer's application for credit, and the resulting transaction with Westlake. Bolmer does not dispute this element. (R. 43-63; R. 64-76).

B. The arbitration provision implicates interstate commerce.

The arbitration provision between Bolmer and AutoNation is for the purchase and financing of a motor vehicle. The South Carolina Supreme Court has held that motor vehicle contracts involve interstate commerce for the purposes of the FAA. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667, n. 1 (2007); *see also York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 79, 749 S.E.2d 139, 145 (Ct. App. 2013) (affirming that vehicle sales contracts involve interstate commerce); *see also Stout v. J.D. Byrider*, 228 F.3d 709, 715 (6th Cir.2000) (holding contracts for the purchase and financing of a vehicle involve interstate commerce); *Scott v. EFN Invs., LLC*, 312 F. App'x 254 (11th Cir. 2009) (same).

To be sure, "[w]hen a case involves allegations of the use of the instrumentalities of interstate commerce, *or persons or things in interstate commerce*, a court need not reach the question whether the underlying transaction 'substantially affects' interstate commerce, because such persons and things, by definition, substantially affect—because they are components of—interstate commerce." *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 100, 592 S.E.2d 50, 54 (Ct. App. 2003) (emphasis added). The purchase and financing of a vehicle clearly involves a "thing" in interstate commerce. Consequently, the Retail Purchase Agreement between Bolmer and AutoNation involves interstate commerce as required by the FAA. Again, Bolmer does not dispute this element. (R. 43-63; R. 64-76).

C. Bolmer failed and refused to arbitrate the dispute.

The final element is met. Bolmer refused to re-open the arbitration case, and instead initiated this lawsuit. Bolmer has continued to refuse requests to submit the complaint to binding arbitration. Bolmer does not dispute this element. (R. 51-63; R. 64-76). Because all four of the elements in *Adkins* were met, the district court had "no choice but to grant a motion to compel

arbitration." *Adkins, Inc.*, 303 at 500. The circuit court's order denying AutoNation's motion to compel was therefore an error, and this Court should reverse the circuit court's order, requiring the parties to submit to arbitration.

II. Bolmer's waiver argument has not been preserved for appellate review, but if so, AutoNation did not waive its right to compel arbitration, and the circuit court erred in denying AutoNation's motion to compel arbitration.

Bolmer submitted an opposition brief to AutoNation's motion to compel arguing solely that AutoNation waived its right to arbitrate the dispute. (R. 43-63). The circuit court, however, did not rule on or even address Bolmer's waiver argument in its Order, and Bolmer did not file a Rule 59(e) motion asking the Court to alter or amend its judgment. (*See* R. 1).

A. Bolmer's waiver argument is not preserved for appellate review because it was not specifically ruled upon by the circuit court.

To preserve an argument for appeal, South Carolina courts have established that an issue must be raised to and ruled upon by the circuit court to be preserved for appellate review. *Pye v. Est. of Fox*, 369 S.C. 555, 566, 633 S.E.2d 505, 511 (2006) ("[T]he Supreme Court identifies two ways to preserve the issue: "a ruling by the trial judge or a post-trial motion."), *overruled on other grounds*. In *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004), the South Carolina Supreme Court stated that "[a] party must file [] a motion [to alter or amend the judgment] when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review."

In his memorandum in opposition to AutoNation's motion to compel, Bolmer argued solely that AutoNation waived its right to compel arbitration. (R. 43-63). As the party asserting waiver, Bolmer had the burden to prove that AutoNation waived its right to compel arbitration. *Myers v. Town of Calhoun Falls*, 441 S.C. 146, 155, 892 S.E.2d 514, 518–19 (Ct. App. 2023) ("The party

seeking to establish waiver or laches has the burden of proof."). But the circuit court did not specifically rule on Bolmer's waiver argument. Instead, the Court issued a Form 4 Order denying AutoNation's motion to compel. (*See* R. 1). The only specific ruling the circuit court made was on AutoNation's motion to compel. (*See id.*). It did not make any specific findings or otherwise rule on Bolmer's waiver argument. (*See id.*). Bolmer did not file a Rule 59(e) motion for the Court to address his waiver argument. And by failing to file a Rule 59(e) motion, Bolmer has failed to preserve the waiver argument for appellate review. Therefore, this Court should only determine whether denying AutoNation's motion to compel arbitration was error under Section I, *supra*.

B. Regardless, waiver is not supported by the undisputed facts and South Carolina law.

i. Applicable law regarding waiver of arbitration rights.

South Carolina, along with numerous other state and federal courts, created an arbitration-specific waiver rule that required a showing of prejudice. *See Morgan v. Sundance, Inc.*, 596 U.S. 411, 417 (2022); *see also Liberty Builders, Inc.*, 336 S.C. at 665, 521 S.E.2d at 753 ("In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration."); *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 257, 743 S.E.2d 868, 872 (Ct. App. 2013) (listing factors in determining waiver of arbitration including "whether the non-moving party was prejudiced by the delay in seeking arbitration."). Courts "justified adopting [this] prejudice requirement based on the 'liberal national policy favoring arbitration.'" *Morgan*, 596 U.S. at 418 (internal citations omitted). But the Supreme Court recently rejected the prejudice requirement because the policy favoring arbitration does not authorize courts to invent special rules. *Id.*; *see also Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021) ("Neither the Supreme Court nor this Court, however, meant

to give the law of arbitration such a special status that it would supplant state procedural law.") With its ruling, the Supreme Court returned to the traditional understanding of the FAA's policy favoring arbitration:

> The policy, we have explained, is merely an acknowledgment of the FAA's commitment to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts. Or in another formulation: The policy is to make arbitration agreements as enforceable as other contracts, but not more so.

Morgan, 596 U.S. at 418. The South Carolina Supreme Court has also acknowledged this misconception. *Lampo v. Amedisys Holding, LLC*, 445 S.C. 305, 317, 914 S.E.2d 139, 146 (2025) ("An arbitration contract is like any other contract: if it exists, it will be enforced according to its terms." (citing *Morgan*, 596 U.S. at 417–19 (describing the decision as "unanimously rebuking the Eighth Circuit for creating 'arbitration-specific variants of federal procedural rules' based on the incorrect notion of a 'policy favoring arbitration' and stating, '[t]he federal policy is about treating arbitration contracts like all others, not about fostering arbitration'")).

Instead, the Supreme Court directed federal courts applying arbitration provisions under the FAA to focus on the traditional understanding of waiver—the intentional relinquishment or abandonment of a known right—rather than the arbitration-specific prejudice requirement. *Morgan*, 596 U.S. at 417–19. Although South Carolina has not directly applied the holding in *Sundance* to the waiver context, the South Carolina Supreme Court's recent decisions indicate that it would follow the logic in *Sundance* when interpreting arbitration provisions.[1] *See Lampo*, 445 S.C. 305, 914 S.E.2d 139 (analyzing arbitration agreement under ordinary contract-formation

[1] Despite the Supreme Court "directing" its decision to federal courts, its ruling would apply equally to state courts interpreting arbitration provisions under the FAA.

principles); *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022) (analyzing whether arbitration agreement was unconscionable under ordinary contract-defense principles).

With that in mind, South Carolina courts should look to our traditional understanding of waiver rather than applying the arbitration-specific factors previously laid out by South Carolina's appellate courts in deciding whether a party has waived their right to arbitration. Under federal and South Carolina law, "[w]aiver is a voluntary and intentional abandonment or relinquishment of a known right." *Strickland v. Strickland*, 375 S.C. 76, 85, 650 S.E.2d 465, 470 (2007).

Under the new standard and based on the undisputed facts, AutoNation did not voluntarily and intentionally abandon its right to arbitration. AutoNation's failure to timely participate in the original demand for arbitration was the result of human error. The arbitration notices from the AAA were mailed to AutoNation's dealership location. (R. 31). The personnel in charge of legal claims do not work locally at that dealership and the notices simply did not make it to the correct personnel in time to the meet the AAA's filing fees deadlines. (*Id.*). After receiving the arbitration notice, however, AutoNation's legal office promptly retained its undersigned counsel. (*Id.*). And once retained, AutoNation's counsel immediately reached out to the AAA to file a notice of appearance in the action and requested the correct amount for the filing fee. (*Id.*). Unbeknownst to AutoNation and its counsel, the AAA had closed the case only seven days prior. (*Id.*). AutoNation took active steps to participate in the AAA, albeit delayed. (*Id.*). AutoNation even took steps with the AAA to get the case re-opened. (*Id.*). But Bolmer refused to cooperate with AutoNation. (*Id.*). With Bolmer's cooperation, the AAA would have simply re-opened the case, and AutoNation would have proceeded in the arbitration without delay. AutoNation clearly expressed a willingness to participate in the arbitration. An error in transmitting the arbitration demand to the AutoNation

legal department and mere delay in paying filing fees, mistakes that AutoNation quickly attempted to correct, is not a voluntary and intentional relinquishment of a known right amounting to waiver.

ii. Even under the old standard, Bolmer's other arguments regarding waiver are unavailing.

Bolmer raised two arguments under the old legal standard to support his position that AutoNation waived its right to arbitrate. (R. 45-51). First, Bolmer argued that AutoNation's failure to pay the AAA filing fees, or otherwise follow the AAA rules, resulted in waiver. (R. 45-48). Second, Bolmer argued that he was prejudiced by AutoNation's delay in filing its motion to compel arbitration. Both arguments are unavailing. (R. 48-51).

Bolmer relies on *Russell v. Wyndham Vacation Resorts, Inc.*, 22-CV-0880-L-DDL, 2023 WL 139803 (S.D. Cal. Jan. 9, 2023),[2] to argue that the failure to follow the AAA rules results in a waiver. (R. 45-48). But this case directly supports AutoNation's argument. In *Russell*, the plaintiff filed a demand for arbitration with the AAA. *Id.* at *1. Roughly a month later, the defendant received a letter from the AAA declining to administer the claim because the defendant failed to comply with the AAA's policies. *Id.* The letter from the AAA stated:

> We have administratively closed our file and will refund any payment received by the filing party. According to R-1(d) of the Consumer Rules, should the AAA decline to administer an arbitration, either party may choose to submit its dispute to the appropriate court for resolution.

Id. After receiving the letter, the defendant attempted to work with the AAA to resolve the issues and remedy the defendant's purported failures. *Id.* at *3. The AAA failed to provide the defendant with clear instructions to resolve the issues before plaintiff filed a complaint in state court. *Id.*

[2] Bolmer's actual citation is listed as *Reynolds v. Wyndham Vacation Resorts*, No. 2020-CP-26-07441, 2021 S.C. C.P. LEXIS 2288 (S.C. Ct. Common Pleas 2021). After review, *Reynolds* does not stand for the proposition asserted by Bolmer.

Because the defendant "requested guidance from the AAA" to participate in the arbitration, the Court found that the defendant did not act inconsistent with the right to arbitrate. *Id.* at *5. In fact, in the Court's view, the defendant's actions to resolve the issues with the AAA indicated the defendant's willingness to arbitrate. *Id.* Ultimately, the Court found that the defendant did not waive its right to arbitration. *Id.* Similar to the defendant in *Russell*, AutoNation attempted to resolve the issues with AAA in order to participate in the arbitration. And AutoNation's request to Bolmer to re-open the case clearly indicated AutoNation's willingness to arbitrate the claim.

Bolmer also relied on *Brown v. Dillard's*, 430 F.3d 1004, 1008 (9th Cir. 2005) for the same proposition. (R. 46-48). *Brown*, however, is starkly different than the case at hand. In *Brown*, the plaintiff initiated a demand for arbitration. *Id.* The defendant failed to answer the AAA's letter and failed to pay the AAA filing fees. *Id.* at 1008-09. The plaintiff called the defendant several times trying to discuss the arbitration, but defendant's counsel told the plaintiff that "her complaint had no merit and that [the defendant] refused to arbitrate." *Id.* at 1009. The defendant admitted that it refused to arbitrate the claim based on its lack of merit. *Id.* at 1010. The Court found that the defendant waived its right to arbitrate the claim because it admittedly refused to arbitrate the claim. *Id.* at 1012. Unlike the defendant in *Brown*, AutoNation did not refuse to arbitrate the claims. In fact, Bolmer is the party who ultimately refused to arbitrate the claim.

Finally, Bolmer argued that he was prejudiced by AutoNation's delay in filing its motion to compel arbitration based on the arbitration-specific factors outlined in *Carlson v. South Carolina State Plastering, LLC.* 404 S.C. 250, 257, 743 S.E.2d 868, 872 (Ct. App. 2013) ("(1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration

engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration."). (R. 49).

To begin, these factors of delay and prejudice are no longer relevant in light of the Supreme Court's holding in *Sundance* and the South Carolina Supreme Court's commentary in *Lampo*, 445 S.C. 305, 914 S.E.2d 139, and *Damico*, 437 S.C. 596, 879 S.E.2d 746, returning to ordinary contract principles. Even so, the undisputed facts do not prove undue delay or prejudice. *Liberty Builders, Inc.*, 336 S.C. at 665, 521 S.E.2d at 753 ("In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration.").

Only eight months lapsed between the initiation of this lawsuit and the motion to compel arbitration and during that time, the parties did not engage in extensive discovery. In addition, Bolmer cannot establish prejudice. *Id.* And mere delay is not enough to establish prejudice. *Carlson*, 404 S.C. at 257, 743 S.E.2d at 872 ("To establish prejudice, the non-moving party must show something more than mere inconvenience."). Bolmer simply cites "unnecessary delays," without more. (R. 51). He was refunded his arbitration fee, and he had already hired a lawyer to prosecute his claims in the AAA, leading to no additional costs. Even if this were still the legal standard, the evidence and argument do not establish undue delay or prejudice to Bolmer.

Based on the foregoing, the district court erred by denying AutoNation's motion to compel arbitration.

CONCLUSION

Based on the forgoing, the district court erred in denying AutoNation's motion to stay litigation and compel arbitration.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

s/ Sarah A. Hodges
James Y. Becker, SC Bar No. 64991
Sarah A. Hodges, SC Bar No. 106253
1201 Main Street, 22nd Floor (29201-3226)
Columbia, South Carolina
Telephone: (803) 779-3080
jbecker@hsblawfirm.com
shodges@hsblawfirm.com
Attorneys for Appellants

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