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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas
The Honorable S. Bryan Doby
Third Judicial Circuit

Appellate Case No. 2025-002019
Circuit Court Case No. 2024-CP-45-00502

William Ward and Charlotte Ward, Respondents,

v.

AmeriCredit Financial Services, Inc. d/b/a GM Financial; Windingmakia Automotive Group, LLC d/b/a Winding Chevrolet GMC; Michael Winding; and Andrew Efird, Defendants,

of which, AmeriCredit Financial Services, Inc. d/b/a GM Financial is the Appellant.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Respondents filed this action on December 2, 2024 against Appellant AmeriCredit Financial Services, Inc. d/b/a GM Financial ("GM Financial"), WindingMakia Automotive Group, LLC d/b/a Winding Chevrolet GMC ("Winding Chevrolet"), and individual defendants associated with the Winding Chevrolet dealership. (Compl.; R. p. 16.) An Amended Complaint was filed on February 14, 2025. (Amended Compl.; R. p. 35.) As to GM Financial, Respondents asserted claims for negligence, gross negligence, negligence *per se*, unfair trade practices, quantum meruit/unjust enrichment, unclean hands, and outrage. (*Id.*; R. p. 16.)

On March 12, 2025, GM Financial moved to compel arbitration and stay the proceedings. (Mot. to Compel; R. p. 72.) On March 27, 2025, GM Financial filed a Memorandum in Support of the Motion to Compel Arbitration and Stay the Proceedings. (Memo in Supp.; R. p. 74.) The motion relied solely upon an arbitration clause contained in a March 27, 2023 retail installment contract executed between Respondent William Ward and a different, non-party dealership, Patriot Chevrolet of Darlington ("Patriot Chevrolet"). (Memo. in Supp. of Mot. to Compel. Ex. A – Affidavit of Lonnie Wilson, Jr. [hereinafter, "Wilson Aff."] ¶4; *Id.*, Ex. 1; R. p. 98-102.)

Respondents opposed the motion on July 9, 2025, arguing that no valid agreement to arbitrate existed, that the arbitration provisin was unconscionable under South Carolina law, and that the clause did not govern disputes arising from the independent 2024 transaction at issue in this case. (Memo. in Opp.; R. p. 198); (Amended Compl. Ex. A; R. p. 48.)

The trial court conducted a hearing on the motion on July 10, 2025. (Transcript of 07/10/2025 Hrg.; R. p. 253.) GM Financial filed a reply in support of its motion to compel arbitration on July 18, 2025. (Reply; R. p. 218.) On July 28, 2025, the trial court denied GM Financial's motion by Form 4 Order, finding that the claims in this action were not connected to

the prior transaction and that compelling arbitration would be unconscionable. (*See* 07/28/2025 Order; R. p. 3.)

On August 20, 2025, the trial court issued a written Order denying the motion to compel arbitration, holding that (1) the arbitration provision did not clearly and unmistakably delegate the issue of whether a valid agreement to arbitrate exists; (2) Respondents' claims were not connected to the prior 2023 Patriot Chevrolet transaction; and (3) the arbitration provision was unconscionable under South Carolina law. (*See* 08/20/2025 Order; R. 6, ¶ 1-5.)

Rule 59(e) Proceedings

GM Financial thereafter filed a Rule 59(e), SCRCP motion on August 25, 2025. (Mot. to Alter or Amend; R. p. 236.) Rule 59(g), SCRCP, requires the moving party to provide a copy of a Rule 59(e) motion to the presiding judge within ten days of filing. GM Financial failed to comply with that mandatory requirement. Instead, it transmitted the motion to the presiding judge by e-mail on September 24, 2025, thirty (30) days after filing. (09/24/25 Email; R. p. 279.)

On September 24, 2025, Respondent responded to GM Financial's e-mail to the court with a letter, which inter alia, notified the court of the procedural defect. (09/24/25 Letter; R. p. 281-282.) On September 26, 2025, the circuit court denied GM Financial's Rule 59(e) motion. (09/26/2025 Order; R. p. 9.) Because that Order did not expressly reference Rule 59(g) defect, Respondents timely filed their own Rule 59(e) motion seeking clarification on September 30, 2025. (Mot. To Reconsider; R. p. 249.)

On September 30, 2025, the circuit court entered an order expressly ruling that GM Financial's Rule 59(e) motion was procedurally defective and "must be dismissed as a matter of law for failing to comply with Rule 59(g), SCRCP," and reaffirmed its denial of GM Financial's motion to compel arbitration. (09/30/2025 Order; R. p. 12, 13.)

GM Financial thereafter filed this appeal.

STATEMENT OF THE FACTS

This is a consumer action arising from a failed automobile trade-in transaction between Respondent William Ward and Winding Chevrolet.

I. The 2023 Patriot Chevrolet Transaction

On March 27, 2023, Mr. Ward purchased a 2023 Chevrolet Silverado truck ("2023 Chevrolet truck") from Patriot Chevrolet of Darlington ("Patriot Chevrolet") pursuant to a retail installment contract that was later assigned to Appellant GM Financial. (Memo. in Supp. of Mot. to Compel, Ex. A – Wilson Aff. ¶4; *Id.*, Ex. 1; R. p. 95, ¶6.) That transaction involved Patriot Chevrolet, a dealership that is not a party to this action. (*Id.*; R. p. 98.)

II. The Separate 2024 Winding Chevrolet Transaction

More than a year later, on July 2, 2024, Mr. Ward purchased a new 2024 GMC Sierra truck ("2024 GMC truck") from Winding Chevrolet. As part of that transaction, Mr. Ward traded in the 2023 Chevrolet truck. (Amended Compl., Ex. A; R. p. 48.) As consideration for the trade-in, Winding Chevrolet expressly agreed to satisfy the outstanding lien on the 2023 Chevrolet truck owed to GM Financial. (*Id.*; R. p. 52, ¶2, p. 53.) Winding Chevrolet took possession of the vehicle on July 2, 2024 but failed to remit payment to satisfy the lien. (*See Id.*; R. p. 38, ¶ 24-25, p. 53.)

Despite knowledge that the 2023 Chevrolet truck had been traded in and that Winding Chevrolet had assumed responsibility for the lien payoff, GM Financial continued to demand payment from Mr. Ward. (Amended Compl.; R. p.38, ¶ 26.) Following the trade-in, GM Financial initially reported the account as closed with a $0.00 balance on Mr. Ward's credit report on July 2, 2024. (*See* Memo in Opposition.; Ex. A; R. p. 210, 213.) When Winding Chevrolet subsequently failed to pay the lien, however, GM Financial reopened Mr. Ward's account and

reported the unpaid balance. (*See* Memo in Opposition.; R. p. 211) As a result, Mr. Ward's credit score dropped 88 points in less than a month. (*See* Memo in Opposition., Ex. A; R. p. 211, 214.)

In response to GM Financial's continued demands for payment, Mr. Ward made multiple payments on the 2023 Chevrolet truck after July 2, 2024, while simultaneously making payments on the newly purchased 2024 GMC truck. (Amended Compl.; R. p. 39, ¶29.) On or about October 16, 2024, GMF repossessed the 2023 Chevrolet truck and later sold it at auction. (*See* Memo. in Opposition, Ex. B; R. p. 217.)

Although this lawsuit arises from the July 2, 2024 purchase transaction with Winding Chevrolet, GM Financial seeks to compel arbitration based solely on an arbitration provision contained in the unrelated March 27, 2023 purchase agreement between Mr. Ward and non-party dealership Patriot Chevrolet.[1]

STANDARD OF REVIEW

I. Appellate Jurisdiction and Tolling of the Appeal Period

Rule 59(g), SCRCP, expressly requires that "[t]he moving party shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion." A trial court may deny a Rule 59(e) motion solely for failure to comply with Rule 59(g). *Smith v. Fedor*, 809 S.E.2d 612, 422 S.C. 118 (S.C. App. 2017); *Gallagher v. Evert*, 353 S.C. 59, 63-64, 577 S.E.2d 217, 219 (Ct. App. 2002). Only a timely and proper Rule 59(e) motion tolls the appeal period. *See* Rule 203(b)(1), SCACR.

[1] *See* Amended Compl., Ex. A; R. p. 48-49 (2024 purchase transaction with Winding Chevrolet); *See* Mot. to Compel, Ex. A – Wilson Aff ¶4; *Id.*, Ex. 1; R. p. 98-102 (2023 purchase transaction with Mr. Ward and Patriot Chevrolet).

II. Denial of Motion to Compel Arbitration

An appeal from the denial of a motion to compel arbitration is reviewed de novo. *Sanders v. Savannah Highway Auto. Co.*, 440 S.C. 377, 382, 892 S.E.2d 112, 114 (2023), reh'g denied (Sept. 27, 2023) (citing *Chassereau v. Global-Sun Pools, Inc.* 363 S.C. 628, 631, 611 S.E.2d 305, 307 (Ct. App. 2005). Determinations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, appellate courts will not overrule those findings. *Id.*

The Federal Arbitration Act (FAA), 9 U.S.C §1 et. seq. (2018), commands that arbitration agreements be treated the same as all other contracts – no more, no less. 9 U.S.C. § 1; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) ("[T]he purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contract, but not more so."). Our Supreme Court has recently addressed the notion that the law "favors" arbitration, reminding that statements that the law 'favors' arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions. There is, however, no public policy – federal or state – 'favoring' arbitration." *Palmetto Construction Group, LLC v. Restoration Specialist, LLC*, 432 S.C. 633, 639, 856 S.E.2d 150, 153 (2021).

In determining whether arbitration may be compelled, courts apply ordinary principles of state contract law, and the party seeking arbitration bears the burden of proving the existence of a valid and enforceable arbitration agreement governing the dispute. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007). Questions of unconscionability are likewise determined under South Carolina contract law and require consideration of both procedural and substantive factors. *Id.* Courts will not presume that the parties agreed to delegation to an arbitrator absent "clear and unmistakable evidence" of such intent. *First Options of Chicago, Inc. v. Kaplan*,

514 U.S. 938 (1995). Any ambiguity is resolved against delegation and in favor of judicial determination. *Id.*

ARGUMENT

This appeal arises from GM Financial's attempt to compel arbitration of a dispute arising from a 2024 purchase transaction by invoking an arbitration provision contained in an unrelated 2023 purchase agreement with a different, non-party dealership. The circuit court correctly rejected that effort, finding that Respondent's claims arise from the independent 2024 transaction with Winding Chevrolet, that the arbitration provision did not clearly and unmistakably delegate the validity determination, that there was no valid agreement to arbitrate, and that the provision was unconscionable under South Carolina law. In addition, the circuit court properly dismissed GM Financial's Rule 59(e) motion as procedurally defective under Rule 59(g), SCRCP. Each of these rulings independently supports affirmance.

I. This Appeal Must Be Dismissed For Lack of Jurisdiction.

A. GM Financial's Rule 59(e) Motion was procedurally defective under Rule 59(g), SCRCP, providing an independent basis to affirm the circuit court's order.

The Appellant is not entitled to pursue this appeal because its Rule 59(e) motion was dismissed as a matter of law for failure to comply with Rule 59(g), SCRCP, and therefore did not toll the time for appeal. Rule 59(g), SCRCP, expressly requires that "[t]he moving party shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion." This requirement is mandatory. SCRCP Rule 59(g). The South Carolina Court of Appeals has held that a trial court may deny a Rule 59(e) motion solely for failure to comply with Rule 59(g). *Smith v. Fedor*, 809 S.E.2d 612, 422 S.C. 118 (S.C. App. 2017); *Gallagher v. Evert*, 353 S.C. 59, 63-64, 577 S.E.2d 217, 219 (Ct. App. 2002).

The Circuit Court denied Appellant's motions to stay litigation and to compel arbitration on August 20, 2025. Appellant thereafter filed a Rule 59(e), SCRCP motion on August 25, 2025, but failed to provide a copy of its Rule 59(e) motion to the presiding judge within ten days of filing. Instead, it transmitted the motion to the presiding judge by e-mail on September 24, 2025, thirty (30) days after filing. This failure rendered the motion procedurally defective.

On September 30, 2025, the Circuit Court expressly ruled that Appellant's Rule 59(e) motion was procedurally defective and "must be dismissed as a matter of law for failing to comply with Rule 59(g), SCRCP," and reconfirmed its denial of the motion to compel arbitration.

Because Appellant's Rule 59(e) motion was dismissed as a matter of law for failure to comply with Rule 59(g), it did not constitute a valid post-trial motion capable of tolling the time for appeal. Only a timely and proper Rule 59(e) motion tolls the appeal period. *See* Rule 203(b)(1), SCACR. An improper Rule 59 motion does not extend appellate deadlines. Accordingly, the Appellant cannot rely upon that motion to invoke appellate jurisdiction.

Absent a timely and properly served Rule 59(e) motion, the time to appeal ran from the August 20, 2025 Order denying arbitration. Any Notice of Appeal filed outside the thirty-day period following that Order is untimely, and this Court lacks jurisdiction under Rule 203(b)(1), SCACR. Appellant filed its Notice of Appeal on October 1, 2025, which was untimely. As such, the appeal should be dismissed on that independent ground alone.

(i) Preservation of the Issue

This issue is preserved for appellate review. Respondents expressly raised Appellant's failure to comply with Rule 59(g) and filed a timely Rule 59(e) motion seeking clarification. On September 30, 2025, the Circuit Court entered an Order expressly ruling that Appellant's Rule 59(e) motion "must be dismissed as a matter of law for failing to comply with Rule 59(g), SCRCP."

Because the trial court ruled squarely on the issue, it is preserved for appellate review. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

II. Even If This Court Finds Jurisdiction, The Denial of Arbitration Should Be Affirmed.

A. The circuit court properly decided the threshold issue of validity because the arbitration provision does not clearly and unmistakably delegate that question to an arbitrator.

Appellant contends that the circuit court lacked authority to determine whether the arbitration provision is valid and enforceable and was instead required to submit that question to an arbitrator. That is incorrect. The crux of Respondents' claim is that he never consented to the arbitration agreement. Because arbitration under the Federal Arbitration Act ("FAA") rests entirely upon consent, a court, not an arbitrator, must determine whether an agreement to arbitrate was ever formed. *Simmons v. Benson Hyundai, LLC*, 438 S.C. 1, 5, 881 S.E.2d 646, 648 (Ct. App. 2022) (citing *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) ("[T]he FAA does not require parties to arbitrate when they have not agreed to do so."). Section 4 of the FAA prohibits compulsion of arbitration unless the court is satisfied "the making of the agreement for arbitration ... is not in issue." 9 U.S.C. § 4. The United States Supreme Court has repeatedly held that disputes concerning whether an arbitration agreement was ever concluded, its formation or existence, are for the court to decide. *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296, (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*, 139 S. Ct. 524, 530 (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).

In determining whether an agreement exists, courts apply state contract law. *First Options*, 514 U.S. 938 at 944. 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. *Player v. Chandler*, 299 S.C. 101, 105 (1989). The parties must also "manifest a mutual intent to be bound." *Stanley Smith & Sons v. Limestone Coll.*, 283 S.C. 430, 433, 322 S.E.2d 474, 477 (Ct. App. 1984). And even where a contract contains a purported delegation clause, that delegation must be "clear and unmistakable." *First Options*, 514 U.S. 938 at 944. Any ambiguity must be resolved against delegation and in favor of judicial determination. *Id.*

Appellant relies heavily on delegation and scope cases, but those authorities presuppose a valid and enforceable arbitration agreement. The threshold question here is whether a valid arbitration agreement exists at all. The circuit court answered that threshold question in the negative, and that conclusion ends the inquiry.

(i) South Carolina law confirms validity challenges are for the court.

Our Supreme Court addressed this issue in *Simpson v. MSA of Myrtle Beach, Inc.*, where, as here, the consumer challenged the arbitration clause as unconscionable and thus unenforceable. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007). Although the clause purported to apply to disputes concerning "the validity and scope," the Court held that when the validity of the arbitration provision itself is challenged, the issue is for the court because the challenge calls into question whether the parties ever agreed to arbitrate in the first place. *Id.* at 23-24. The court further explained where a party challenges the validity of the entire arbitration clause on grounds of unconscionability, there can be no "clear and unmistakable" evidence that the parties agreed to arbitrate. Accordingly, the Court did not err in deciding validity rather than submitting the matter to arbitration. *Id.*

That reasoning controls here. Because Respondents challenge the arbitration provision itself as unconscionable and unenforceable, the circuit court properly resolved the threshold question of validity and correctly concluded that delegation was not "clear and unmistakable." Courts do not send parties to arbitration to decide whether they ever agreed to arbitrate in the first place. *See Id*. Instead, it remains for the court to decide whether a valid arbitration agreement exist. *See Henry Schein*, 139 S. Ct. 524 at 530 ("To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists."); *See* 9 U.S.C. § 2.

(ii) The Court of Appeals' two-step framework likewise requires judicial resolution of validity first.

In *Simmons v. Benson Hyundai, LLC*, the Court of Appeals set forth a two-process framework: (1) first, resolve any challenge to the formation of the arbitration agreement (consistent with *Granite Rock*); and (2) second, determine whether subsequent challenges are directed to the entire agreement or specifically to the arbitration clause (consistent with *Prima Paint Corp. v. Flood & Conklin Mfg. Co*.) *Simmons*, 438 S.C. 1, 881 S.E.2d 646; *Granite Rock*, 561 U.S. 287; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *See also Solymar Invs., Ltd. v. Banco Santander S.A.,* 672 F.3d 981, 990 (11th Cir. 2012) (describing two-step process and explaining that "*Granite Rock's* threshold inquiry of whether a contract was formed necessarily precedes "the determination of whether any subsequent challenges are to the entire agreement, or to the arbitration clause specifically" under the severability principle).

Federal courts have applied the same rule. The federal court in *In re StockX Customer Data Sec. Breach Litig.* adopts a similar two-step process, holding that even where a delegation provision purports to require arbitration of formation or 'existence of an agreement in the first instance' issues, courts must decide challenges to whether an agreement "was in fact agreed to" or "was ever concluded". *In re StockX Customer Data Sec. Breach Litig.* 19 F.4th 873, 879-80 (6th

Cir. 2021) (quoting *VIP, Inc. v. KYB Corp.* (In re Auto. Parts Antitrust Litig.), 951 F.3d 377, 386 (6th Cir. 2020)); *accord MZM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386, 400–02 (3d Cir. 2020).

Under this settled framework, the circuit court was required to determine whether a valid agreement to arbitrate exists before compelling arbitration.

(iii) Respondents' unconscionability challenge itself defeats "clear and unmistakable" delegation.

Respondents challenge the arbitration provision itself as unconscionable. That challenge necessarily undermines any claim that Respondent "clearly and unmistakably" agreed to arbitrate validity and enforceability. The court must resolve the merits of Respondents' unconscionability claim in order to determine whether a valid agreement exists. Where the issue presented is whether the arbitration provision is enforceable at all, the court must decide that threshold question before any delegation can operate. The circuit court properly resolved that threshold issue.

(iv) References to AAA and/or NAM rules do not establish clear and unmistakable delegation

Appellant also argues that references to the American Arbitration Association ("AAA") and the National Arbitration and Mediation ("NAM") rules establish delegation. But mere incorporation by reference does not bypass judicial review when validity is at issue. *See Simmons*, 438 S.C. 1, 881 S.E.2d 646 (reaffirming that formation challenges must be resolved first). This is particularly true where the alleged delegation is embedded in a consumer adhesion contract, essential terms are not reasonably communicated, and Respondents challenge the very existence and enforceability of the arbitration agreement.

Here, the arbitration provision references AAA rules, NAM rules, and further permits selection of an entirely different arbitration organization. No copies of the AAA or NAM rules

were attached to the contract or provided to Respondent prior to execution. Because arbitration organizations may employ materially different procedural rules, including rules governing discovery, whichever rule set applies could substantially affect the rights of the parties and the substantive outcome. Without reasonable access to these material rules allegedly incorporated into the agreement, and without clarity as to which set of rules would govern, Respondent could not knowingly and voluntarily assent to any purported delegation of arbitrability. *See Spoone v. State*, 379 S.C. 138, 142, 665 S.E.2d 605, 607 (2008). ("[a] waiver will be held effective only if it is knowing and voluntary."). Here, there was no knowing waiver where the governing rules and even the governing forum are left uncertain.[2]

The arbitration clause's internal uncertainty underscores the problem. AAA Consumer Rule 1(a) makes AAA's rules an "essential term," yet the provision simultaneously permits NAM rules or any other organization's rules. That contradiction illustrates the lack of meeting of the minds as to which rules govern and defeats the "clear and unmistakable" standard. Where no rule set can be identified with certainty, the alleged delegation cannot be deemed clear and unmistakable. Any ambiguity must be resolved against delegation and in favor of judicial determination. *First Options*, 514 U.S. 938 at 944.

The arbitration provision does not clearly and unmistakably delegate validity, and Respondent's unconscionability challenge required judicial resolution. Accordingly, the circuit court properly determined that the validity of the arbitration provision must be resolved by the court before any arbitration could be compelled. For these reasons, the circuit court acted well

[2] In deciding whether to arbitrate, a consumer is entitled to know the specifics of the governing arbitration rules so that he may make an informed decision regarding the waiver of important legal rights. Respondents submit that, as a matter of law, a consumer cannot knowingly and voluntarily waive those rights without reasonable prior access to the procedural rules that would govern the arbitration. Here, there is no evidence that any arbitration rules were ever provided to Respondents prior to execution of the agreement.

within its authority in deciding the threshold issue of validity, and the denial of arbitration should be affirmed.

B. The circuit court correctly found that the arbitration provision was unconscionable based on analysis of the facts, contract documents, and circumstances.

Even assuming arguendo that the arbitration provision could otherwise be enforced, the order must still be affirmed because the circuit court independently determined the provision is unconscionable under South Carolina law.

Arbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate. *See Simpson,* 373 S.C 14, 644 S.E.2d 663. As such, a party may seek revocation of the arbitration agreement under "such grounds as exist at law or in equity," including unconscionability. *Id.*; 9 U.S.C. §2. Arbitration will be denied if a court determines no agreement to arbitrate existed. *Id.* In determining whether a valid arbitration agreement exists, trial courts consider "general contract defenses" to ensure a meeting of the minds to arbitrate existed, and that such an agreement was not the result of "fraud, duress, [or] unconscionability." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 593, 553 S.E.2d 110, 116 (2001). Even in cases where the FAA otherwise applies, general principles of state contract law apply in a court's evaluation of the validity and enforceability of an arbitration clause. *First Options*, 514 U.S. 938 at 944; *Simpson,* 373 S.C. 14 at 24, 553 S.E.2d 663 at 668; *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2011).

In *Simpson v. MSA of Myrtle Beach, Inc.*, the South Carolina Supreme Court explained that "unconscionability is defined as 'the absence of meaningful choice on the part of one party, due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.'" *Simpson,* 373 S.C. 14 at

25, 644 S.E.2d 663 at 668. In this case, our Supreme Court addressed issues of unconscionability of arbitration clauses embedded in adhesion automobile contracts, emphasizing that they warrant not merely scrutiny, but "considerable skepticism" given the disparity in bargaining power between the dealer and consumer. *Id.*

Applying the Supreme Court's analysis to the contract at issue, the arbitration provision was one of adhesion, with terms that were not negotiable and the Respondents had no part in drafting the documents. Appellant argues that the adhesive nature of the contract alone is insufficient to establish a lack of meaningful choice.[3] Indeed, the fact that this is an adhesive contract is merely the starting point for the unconscionability analysis, but the Court should approach this adhesion contract between the consumer and the car dealer with considerable skepticism. *Id.* The surrounding circumstances here confirm that Respondent lacked a meaningful ability to negotiate or reject the arbitration provision.

(i) Absence of A Meaningful Choice

Determining whether a party had a meaningful choice to arbitrate requires sizing up the fundamental fairness of the bargaining process. *Id.* at 25.; *See also Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016). Accordingly, when determining whether there is an absence of meaningful choice, courts should take certain factors into account. Each factor is considered below:

[3] The Supreme Court noted in *Doe* that it is mindful that *Simpson*'s treatment of adhesive car sales contracts may have been tempered, but still considered that the non-negotiable Agreement, while conspicuous, was still sprung on Doe along with a flurry of other closing documents and therefore concluded that Doe had no meaningful choice in accepting the Agreement. *Doe v. TCSC, LLC,* 430 S.C. 602, 613, 843 S.E.2d 874, 880 (Ct. App. 2020).

a. The nature of injuries suffered by the Respondents

Respondents suffered concrete financial and reputational harm, including continued payments on the 2023 Truck after the trade-in. Appellant demanded payments from Respondents despite its assent to and notice of the trade in, and made deceptive and misleading communications to Respondents regarding same. Respondent's credit worthiness and financial health was detrimentally harmed by Appellant's failure to remove its lien.

b. Whether the Respondent is a substantial business concern

Respondent is an individual consumer rather than a substantial business entity. Respondent's status as an individual consumer makes him the weaker party, and the arbitration provision was drafted by the superior party.

c. Relative disparity in the parties' bargaining power

Our supreme court recognizes an inherent disparity in bargaining power between the parties when the transaction is between a consumer and an established commercial entity. *See, e.g., Simpson* 373 S.C. 14, 644 S.E.2d 663. Additionally, because the contract at issue was an adhesion contract, Respondent was unable to negotiate the terms, resulting in a further disparity in bargaining power.

The contract between Respondent and Patriot Chevrolet involved the purchase of a car that Respondent intended to use as his primary transportation; as such, the car was a necessity for Respondent as he would use it to travel to and from work every day. The characterization of automobiles as a "necessity" factors into a determination of whether a consumer had a "meaningful choice" in negotiating the arbitration agreement. *See, e.g., Eagle v. Fred Martin Motor Co.,* 157 Ohio App.3d 150, 809 N.E.2d 1161 (Ohio Ct. App. 2004) (9th Dist. 2004).

d. Relative sophistication of the parties

Similar to the transaction with unsophisticated consumer in *Simpson* in which the Supreme Court acknowledged the lack of business judgment, this was also not a transaction where both signatories were sophisticated business interests in an arms-length negotiation. Rather, Respondent is a maintenance mechanic who entered this transaction with a large car dealership as a single customer. Not only does Respondent lack a sophisticated business acumen, but he also specifically lacks any sophistication as to finance law, contract interpretation, arbitrations, or incorporated rule sets. Respondent did not possess the business judgment necessary to understand the implications of the arbitration provision, such as the effect that waiving a jury trial would have, nor did he have the ability to interpret the contractual documents drafted by the car dealership. Further, Respondent had no independent counsel to provide assistance in the matter and no meaningful ability to evaluate the procedural tradeoffs being imposed.

It is true that Respondent William Ward could understand the dollar figures in the trade-in and sale documents, but he did not understand many of the material legal aspects. For example, he was unaware what was meant by the American Arbitration Association or the National Arbitration and Mediation Rules, the arbitration clause in the sales/financing document's documents, how arbitration worked, and what rights he was waiving.

e. Whether there is an element of surprise in the inclusion of the challenged clause

The arbitration clause was buried inside a large stack of closing documents during a rushed vehicle purchase transaction. Respondent was not provided a meaningful opportunity to review or understand the provision before signing. Although the arbitration provision referenced the rules of AAA and NAM, no copies of those governing rules were provided to Respondent prior to

execution of the agreement. This left Respondent unable to understand the procedures and rights he was purportedly accepting.

Compounding this lack of notice, the provision further allowed for arbitration under the rules of any other arbitration organization that might be later selected, as well. The uncertainty surrounding the governing arbitration rules and forum contributes to the element of surprise surrounding the inclusion of the arbitration clause.

Appellant cites *Pitt v. Wells Fargo Bank, Nat'l Assoc.*, suggesting there is no duty to explain a document's contents when a party can learn those contents by reading. *Pitt v. Wells Fargo Bank, Nat'l Assoc.*, No. 3:21-cv-3428-JFA-TER, 2022 WL 2068851, at *4 (D.S.C. Apr.1, 2022). But here, Respondent could not learn essential terms from the face of the arbitration provision because it fails to identify, with certainty, the governing arbitral forum and rules, and because no rules were provided.

f. The conspicuousness of the clause

The arbitration provision was inserted on the second to last page of the Patriot Chevrolet sales contract. Even if the clause's placement or formatting could be considered similar to that found to be conspicuous in *Rutledge v. Santander Consumer USA, Inc.* and *Prosper v. American Credit Acceptance* relied upon by Appellant, conspicuousness alone is not dispositive where the clause purports to waive fundamental rights and where essential terms (including governing rules and forum certainty) were not reasonably communicated to the consumer. *See Rutledge v. Santander Consumer USA, Inc.*, No. 6:20-cv-04214-DCC, 2021 WL 2949860 (D.S.C. July 14, 2021); *Prosper v. American Credit Acceptance, LLC*, No. 7:15-01581-HMH, 2015 WL 13310148 (D.S.C. August 17, 2018).

Appellant relies upon *Rutledge*, where the court held that the consumer failed to establish that the arbitration clause, with similar placement or formatting, was not conspicuous, noting that it was "difficult to imagine what more [*the dealership*] could have done to make the arbitration clause conspicuous and to emphasize its legal significance." *Rutledge*, 2021 WL 2949860 at *5. Here, however, the dealership could have taken additional steps to emphasize the legal significance of the arbitration provision, including providing copies of the rules of AAA and NAM so the consumer could review the rules and procedures by which he would be bound.

Appellant also compares the conspicuousness of the clause here to the provision examined in *Prosper*, asserting that the court rejected arguments identical to those advanced by Respondents in this case. That characterization overlooks a critical factual distinction. In *Prosper*, the consumer asserting lack of sophistication held a bachelor's degree in Criminal Justice. *Prosper*, 2015 WL 13310148 at *4. In light of that educational background, the court concluded that she failed to demonstrate a lack of sophistication sufficient to prevent her from understanding the arbitration provision and the rights implicated by it. *Id.* Under those circumstances, the court found the clause sufficiently conspicuous and enforceable. *Id.*

The facts here are materially different. Unlike the consumer in *Prosper*, Respondent William Ward is a mechanic with no comparable legal or academic training that would have equipped him to understand the constitutional and procedural rights relinquished through arbitration. Moreover, Respondent was not provided copies of the arbitration rules that would govern the proceeding, rules that would replace the judicial protection otherwise available in court.

Because the *Prosper* court's analysis turned in part on the consumer's educational background and ability to understand the arbitration provision, that decision does not control the outcome here. While the arbitration provision in this case may be similar in placement to those in

Rutledge and *Prosper*, the circuit court properly considered additional circumstances specific to this case in conducting its unconscionability analysis. Unlike Ms. Prosper, Respondent Ward lacked specialized training or education that would enable him to fully appreciate the legal rights he was relinquishing through arbitration, and the drafter of the contract should have done more to emphasize the legal significance of the arbitration provision, such as providing copies of the governing arbitration rules.

Although the factual circumstances here may differ from those present in *Simpson*, the circuit court correctly applied the analytical framework established in *Simpson* by evaluating the relevant factors apply in light of the particular facts of this case. Appellants' suggestion that identical arbitration language in *Rutledge* and *Prosper* must necessarily yield identical outcomes misstates the governing law. The Simpson analysis is inherently fact-specific and requires courts to evaluate the six factors based on the individual circumstances presented. *See Simpson*, 373 S.C. 14, 644 S.E.2d 663. Because the circuit court conducted that analysis and reasonably applied those factors to the record before it, its ruling should be affirmed.

Considering all the facts and circumstances together, the bargaining process did not afford Respondent a meaningful choice to accept or reject arbitration on informed terms, supporting the circuit court's finding of procedural unconscionability.

(ii) Harsh and Oppressive Terms

In analyzing Respondent's claim that the arbitration provision is unconscionable, the court should also consider whether the arbitration provision contains terms so harsh and oppressive that no reasonable person would make them, and no fair and honest person would accept them. *See Id.* The portion of Patriot Chevrolet's arbitration clause which would require Respondent to arbitrate "[a]ny claim or dispute" arising out of or relating to "any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract)" is so oppressive

and one-sided as to be unconscionable. In *Doe v. TCSC, LLC*, this Court found materially identical language to be unconscionable. *See Doe v. TCSC, LLC*, 430 S.C. 602, 615, 843 S.E.2d 874, 880 (Ct. App. 2020). These terms attempt to immunize not only the dealer, but also any third parties from being sued in court, forever, based on an expansive notion of "relationship." *Id*. Those same features exist here. The provision does not simply cover disputes about the original 2023 transaction; it attempts to bind Respondent to arbitrate future disputes with unknown parties, regardless of whether the dispute has a meaningful connection to the original transaction. That expansive, one-sided reach is precisely the type of harshness *Doe* cautioned exceeds what conscionability allows. *See Id.*

While Appellant contends the holding of *Rutledge* more closely aligns with the facts of this case, that reliance is misplaced. In *Rutledge*, the court applied Virginia law in its unconscionability reasoning and analysis. *See Rutledge,* 2021 WL 2949860 at *7. Because state contract law determines the instant matter, Respondents submit that the reasoning and analysis in *Doe* applying South Carolina law is controlling here. *See Doe*, 430 S.C. 602 at 611, 843 S.E.2d 874 at 878.

Moreover, even under its own framework, *Rutledge* does not support Appellant's position. The court in *Rutledge* concluded the arbitration clause was not substantively unconscionable because it was "substantively limited to claims with a reasonable relationship to the RISC and Plaintiff's vehicle purchase." *Rutledge*, 2021 WL 2949860 at *5. In contrast, Respondents' claims in the present case bear no such relationship to the earlier 2023 purchase agreement containing the arbitration provision or to the condition of the 2023 Truck. Instead, the claims arise from a separate 2024 purchase transaction involving a different vehicle and a different purchase contract.

Thus, unlike the dispute in *Rutledge*, the claims here arise from a distinct and subsequent transaction between different parties. Under these circumstances, compelling arbitration based on

the earlier agreement would improperly extend the arbitration clause and allow it to "wander outside the bounds of the FAA," as cautioned in *Doe*. *Doe,* 430 S.C. 602 at 614, 843 S.E.2d 874 at 880.

Like the court in *Doe,* which found materially identical terms to the arbitration provision at issue here to be unconscionable, being that the terms were "so harsh and oppressive that no reasonable person would offer or accept them", the circuit court reached the same conclusion. *Id.* 430 S.C. 602 at 614, 843 S.E.2d 874 at 880. When considered together with Respondent's lack of meaningful choice in agreeing to arbitrate, the oppressive nature of the provision renders the arbitration clause unconscionable and therefore unenforceable. Because this arbitration clause was unconscionable at the time the Patriot Chevrolet contract was made, no valid agreement to arbitrate was formed. Accordingly, it is the duty of the Court to invalidate the arbitration provision and affirm the circuit court's denial of Appellant's motion to compel arbitration.

(iii) Discovery limitations further underscore unfairness of the arbitration provision

Finally, the practical limitations on discovery in arbitration further demonstrate the unfairness of the provision at issue. Respondents' claims depend upon access to information in the possession of Appellant and its agents, making meaningful pre-hearing discovery, particularly depositions, critical to establishing the underlying misconduct. Yet the arbitration clause, together with the rules of the multiple arbitration organizations it references, materially restrict discovery when compared to the procedures available in court.

Here, key witnesses and relevant evidence are within the control of Appellant and its affiliates. Appellant's customer service division communicated directly and exclusively with Respondents regarding the disputed 2024 transaction and may have information concerning the handling of the trade-in and any resulting improprieties by Appellant and Winding Chevrolet.

However, under the arbitration frameworks referenced in the alleged agreement, Respondents would lack the ability to compel pre-hearing depositions of Appellant's employees or other relevant witnesses. Importantly, the AAA Consumer Rules do not permit depositions which are material in this case.

These restrictions significantly disadvantage Respondents in a dispute where the critical evidence is controlled by the corporate party. By limiting tools necessary to obtain testimony and documentary evidence, the arbitration provision effectively impairs Respondents' ability to prove their claims.

For these reasons, the breadth and practical effect of the arbitration provision render it oppressive and substantively unconscionable. The circuit court correctly determined that the arbitration provision is unenforceable, and its denial of Appellant's motion to compel arbitration should be affirmed.

(iv) Severability is not an appropriate remedy

Our Supreme Court has made clear that severability is not always an appropriate remedy for an unconscionable provision in an arbitration clause. In *Simpson*, the Court explained that

> [a]lthough 'a critical consideration in assessing severability is giving effect to the intent of the contracting parties, the District of Columbia Circuit Court recently cautioned, 'If illegality pervades the arbitration agreement such that only a disintegrated fragment would remain after hacking away the unenforceable parts, the judicial effort begins to look more like rewriting the contract than fulfilling the intent of the parties.' Similarly . . . it is not the function of the court to rewrite contracts for the parties.

Simpson, 373 S.C. 14 at 34 644 S.E.2d 663 at 672 (*citing Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 363 (2002)).

Severance in this case would therefore be both impractical and contrary to public policy. Allowing Appellant to insert improper and oppressive provisions into a consumer contract, only to later request that a court salvage the agreement by excising the offending terms, would

undermine the protections against unconscionable contracts recognized by South Carolina law. *See Simpson*, 373 S.C. 14, 644 S.E.2d 663 (Moore, Waller, Burnett and Pleicones, JJ. concurring) (citing *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1180 (9th Cir. 2003) (finding an arbitration agreement wholly unenforceable because of an "insidious pattern of unconscionable provisions, and therefore "any earnest attempt to ameliorate the unconscionable aspects of [the] arbitration agreement would require [the] court to assume the role of contract author rather than interpreter").

Here, the cumulative defects in the arbitration provision cannot be remedied through severance without fundamentally altering the agreement. Because the unconscionable provisions permeate the arbitration clause, severance would improperly require the court to rewrite the parties' contract; therefore, the circuit court correctly declared the provision unenforceable in its entirety and its ruling should be affirmed.

Considering the totality of the circumstances, the arbitration provision fails under the established framework. The record demonstrates that Respondent lacked a meaningful opportunity to understand or reject arbitration on informed terms, the governing arbitration rules were never defined or provided, and the clause contains oppressive provisions that unfairly advantage the drafter. These circumstances collectively support the circuit court's finding of procedural and substantive unconscionability. Moreover, because the defects permeate the arbitration provision, severance would require the court to rewrite the parties' contract, which the circuit court properly declined to do. Under these circumstances, the circuit court correctly concluded that no enforceable agreement to arbitrate exists, and its denial of Appellant's motion to compel arbitration should be affirmed.

C. Respondents' claims are not connected to the 2023 purchase agreement containing the arbitration provision.

Even if the 2023 arbitration provision were enforceable, it would only be applicable to issues arising in connection with the 2023 purchase agreement. The circuit court correctly held Respondents' claims are not connected to the 2023 purchase agreement.

Respondents' causes of action arise from: (1) a separate 2024 transaction involving a different vehicle; (2) Winding Chevrolet's independent agreement in that transaction to pay off the 2023 loan; and (c) Appellant's post-contract misconduct. These claims do not arise out of the credit application for the purchase of the 2023 vehicle, nor do they stem from the purchase or condition of the 2023 vehicle.

South Carolina law requires a direct relationship between the claims and the contract containing the arbitration clause. *See Zabinski,* 346 S.C. 580 at 599-600, 553 S.E.2d 110 at 120-21. (Although "arising out of or relating to" language is broad, it is not limitless; the dispute must bear a significant [direct and substantial] relationship to the contract containing the clause). The circuit court correctly rejected Appellant's efforts to stretch "relating to" beyond all reasonable bounds. Appellant's theory would render virtually any future disagreement arbitrable in perpetuity, a result expressly rejected in *Simpson*.

Accordingly, the circuit court properly concluded that because Respondents' claims stem from a distinct 2024 transaction and subsequent independent misconduct, the arbitration provision contained in the 2023 purchase agreement would not apply.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed for lack of appellate jurisdiction. Appellant's Rule 59(e), SCRCP motion was dismissed as a matter of law for failure to comply with Rule 59(g), SCRCP, and therefore did not toll the time for appeal. Because no timely and

proper post-trial motion extended the appellate deadline, this Court lacks jurisdiction under Rule 203(b)(1), SCACR.

Alternatively, should this Court determine jurisdiction exists, the circuit court's denial of Appellant's Motion to Compel Arbitration and Stay Litigation should be affirmed in all respects.

Accordingly, Respondents respectfully request that this Court dismiss the appeal, or, in the alternative, affirm the Orders of the Circuit Court.

Respectfully Submitted,

Florence, South Carolina
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