THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2012-CP-23-7156

David Carroll ..... Respondent,

v.

Toyota of Greenville, Inc. ..... Petitioner.

PETITION FOR WRIT OF CERTIORARI

Bradford N. Martin, Esq. (SC Bar No. 3658)
Laura W. H. Teer, Esq. (SC Bar No. 16698)
Brook Bristow, Esq. (SC Bar No. 76038)
BRADFORD N. MARTIN & ASSOCIATES, PA
Post Office Box 10410
Greenville, South Carolina 29603
(864) 552-9990

ATTORNEYS FOR PETITIONER TOYOTA OF GREENVILLE, INC.

OTHER COUNSEL OF RECORD

Terry E. Richardson, Jr., Esq.
Brady R. Thomas, Esq.
James David Butler, Esq.
RICHARDSON, PATRICK, WESTBROOK & BRICKMAN, LLC
P.O. Box 1368
Barnwell, South Carolina 29812

A. Camden Lewis, Esq.
LEWIS & BABCOCK, LLP
P.O. Box 11208
Columbia, South Carolina 29211

Gedney M. Howe, III, Esq.
GEDNEY M. HOWE, III, PA
P.O. Box 1034
Charleston, South Carolina 29402

Michael E. Spears, Esq.
MICHAEL E. SPEARS, PA
P.O. Box 5806
Spartanburg, South Carolina 29304

Richard A. Harpootlian, Esq.
RICHARD A. HARPOOTLIAN, PA
P.O. Box 1090
Columbia, South Carolina 29211

CERTIFICATION

The undersigned counsel for the Petitioners, Toyota of Greenville, Inc., certifies the following: the Court of Appeals entered an Order on March 24, 2014 dismissing the Appeal. A Petition for Rehearing was filed on April 8, 2014 and denied on June 5, 2014. This Petition for Writ of Certiorari follows.

Bradford N. Martin

Bradford N. Martin

ISSUES PRESENTED FOR REVIEW

I. This Writ presents a novel issue due to the lower court allowing Carroll to do what he explicitly agreed not to do – proceed in a representative capacity as a private attorney general on behalf of the entire public in the State of South Carolina.

II. This Writ presents a federal question because the lower court's decision undermines the goals and policies of the Federal Arbitration Act.

III. This Writ presents a federal question because the lower court's decision violates U.S. Supreme Court precedent requiring state courts to honor the parties' expectations.

IV. This Writ presents an important and special matter for this Court's review because the lower court has made a decision that due to the unusual juxtaposition of circuit court action and arbitration to be held leaves Petitioner with no means of full judicial review.

V. The Writ presents an important issue for this Court's review because the issues are

capable of repetition, may affect over 300 pending cases, and need to be addressed.

STATEMENT OF THE CASE

On August 29, 2006, four plaintiffs filed one Complaint in Aiken County against fifty-one automobile dealers located in thirteen counties in a case styled *Herron, et al vs. CarMax, et al* alleging that the closing fees charged by Defendants in connection with the sale of automobiles were illegal, despite such fees being expressly approved in S.C. Code Section 37-2-

307. Plaintiffs filed their First Amended Complaint on October 31, 2006, now with eight Plaintiffs suing 324 car dealerships ("Defendants" or "Dealers") located in forty-one counties. Petitioner Toyota of Greenville ("TOG") was sued by a Plaintiff named Michael Watts. Plaintiffs later attempted to add 246 additional Plaintiffs to the *Herron* case by Motion dated June 2, 2007, which was denied by Order dated August 21, 2007.

Plaintiffs next decided to pare down the *Herron* case to seven Defendants, filing a Rule 41(a) Motion to Voluntarily Dismiss the other 317 Defendants. An Order dismissing all but the seven Defendants chosen by Plaintiffs' counsel was signed on January 31, 2008. During the interim, however, two cases virtually identical to the *Herron* Complaint were filed, suing the Defendants who were being dismissed from the *Herron* case in two new cases, *West Cox v. Yarborough Honda,* C/A No. 2007-CP-02-1154 (filed August 29, 2007) and *Adams v. Action Ford* C/A No. 2007-CP-02-1232 (filed September 4, 2007). These two cases have been stayed pending the outcome of the *Herron* case.

TOG was one of the seven Defendants that Plaintiffs had decided not to dismiss in *Herron*, thus becoming one of the seven Defendants selected for this test case. In defending against Defendants' Motion to Dismiss, Plaintiffs sought to establish "public interest standing," but the lower court expressly held in its January 31, 2008, order that this case was a case of private individual Plaintiffs against private corporate Defendants (App. p. 85) - no Rule 59(e) motion was filed by Plaintiffs.

Plaintiffs then filed a Motion to Dismiss Michael Watts, the Plaintiff who had purchased a car from TOG, and substitute David Carroll, the Respondent in this Petition. By an order filed October 12, 2009, the lower court allowed Plaintiffs' counsel to replace Watts with Carroll as the named Plaintiff in the case against TOG. (App. p. 62) Carroll, unlike Watts, had signed an

arbitration agreement. (App. p. 60)

Although not requested in any of the Complaints, nor the Motion, nor the Memorandum, but raised for the first time at oral argument, the lower court entered a finding that Respondent was prosecuting the case in a representative capacity pursuant to a "private attorney general" provision under the South Carolina Dealers Act (S.C. Code §56-15-110(2)). TOG filed a Motion to Alter or Amend on January 19, 2010, specifically objecting to the "private attorney general" finding on several grounds, which Motion was denied on February 5, 2010. TOG then filed its appeal on March 5, 2010, which was dismissed as interlocutory on July 3, 2010.

TOG had previously reserved its right to demand arbitration in its Answer filed March 10, 2008, and had filed a Motion to Dismiss to Arbitration on September 19, 2011.[1] On August 31, 2012, an order granting change of venue was entered which severed Carroll's claims from *Herron* and transferred his case to Greenville County. A Priority Motion to Dismiss to Arbitration had been filed by TOG on June 14, 2012, and after the case was transferred to Greenville County, TOG's Motion was heard on July 8, 2013. By order filed August 19, 2013, the lower court granted TOG's Motion, and stayed the case pending the outcome of the arbitration, which ordered Carroll to pursue his claims on an individual basis in an arbitration proceeding. (App. p. 71) The order also expressly found that Carroll could not act in a representative capacity as a private attorney general.

Carroll then filed a Motion to Alter or Amend, but did not dispute the stay to arbitration, instead sought solely that the lower court reverse itself on the ruling that Carroll could not act in a representative capacity, which the lower court did, by order filed October 10, 2013. (App. p. 5) TOG filed a Motion to Alter or Amend seeking to have reinstated the lower court's initial ruling

[1] Unlike Carroll, Watts did not have an arbitration agreement with Toyota of Greenville. When Carroll was substituted for Watts, the appropriate Motion to Dismiss to Arbitration was filed.

that Carroll could not sue in a representative capacity, which was denied by order filed October 30, 2013. (App. p. 23)

TOG filed a Notice of Appeal on December 9, 2013. (App. p. 1) Carroll filed a Motion to Dismiss on January 9, 2014 (App. p. 25), asserting the appeal was premature, which the Court of Appeals granted on March 24, 2014 (App. p. 47). A Petition for Rehearing was filed April 8, 2014 (App. p. 49), and denied by the Court of Appeals on June 5, 2014 (App. 58). This Petition for Writ of Certiorari follows because of the importance of these issues, and this is TOG's only chance for this error below to be rectified.

UNDERLYING FACTS

In 2005, Carroll purchased a vehicle from TOG. The Retail Installment Sales Contract ("RISC") contained an arbitration agreement controlled by the Federal Arbitration Act ("FAA") in which Carroll agreed that he would arbitrate any dispute on an individual basis and would not participate in any proceeding in a representative capacity or as a class member. The arbitration agreement provided:

> ARBITRATION CLAUSE – IMPORTANT – PLEASE REVIEW – AFFECTS YOUR LEGAL RIGHTS. . . . IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS. . .
>
> Each dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. . . . The arbitrator's award shall be final and binding on all parties. . . .
>
> . . .The parties agree that the transactions relating to this Contract involve interstate commerce and that the Contract shall be subject to and governed by the Federal Arbitration Act, 9 USC Sections 1 et seq., as amended, and not by any state law concerning arbitration. (App. p. 61)

Carroll signed the RISC and initialed below the arbitration agreement. Carroll expressly agreed he would give up any right he had to participate in a representative capacity – either in court or in arbitration. He expressly agreed any dispute would be arbitrated on an individual basis. Nowhere did Carroll and TOG agree to allow a representative claim be brought by Carroll, either in court or in arbitration.

The initial 2006 *Herron* Complaint did not contain any reference to Plaintiffs acting in a representative capacity as a private attorney general (App. p. 84). Likewise, Plaintiffs' First Amended Complaint had no reference whatsoever to Plaintiffs acting as private attorneys general *Id.* Then, to completely make clear that Carroll was not attempting to proceed in a representative capacity, Carroll testified in his deposition that he was bringing this case for his own benefit, and for no one else. (App. p. 85)

ARGUMENTS

I. THE LOWER COURT'S ORDER ALLOWING AN INDIVIDUAL WHO AGREED TO ARBITRATION ON AN INDIVIDUAL BASIS TO ALSO SERVE IN A REPRESENTATIVE CAPACITY IS IN CONFLICT WITH U.S. SUPREME COURT PRECEDENT, THEREBY PRESENTING A FEDERAL QUESTION.

The unequivocally-worded arbitration agreement provides: 1) that each dispute must be arbitrated on an individual basis; 2) that Carroll cannot be a class representative; and 3) that the parties never agreed to private attorney general arbitration. The lower court partially recognized the clearly controlling United States Supreme Court authority[2] by enforcing the "no class representative" provision, but ignored *AT&T Mobility* and *Stolt-Nielsen* by ruling that Carroll, whose only forum is binding arbitration, could act on behalf of the public as a private attorney

[2] *AT&T Mobility LLC vs. Concepcion*, 563 U.S. 321 (2011); *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662 (2010).

general when the arbitration provision unambiguously prohibits any such representative capacity by Carroll.

The lower court's ruling both denies TOG arbitration on an individual basis that was contractually agreed to and was the expectation of both parties, as well as rejects the controlling United States Supreme Court precedent,[3] that a party may not be compelled to submit to class arbitration absent an agreement. While this error by the lower court might conceivably be corrected by the arbitration, there is no assurance of that. Should the arbitrator accept what a circuit court judge has already (but wrongly) ruled, TOG has limited judicial recourse, as the arbitrator's decision is appealable only on a limited basis.[4]

The decision of the lower court interjected a requirement not contained in the arbitration agreement, which radically changed the nature and scope of the arbitration[5], in clear violation of United States Supreme Court precedent.

The Court of Appeals stated in its Order:

> Finally, because the scope of arbitration is determined by the arbitration agreement, and because the United States Supreme Court recently determined the enforceability of arbitration agreements cannot be conditioned upon the availability of classwide arbitration procedures, we do not find a compelling reason to consider the merits of this appeal. *AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740, 1744, 1750-51 (2011); *id.* at 1752 ("Arbitration is a matter of contract, and the [Federal Arbitration Act] requires courts to honor parties' expectations."). (App. p. 48)

---

[3] *Stolt-Nielsen* made clear that the FAA imposes certain rules of fundamental importance, "including the basic precept that arbitration is a matter of consent, not coercion." Id at 681.

[4] The arbitration agreement states the arbitrator's award shall be final and binding on all parties. (App. p. 61).

[5] *Stolt-Nielsen* recognized some of the fundamental changes brought about by the shift from bilateral arbitration to class representative arbitration:

1) The arbitrator no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties;
2) The arbitration award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties, as well;
3) The commercial stakes of class action arbitration are comparable to those of class action litigation, even though the scope of judicial review is much more limited. *Id.* 559 U.S. at 686, 130 S.Ct. at 1776.

The compelling reason to consider the merits of this appeal is if the lower court's Order is not immediately appealable, Carroll's arbitration against TOG will go forward with Carroll serving in a representative capacity on behalf of the entire South Carolina public when the arbitration agreement explicitly does not permit class representative status, and yet the standing of a "private attorney general" is exactly that. This greatly increases the complexity, time and expense of the arbitration, all reasons the U.S. Supreme Court honored the parties' intent to agree to dispute resolution of one-on-one arbitration. The parties never agreed to such "for the public" arbitration. TOG has no protection against the lower court's rejection of clear and binding U.S. Supreme Court precedent other than the grant of this Writ. Since this is binding arbitration, this is TOG's only opportunity for this Court to exercise its important responsibility of full judicial review.

II. THE LOWER COURT'S DECISION UNDERMINES THE GOALS AND POLICIES OF THE FAA.

This Court has recognized that the federal policy favoring arbitration is binding in state courts and supersedes inconsistent state law and statutes that invalidate arbitration agreements. *Toler's Cove Homeowner's Assoc., Inc.* v. *Trident Construction Co., Inc.*, 355 S.C. 605, 610, 586 S.E.2d 581, 584 (2003) citing *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001). The Court has further found that a state's procedural rules apply in state court **unless** they conflict with or undermine the purpose of the FAA.[6] *Henderson v. Summerville Ford-Mercury Inc. et al.*, 405 S.C. 440; 748 S.E.2d 221 (2013) (emphasis added). It is well recognized that "the central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 130 S. Ct. 1758, 1773, 176 L. Ed. 2d 605 (2010).

[6] The Fourth Circuit has also recognized that a judicially created procedural doctrine cannot defeat the intent of Congress. *See Sejman v. Warner-Lambert Co.*, 845 F.2d 66 (4th Cir. 1988).

The Court of Appeals cited *Toler's Cove Homeowner's Assoc., Inc.* v. *Trident Construction Co., Inc.,* 355 S.C. 605, 586 S.E.2d 581 (2003) as support for its finding that the lower court's order is not appealable. However, the Court of Appeals failed to address whether this order would undermine the goals and policies of the FAA. In *Toler's Cove*, the Court found that the arbitration agreement was being enforced by the order compelling arbitration. Likewise, in *Henderson, supra,* the Court found that the lower court did not err in applying the confirmation procedure set forth in the South Carolina Uniform Arbitration Act instead of the FAA because the applicable provisions of the two statutes were nearly identical and the outcome would be the same under either. *Henderson,* 405 S.C. at 450-451.

In the present case, however, the arbitration agreement between TOG and Carroll is not being enforced by the lower court's Order. The arbitration agreement provided that disputes would be arbitrated on an individual basis while the lower court's order provides that Carroll can act in a representative capacity on behalf of all citizens of the State of South Carolina. This directly undermines the purpose of the FAA to ensure this private agreement to arbitrate is enforced according to its terms. TOG respectfully submits that the FAA would preempt the state procedural rule under these facts. Therefore, this Court should grant TOG's Writ of Certiorari and hear this appeal.

III. THIS DECISION BY LOWER COURT MAY AFFECT OVER 300 DEFENDANTS IN PENDING CASES BY ALLOWING ONE PLAINTIFF IN THIS ONE BINDING ARBITRATION AGAINST ONE DEFENDANT TO ACT AS A PRIVATE ATTORNEY GENERAL WHEN NEITHER THE CONTRACT NOR THE PARTIES' EXPECTATIONS PROVIDED FOR IT, BEING AN IMPORTANT REASON FOR THE SOUTH CAROLINA SUPREME COURT TO ADDRESS THIS ISSUE NOW.

The important reason to address now the lower court's decision is because not only will TOG be subjected to Carroll serving in a representative capacity on behalf of the public, but

hundreds of other Defendants also would be subjected to the lower court's erroneous ruling in the two companion cases of *West-Cox* and *Adams*.

This Court is very familiar with the complex history of this case, having already heard several separate appeals in the *Herron* case.[7] The Amended Complaint filed in 2006 sued three hundred twenty-four automobile dealerships, then all but seven were dismissed, then they were sued again, and these cases are now stayed pending the conclusion of the *Herron* cases, only two of which have gone to trial in the eight years since this litigation began.

These same issues exist for all of the plaintiffs and defendants that have arbitration provisions in the hundreds of cases that will be severed once the stays in *West-Cox* and *Adams* are lifted. The interest of judicial economy offers a compelling reason to determine this issue at this time as to this novel and important issue of law. *See In re Breast Implant Prod. Liab.*, 331 S.C. 540, 503 S.E.2d 445 (1998) ("Novel questions of law concerning issues of significant public interest that are contained in numerous state and federal actions are involved in this matter. A decision by this Court would serve the interests of judicial economy by eliminating numerous inevitable appeals raising these issues."). Immediate appeals have been granted in cases where arbitration was compelled. *See York v. Dodgeland of Columbia, Inc.*, 406 S.C.67, 749 S.E.2d 139 (Ct. App. 2013); *Toler's Cove Homeowner's Ass'n. v. Trident Constr. Co.*, 355 S.C. 605, 586 S.E.2d 581 (2003); *Episcopal Housing Cop. V. Fed. Ins. Co.*, 273 S.C. 181, 255 S.E.2d 451 (1979).

This Court's grant of writ of certiorari to determine the issues would result in the correct application of U.S. Supreme Court precedent in more than three hundred cases still awaiting trial, which have already been languishing in the morass of the court system for seven years. It is

[7] Herron v. Century BMW, 387 S.C. 525 (S.C. 2010); Herron v. Century BMW, 395 S.C. 461 (S.C. 2011); Watts v. Sonic Automotive, Mem. Op. 2014-NO-015 (filed June 4, 2014).

cases such as this one that cry out for the attention of this Honorable Court.

CONCLUSION

Based on the above arguments, Petitioner requests that this Court grant it a writ of certiorari and hear this appeal.

Respectfully submitted,

July 7, 2014

Bradford N. Martin, SC Bar No. 3658
Laura W. H. Teer, SC Bar No. 16698
Brook Bristow, SC Bar No. 76038
BRADFORD NEAL MARTIN & ASSOCIATES, P.A.
Post Office Box 10410
Greenville, South Carolina 29603
864.552.9990

ATTORNEYS FOR PETITIONER TOYOTA OF GREENVILLE, INC.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Opinion No. 2013-002599 (S.C. Ct. App. Filed March 24, 2014)

PROOF OF SERVICE

I certify that I have served Appellant's Petition for Certiorari and Appendix by depositing a copy in the U.S. Mail, postage prepaid, on July 7, 2014, addressed to Respondent's attorneys, Terry E. Richardson, Jr., Esq., Brady R. Thomas, Esq., James David Butler, Esq., Richardson, Patrick, Westbrook & Brickman, LLC, P.O. Box 1368, Barnwell, South Carolina 29812; A. Camden Lewis, Esq., Lewis & Babcock, LLP, PO Box 11208, Columbia, SC 29211; Gedney M. Howe, III, Esq., Gedney M. Howe, III, PA, Post Office Box 1034, Charleston, South Carolina 29402; Michael E. Spears, Esq., Michael E. Spears, PA, Post Office Box 5806, Spartanburg, South Carolina 29304; and Richard A. Harpootlian, Esq., Richard A. Harpootlian, PA, Post Office Box 1090, Columbia, South Carolina 29211.

July 7, 2014

Gwendolyn G. Martin
BRADFORD NEAL MARTIN & ASSOCIATES, PA
Post Office Box 10410
Greenville, South Carolina 29603
864.552.9990