THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
SEP 15 2015
SC Court of Appeals

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas
Civil Action No.: 2013-CP-03-00147
Honorable Perry M. Buckner

Appellate Case No.: 2015-001401

JOYCE MYERS..Respondent,

-vs-

TITLEMAX OF SOUTH CAROLINA, INC. AND AFFORDABLE RECOVERY SOLUTIONS, A/K/A ARS...Defendants,

Of which AFFORDABLE RECOVERY SOLUTIONS A/K/A ARS is........Appellant.

INITIAL BRIEF OF APPELLANT

Patrick M. Higgins
Steven A. Jordan, Jr.
Howell, Gibson & Hughes, P.A.
Post Office Box 40
Beaufort, SC 29901
(843) 522-2400
(843) 522-2429 (fax)

TABLE OF CONTENTS

Table of Authorities..iii

Statement of Issues on Appeal...v

Statement of the Case...1

Statement of Facts..1

Standard of Review...7

Arguments..8

I. THE CIRCUIT COURT ERRED BY FINDING THE EXISTENCE OF A "SIGNIFICANT RELATIONSHIP BETWEEN THE ARBITRATION AGREEMENT AND RESPONDENT'S FACTUAL ALLEGATIONS WAS NECESSARY IN ORDER TO COMPEL ARBITRATION...8

II. THE ARBITRATION AGREEMENT ENCOMPASSES RESPONDENT'S FACTUAL ALLEGATIONS IN THIS ACTION, AND THE CIRCUIT COURT ERRED BY FINDING THE CONDUCT ALLEGED BY RESPONDENT WAS UNFORESEEABLE AT THE TIME THE PARTIES EXECUTED THE ARBITRATION AGREEMENT...10

A. The Arbitration Agreement Encompasses Respondent's Factual Allegations Because Her Factual Allegations Arise Out Of The Loan Agreement And Constitute Allegations Of Basic State Law Intentional Torts, Which Are Expressly Included In The Arbitration Agreement..10

B. The Circuit Court Erred By Finding Respondent's Factual Allegations Were Unforeseeable At The Time The Parties Executed The Arbitration Agreement.............................16

Conclusion..20

TABLE OF AUTHORITIES

Cases

Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 644 S.E.2d 705 (2007)....................6, 7, 11, 16

Ala. Title Loans, Inc. v. White, 80 So. 3d 887 (Ala. 2011)................11,12,15,17

Black v. Lexington Sch. Dist. No. 2, 327 S.C. 55, 488 S.E.2d 327 (1997)..........5

Brown v. City of Philadelphia, 2010 WL 4484630 (E.D.Pa. 2010)..........12,15, 17

Chassereau v. Global-Sun Pools, Inc., 373 S.C. 168, 644 S.E.2d 718 (2007).....6

Childers v. Judson Mills Store Co., 189 S.C. 224, 200 S.E. 770 (1939)...........17

Davenport v. Chrysler Credit Corp., 818 S.W.2d 23 (Tenn. Ct. App. 1991)........17

Hall v. Green Tree Servicing, LLC, Op. No. 5323 (S.C. Ct. App. filed July 1, 2015) (Shearouse Adv. Sh. No. 25 at 50)..........................7, 14

Housing Auth. of City of Columbia v. Cornerstone Housing, LLC, 356 S.C. 328, 588 S.E.2d 617 (Ct. App. 2003)..........................8, 10

In re Conseco Fin. Servicing Corp., 19 S.W.3d 562 (Tex. App. 2000).............15

Jordan v. Citizens & S. Nat'l Bank of S.C., 278 S.C. 213, 298 S.E.2d 213 (1982)..........................17

Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 739 S.E.2d 209 (2013)..........................10, 11, 13, 16

Lucas v. Atl. Greyhound Fed. Credit Union, 268 S.C. 30, 231 S.E.2d 302 (1977)..........................17

Lyda v. Cooper, 169 S.C. 451, 169 S.E. 236 (1933)..........................17

McMaster v. Dewitt, 411 S.C. 138, 767 S.E.2d 451 (Ct. App. 2014)..................5

Mishoe v. Gen. Motors Acceptance Corp., 234 S.C. 182, 107 S.E.2d 43 (1958)..........................17

Nichols v. Metropolitan Bank, 435 N.W.2d 637 (Minn. Ct. App. 1989).............17

Pearson v. Hilton Head Hosp., 400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012)..11

Partain v. Upstate Auto. Group, 386 S.C. 488, 689 S.E.2d 602 (2010)..........8, 9

Rucker v. Smoke, 37 S.C. 377, 16 S.E. 40 (1892).......................................17

Soulios v. Mills Novelty Co., 198 S.C. 355, 17 S.E.2d 869 (1941)...................17

Webber v. Farmers Chevrolet Co., 186 S.C. 111, 195 S.E. 139 (1938)............17

Statutes and Rules

S.C. Code Ann. § 37-5-112 (2015)..17

Rule 6, SCRCP..5

STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT ERR BY FINDING THE EXISTENCE OF A "SIGNIFICANT RELATIONSHIP" BETWEEN THE ARBITRATION AGREEMENT AND RESPONDENT'S FACTUAL ALLEGATIONS WAS NECESSARY IN ORDER TO COMPEL ARBITRATION?

II. DID THE ARBITRATION AGREEMENT ENCOMPASS RESPONDENT'S FACTUAL ALLEGATIONS?

III. DID THE CIRCUIT COURT ERR BY FINDING THE CONDUCT ALLEGED BY RESPONDENT WAS UNFORESEEABLE AT THE TIME THE PARTIES EXECUTED THE ARBITRATION AGREEMENT?

STATEMENT OF THE CASE

Respondent filed this action on August 16, 2013, due to alleged events related to the repossession of an automobile. Appellant filed its answer on March 4, 2014, denying Respondent's allegations. On September 2, 2014, Appellant filed a motion to compel arbitration, and the circuit court held a hearing on Appellant's motion on April 20, 2015. The circuit court filed an order dated April 30, 2015, denying Appellant's motion to compel arbitration, and Appellant filed a motion to reconsider on May 15, 2015. The circuit court issued a form order denying Appellant's motion to reconsider on June 19, 2015. Appellant filed its notice of appeal on June 22, 2015, and served its notice of appeal on opposing counsel on June 26, 2015.

STATEMENT OF FACTS

In 2008, Respondent obtained a loan from Defendant TitleMax of South Carolina (TitleMax) using her vehicle as collateral. (2008 Loan Agreement p. 1). During the period of the loan term, Respondent refinanced the loan multiple times. (2012 Loan Agreement p. 1). When Respondent received the initial loan and the subsequent refinancing, she signed loan agreements, which provided, in conspicuous font, that the loan agreements were subject to an arbitration agreement (hereinafter referred to as Arbitration Agreement). (2008 and 2012 Loan Agreements p. 2). The Arbitration Agreement explained all disputes shall be resolved by binding arbitration. (2012 Loan Agreement p. 2). The Arbitration Agreement defined a "dispute" as follows.

> For purposes of this [Arbitration Agreement], the words "dispute" and "disputes" are given the broadest

> possible meaning and include, without limitation (a) all claims, disputes, or controversies arising from or relating directly or indirectly to the signing of this Arbitration [Agreement] . . .; (b) all federal or *state law claims*, disputes or controversies, arising from or relating directly or indirectly to this Loan Agreement . . .; (c) all counterclaims, cross-claims, and third-party claims; (d) all common law claims, based upon contract, *tort*, fraud, or *other intentional torts* . . . .

(2012 Loan Agreement p. 2) (emphasis added).

The Arbitration Agreement also provided for an opt-out process. (2012 Loan Agreement p. 3). The opt-out clause allowed Respondent to opt-out of the Arbitration Agreement by simply writing a letter to TitleMax expressing her desire to not be bound by the Arbitration Agreement. (2012 Loan Agreement p. 3). Respondent signed the Arbitration Agreement multiple times. (2008 Loan Agreement p. 3; 2012 Loan Agreement pp. 3-4).

In September 2010, Appellant and TitleMax executed a Repossession Agreement whereby Appellant agreed to repossess vehicles for TitleMax. (Repossession Agreement p. 1). The agreement required Appellant to accomplish the repossessions "without (1) the use of trick, fraud or other deceptive practices, including but not limited to impersonating a law enforcement or court official or other deceptive practices; (2) a breach of the peace; (3) force, threat or intimidation; or (4) any other unlawful means." (Repossession Agreement p. 1). It also required Appellant to indemnify TitleMax regarding "the manner in which the repossession was accomplished . . . as well as all claims of whatever nature including, but not limited to, bodily injury, property damage

(including the loss of use thereof), economic damage, [and] personal injury." (Repossession Agreement p. 2).

In June 2012, Respondent ceased making payments on the loan. (Notice of Default and Right to Cure Letter, Exhibit 9 to Plaintiff Deposition). During the day on January 11, 2013, Appellant repossessed the vehicle, and TitleMax sold it to satisfy part of Respondent's loan obligation. (Explanation of Deficiency Letter).

Immediately following Appellant's repossession of the vehicle, Respondent contacted the police department, and an officer responded to the scene. (Incident Report pp. 1-2). Respondent informed the officer somebody repossessed her vehicle, and admitted she was "behind on payments." (Incident Report p. 1). Respondent claimed she intended to make payments later that day. (Incident Report p. 1). Respondent complained to the officer that Appellant "scratched" her hand, but the officer noted it was only a "contact scratch." (Incident Report p. 1). Respondent documented the scratch with photographs. (Photographs from Respondent).

The officer asked Respondent to demonstrate how she obtained the scratch. (Incident Report p. 1). The officer explained, "[Respondent] put her hand within one foot of [the officer]'s face, to the side of it, and stated that she was doing this (pointing past the subject with quick hand motions) telling [Appellant] to get off of her property." (Incident Report p. 1). The officer noted Respondent's demonstration gave the officer "a discomfort." (Incident Report p. 1). Respondent sought medical attention for her scratched finger on the same

day as the alleged incident and paid $10 for her medical treatment. (Carolina Medical Associates Invoice).

Subsequently, Respondent filed this action against Appellant and TitleMax alleging Appellant trespassed on her property while repossessing the vehicle and claiming Appellant "struck" her hand and shouted profanity. (Complaint p. 2). Respondent claimed she suffered the scratched finger, which was the only alleged physical injury, and emotional distress as a result of the repossession. (Complaint pp. 2-3; Photographs from Respondent; Respondent Deposition p. 37-38). The only "profanity" Respondent could allege was one instance of Appellant referring to Respondent as a "bitch." (Respondent Deposition p. 35). Respondent's causes of action were for trespass, battery, assault, negligence, and intentional infliction of emotional distress (IIED). (Complaint pp. 1-5).

During her deposition, Respondent admitted she signed the Arbitration Agreement. (Respondent Deposition pp. 21-22). She further admitted she read and understood the terms of the Arbitration Agreement. (Respondent Deposition pp. 21-22). Appellant filed a motion to compel arbitration pursuant to the Arbitration Agreement on September 2, 2014. (Appellant's Motion to Compel Arbitration). TitleMax also filed a motion to compel arbitration. (TitleMax's Motion to Compel Arbitration).

Prior to the hearing on Appellant's motion, Appellant filed a memorandum in support of its motion. (Appellant's Memo in Support; First Hearing Transcript p. 4). Appellant argued Respondent's factual allegations were foreseeable and

within the scope of the Arbitration Agreement based primarily on the plain language of the agreement. (Appellant's Memo in Support p. 6).

Respondent did not file a memorandum in support of her position,[1] but the day before the hearing, she filed two affidavits allegedly supporting her argument.[2] (Affidavits of Respondent and Adam Yount). Respondent's affidavit claimed she did not contemplate at the time she signed the Arbitration Agreement that the acts alleged in her complaint could occur. (Affidavit of Respondent).

The second affidavit was from TitleMax's counsel, Adam Yount. (Affidavit of Adam Yount). The week before the hearing on TitleMax's and Appellant's motions to compel arbitration, TitleMax and Respondent reached a settlement to extinguish TitleMax's liability. (TitleMax Settlement; First Hearing Transcript pp. 3-4). Mr. Yount then executed the affidavit relied upon by Respondent. (Affidavit of Adam Yount). In the affidavit, Mr. Yount claimed TitleMax never intended the

---

[1] Although Respondent did not file a memorandum, she submitted a proposed order to the circuit court during the hearing after Appellant's counsel made his arguments. (First Hearing Transcript p. 14).

[2] The hearing on Appellant's motion to compel arbitration took place on Monday, April 20, 2015. (Order Denying Arbitration p. 1). Respondent filed and sent Appellant copies of the affidavits on Friday, April 17, 2015, at approximately 4:30 p.m. (Affidavits of Respondent and Adam Yount). Also, the affidavits were executed on April 17, 2015. (Affidavits of Respondent and Adam Yount). Based on Rule 6, SCRCP, Appellant argued to the circuit court that Respondent's affidavits were clearly untimely and should not be considered. See Black v. Lexington Sch. Dist. No. 2, 327 S.C. 55, 60, 488 S.E.2d 327, 329 (1997) (finding the trial court properly refused to consider an untimely affidavit); McMaster v. Dewitt, 411 S.C. 138, 151, 767 S.E.2d 451, 458 (Ct. App. 2014) (finding the "last-minute submission" of an affidavit opposing summary judgment weighed in favor of excluding the affidavit even though it was timely submitted because it indicated the party was attempting to create an issue of fact). However, the circuit court refused to exclude the affidavits. (First Hearing Transcript p. 5-8).

Arbitration Agreement to cover assaults, batteries, or trespasses. (Affidavit of Adam Yount p. 2).

During the hearing, Respondent relied on Chassereau[3] and argued she could not have foreseen at the time of signing the Arbitration Agreement the type of conduct in which Appellant allegedly engaged while repossessing the vehicle. (First Hearing Transcript p. 18-19). Specifically, Respondent claimed her type of allegations were beyond the contemplation of the parties when they signed the Arbitration Agreement. (First Hearing Transcript p. 21). At the conclusion of the hearing, the circuit court advised it would consider the arguments and render its decision at a later date. (First Hearing Transcript p. 27).

In a written order, the circuit court found it "must analyze whether there is a 'significant relationship' between the [Arbitration] Agreement and the allegations made in the [c]omplaint." (First Order p. 2). The circuit court noted language in the Repossession Agreement between TitleMax and Appellant and found Respondent "would not expect the alleged conduct from reading the Repossession Agreement." (First Order pp. 2-3). Additionally, the circuit court found the Arbitration Agreement did not have a "significant relationship" to Respondent's allegations, and under Aiken[4] and Chassereau, the alleged conduct "was unforeseeable at the time the parties executed" the Arbitration

---

[3] Chassereau v. Global-Sun Pools, Inc., 373 S.C. 168, 644 S.E.2d 718 (2007).
[4] Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 644 S.E.2d 705 (2007).

Agreement. (First Order p. 3). Based on these findings, the circuit court denied Appellant's motion to compel arbitration.[5] (First Order p. 3).

On May 15, 2015, Appellant filed a motion to reconsider the circuit court's order arguing the circuit court erred in multiple respects including by finding Respondent's factual allegations were unforeseeable when the parties executed the Arbitration Agreement. (Motion to Reconsider pp. 3-4). Appellant asserted the circuit court erred by requiring the existence of a "significant relationship" between Respondent's allegations and the Arbitration Agreement. (Motion to Reconsider p. 2). Appellant also argued the Repossession Agreement between Appellant and TitleMax should not be considered to determine what was foreseeable to Respondent because Respondent had no knowledge of the Repossession Agreement at the time she agreed to the Arbitration Agreement. (Motion to Reconsider p. 4). The circuit court held a short hearing to consider Appellant's motion to reconsider and denied the motion in a form order. (Second Order). This appeal followed.

STANDARD OF REVIEW

"The determination of whether a claim is subject to arbitration is subject to de novo review." Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007) (emphasis removed). "The party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." Hall v. Green Tree Servicing, LLC, Op. No. 5323 (S.C. Ct. App. filed

---

[5] The parties made multiple other arguments before the circuit court, but when denying Appellant's motion, the court discussed and relied only on its findings regarding foreseeability and the scope of the Arbitration Agreement. (First Order pp. 1-3). Thus, the other arguments and issues are not subjects of this appeal.

July 1, 2015) (Shearouse Adv. Sh. No. 25 at 50) (brackets removed). "There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration." Housing Auth. of City of Columbia v. Cornerstone Housing, LLC, 356 S.C. 328, 334, 588 S.E.2d 617, 620 (Ct. App. 2003).

ARGUMENT

I. THE CIRCUIT COURT ERRED BY FINDING THE EXISTENCE OF A "SIGNIFICANT RELATIONSHIP" BETWEEN THE ARBITRATION AGREEMENT AND RESPONDENT'S ALLEGATIONS WAS NECESSARY IN ORDER TO COMPEL ARBITRATION.

The circuit court erred by finding the existence of a "significant relationship" between the Arbitration Agreement and Respondent's allegations was necessary in order to compel arbitration.

> Unless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered. Regardless of the label the plaintiff uses, when deciding whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause. Moreover, even if the court finds that a claim is outside the scope of the arbitration clause, the clause may still apply. A broadly worded arbitration clause applies to disputes that do not arise under the governing contract when a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained. Thus, a claim falls within the scope of an arbitration clause if it is encompassed by the language of the clause *or* if a significant relationship exists between the claim and the contract.

Partain v. Upstate Auto. Group, 386 S.C. 488, 491-92, 689 S.E.2d 602, 603-04 (2010) (citations and internal quotation marks omitted) (emphasis added). In

Partain, our Supreme Court found it did not need to address the question of a significant relationship because the factual allegations underlying the plaintiff's claims were encompassed by the terms of the arbitration clause. Id. at 492, 689 S.E.2d at 604.

In this case, the circuit court failed to assess whether the factual allegations underlying Respondent's claims were encompassed by the terms of the Arbitration Agreement despite Appellant's argument that the claims were within the scope of the agreement. (Appellant's Memo in Support pp. 5-6). The circuit court ignored this initial consideration and began its inquiry by analyzing whether a significant relationship existed. (First Order p. 2). The circuit court found it "must analyze whether there is a 'significant relationship' between the [Arbitration] Agreement and the allegations made in the [c]omplaint." (First Order p. 2).

Under Partain, the circuit court was required to analyze whether Respondent's claims were encompassed by the terms of the Arbitration Agreement prior to determining whether a significant relationship existed. See Partain, 386 S.C. at 492, 689 S.E.2d at 604 (finding a significant relationship analysis was unnecessary because the plaintiff's factual allegations were encompassed by the terms of the arbitration clause). Thus, the circuit court committed an error of law by failing to consider whether Respondent's claims were encompassed by the terms of the Arbitration Agreement prior to determining whether a significant relationship existed. Further, as discussed below, the Arbitration Agreement encompasses Respondent's factual allegations,

and therefore, the circuit court erred by finding a significant relationship did not exist.

II. THE ARBITRATION AGREEMENT ENCOMPASSES RESPONDENT'S FACTUAL ALLEGATIONS IN THIS ACTION, AND THE CIRCUIT COURT ERRED BY FINDING THE CONDUCT ALLEGED BY RESPONDENT WAS UNFORESEEABLE AT THE TIME THE PARTIES EXECUTED THE ARBITRATION AGREEMENT.

A. The Arbitration Agreement encompasses Respondent's factual allegations because her factual allegations arise out of the loan agreement and constitute allegations of basic state law intentional torts, which are expressly included in the Arbitration Agreement.

The Arbitration Agreement encompasses Respondent's factual allegations because her factual allegations arise out of the loan agreement and constitute allegations of basic state law intentional torts, which are expressly included in the Arbitration Agreement. "There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration." Housing Auth. of City of Columbia v. Cornerstone Housing, LLC, 356 S.C. 328, 334, 588 S.E.2d 617, 620 (Ct. App. 2003). "Whether a party has agreed to arbitrate an issue is a matter of contract interpretation . . . ." Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 108, 739 S.E.2d 209, 213 (2013). "Although the intention of the parties is relevant, as a matter of policy, arbitration agreements are liberally construed in favor of arbitrability." Id. at 108-09, 739 S.E.2d at 213. Courts "must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the legal label assigned to the claim." Id. at 110, 739 S.E.2d at 214.

"Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Pearson v. Hilton Head Hosp., 400 S.C. 281, 287, 733 S.E.2d 597, 600 (Ct. App. 2012).

> [U]nless the [circuit] court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered. A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute.

Id. (citation and internal quotation marks omitted).

Arbitration agreements that require arbitration of disputes can encompass tort as well as contractual causes of action. See Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 152, 644 S.E.2d 705, 709 (2007) ("[T]his Court does not seek to exclude all intentional torts from the scope of arbitration."). Additionally, in previous cases, our Supreme Court has found arbitration agreements encompassed intentional torts. See Landers, 402 S.C. at 107, 111, 115-16, 739 S.E.2d at 212, 214-15, 217 (finding an arbitration agreement encompassed the tort of intentional infliction of emotional distress).

Furthermore, other jurisdictions have found similar arbitration agreements encompassed similar, if not more outrageous, factual allegations. In White, the plaintiff used her vehicle as collateral to obtain a loan from the defendant. Ala. Title Loans, Inc. v. White, 80 So. 3d 887, 888 (Ala. 2011). The plaintiff signed an arbitration agreement as part of the loan agreement, which stated it included "disputes based upon . . . tort." Id. at 888-89. The plaintiff claimed she repaid the loan in full in August 2009, and the defendant returned the original title for the

vehicle to the plaintiff. Id. at 889. However, in January 2010, the plaintiff observed men in her driveway preparing to tow the vehicle. Id. at 890. The plaintiff approached the men and began a discussion with the man sitting in the passenger seat of the tow truck. Id. During this discussion, the driver of the tow truck "pressed the accelerator," and the plaintiff "grabbed the passenger-side door in an effort to prevent the truck from running over her." Id. The man in the passenger seat pulled her into the truck, and the truck proceeded to the defendant's repossession lot. Id. The plaintiff claimed the driver of the truck threatened her during the ride. Id. The police arrived at the lot and required the defendant to release the vehicle to the plaintiff because the defendant could not produce the title to the vehicle. Id. The plaintiff filed suit alleging assault, battery, negligence, trespass, wrongful repossession, and conversion. Id. The defendant filed a motion to compel arbitration. Id.

The trial court denied the defendant's motion to compel arbitration. Id. at 891. On appeal, the White court found it must decide whether the language of the arbitration agreement encompassed the plaintiff's claims. Id. at 893. The court concluded the plaintiff's claims were "squarely" within the scope of the arbitration agreement and entered an order granting the defendant's motion to compel arbitration. Id. at 894.

In Brown, the plaintiff obtained a loan from the defendant and used his vehicle as collateral. Brown v. City of Philadelphia, 2010 WL 4484630, *1 (E.D.Pa. 2010). The plaintiff signed an arbitration clause as part of the loan agreement, which stated it included "disputes based upon . . . tort." Id. at *1-2.

Later, the plaintiff defaulted on the loan, and the defendant attempted to repossess the vehicle. Id. at *2. When the plaintiff realized the defendant was in his yard attempting to repossess the vehicle, the plaintiff sat in the driver's seat and locked himself inside. Id. The defendant proceeded to secure the vehicle and towed it partially to the repossession lot with the plaintiff inside the vehicle until police officers arrived and removed the plaintiff from the vehicle. Id. The plaintiff brought suit against the defendant alleging multiple tort actions, and the defendant moved to compel arbitration. Id. at *3. The court analyzed whether the plaintiff's allegations fell within the scope of the arbitration agreement and explained "this inquiry is guided by the intent of the parties in making the arbitration agreement." Id. at *6. The court found it was "unquestionable" the plaintiff's allegations fell within the scope of the arbitration agreement because the allegations were tort claims and the agreement "specifically list[ed] tort claims as being covered by the agreement." Id. at *7. Accordingly, the court ordered arbitration. Id. at *7.

In this case, the Arbitration Agreement encompasses Respondent's factual allegations. Respondent's causes of action were for trespass, battery, assault, negligence, and IIED. (Complaint pp. 1-5). However, we must look at the factual allegations, rather than the legal labels Respondent assigned to the claim. See Landers, 402 S.C. at 110, 739 S.E.2d at 214 (explaining courts "must determine whether *the factual allegations underlying the claim* are within the scope of the arbitration clause, regardless of the legal label assigned to the claim" (emphasis added)).

Respondent alleged Appellant trespassed on her property while repossessing the vehicle and claiming Appellant "struck" her hand and shouted profanity. (Complaint p. 2). Respondent claimed she suffered a scratched finger, which was the only alleged physical injury, and emotional distress due to the repossession. (Complaint pp. 2-3; Photographs from Respondent; Respondent Deposition p. 37-38). The only "profanity" Respondent alleged was one instance of Appellant referring to Respondent as a "bitch." (Respondent Deposition p. 35). Respondent essentially claims Appellant scratched her finger and shouted one instance of profanity and that she suffered emotional distress due to the repossession. (Complaint pp. 2-3; Respondent Deposition pp. 35, 37-38). Respondent's factual allegations constitute basic state law intentional torts.

The Arbitration Agreement encompasses Respondent's factual allegations. The agreement required all "disputes" be resolved by arbitration. (2012 Loan Agreements p. 2). The Plaintiff's factual allegations are within the scope of the Arbitration Agreement because dispute is defined as all claims arising from or relating directly or indirectly to the loan agreement, and Appellant's attempt to recover the vehicle was due to Respondent's default, which created a controversy arising out of the loan agreement. See Hall v. Green Tree Servicing, LLC, Op. No. 5323 (S.C. Ct. App. filed July 1, 2015) (Shearouse Adv. Sh. No. 25 at 53) (finding the plaintiff's causes of action relating to the repossession of a mobile home were within the scope of a broad arbitration clause because the defendant's actions to recover the property were the result of the plaintiff's default, which created a controversy arising out of the

loan agreement); In re Conseco Fin. Servicing Corp., 19 S.W.3d 562, 570 (Tex. App. 2000) (finding tort causes of action arising out of the defendant's repossession of a mobile home were within the scope of the arbitration agreement because the plaintiff's factual allegations arose from the defendant's efforts to collect amounts due under the terms of the agreement).

In addition to defining "dispute" broadly, the Arbitration Agreement specifically defines "dispute" to include "all state law claims" and "all common law claims based upon contract, *tort*, fraud, or *other intentional torts*." (2012 Loan Agreement p. 2) (emphasis added). Thus, the Arbitration Agreement expressly encompasses all state law torts and intentional torts arising out of or relating to the loan agreement. (2012 Loan Agreement p. 2). Because the Arbitration Agreement expressly encompasses all state law torts and intentional torts and Respondent's factual allegations consist of basic state law intentional torts, the Arbitration Agreement encompasses Respondent's claims, and they are within the scope of the agreement. See White, 80 So. 3d at 894 (finding the plaintiff's factual allegations were "squarely" within the scope of the arbitration agreement after considering an arbitration agreement and factual allegations similar to this case); Brown, 2010 WL at *7 (finding it was "unquestionable" that the plaintiff's factual allegations were within the scope of the arbitration agreement because the allegations were tort claims and the arbitration agreement "specifically list[ed] tort claims as being covered by the agreement").

Furthermore, even if there was a doubt concerning whether the Arbitration Agreement encompasses Respondent's factual allegations, the doubt should be

resolved in favor of arbitration. See Pearson, 400 S.C. at 287, 733 S.E.2d at 600 ("Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.").

B. The circuit court erred by finding Respondent's factual allegations were unforeseeable at the time the parties executed the Arbitration Agreement.

The circuit court erred by finding Respondent's factual allegations were unforeseeable at the time the parties executed the Arbitration Agreement.[6] Our Supreme Court "will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings." Aiken, 373 S.C. at 151, 644 S.E.2d at 709. However, the Aiken Court explained, "this Court does not seek to exclude all intentional torts from the scope of arbitration." Id. at 152, 644 S.E.2d at 709. Thus, tort claims can be foreseeable and subject to arbitration. Additionally, in previous cases, our Supreme Court has ordered arbitration for intentional torts such as intentional infliction of emotional distress. See Landers, 402 S.C. at 107, 111, 115-16, 739 S.E.2d at 212, 214-15, 217 (ordering arbitration for an allegation of intentional infliction of emotional distress pursuant to an arbitration agreement).

In this case, Respondent's factual allegations were foreseeable to the parties at the time they executed the Arbitration Agreement. Respondent obtained a loan from TitleMax and used the vehicle as collateral. (2008 Loan Agreement p. 1). The loan agreement expressly stated Appellant could

[6] The circuit court did not find that Respondent's factual allegations would constitute outrageous conduct by Appellant. (First Order pp. 2-3).

repossess the vehicle without judicial process pursuant to statute in the event of Respondent's default. (2008 Loan Agreement p. 2; 2012 Loan Agreement p. 2). Thus, it was foreseeable to Respondent that Appellant may enter her yard and repossess the vehicle because the loan agreement specifically contemplated such action. Moreover, it was foreseeable that Respondent could suffer emotional distress due to a repossession of the vehicle.

Furthermore, it was foreseeable to the parties that an argument, which resulted in a scratched finger and one instance of profanity, could ensue during the repossession of the vehicle. Arguments and altercations, which could develop into tort claims, frequently occur during repossessions.[7] The foreseeability of altercations arising out of repossessions is further evinced by the fact that South Carolina has statutes in place directing the manner in which a repossession may be accomplished. See S.C. Code Ann. § 37-5-112 (2015) (allowing repossessions without judicial process as long as the repossessions are not accomplished by certain unlawful means).

---

[7] There are many reported cases in South Carolina involving alleged altercations and arguments arising out of repossessions. See Jordan v. Citizens & S. Nat'l Bank of S.C., 278 S.C. 213, 298 S.E.2d 213 (1982); Lucas v. Atl. Greyhound Fed. Credit Union, 268 S.C. 30, 231 S.E.2d 302 (1977); Mishoe v. Gen. Motors Acceptance Corp., 234 S.C. 182, 107 S.E.2d 43 (1958); Soulios v. Mills Novelty Co., 198 S.C. 355, 17 S.E.2d 869 (1941); Childers v. Judson Mills Store Co., 189 S.C. 224, 200 S.E. 770 (1939); Webber v. Farmers Chevrolet Co., 186 S.C. 111, 195 S.E. 139 (1938); Lyda v. Cooper, 169 S.C. 451, 169 S.E. 236 (1933); Rucker v. Smoke, 37 S.C. 377, 16 S.E. 40 (1892). Additionally, the number of cases from other jurisdictions involving alleged altercations arising out of repossessions is legion. See Ala. Title Loans, Inc. v. White, 80 So. 3d 887 (Ala. 2011); Davenport v. Chrysler Credit Corp., 818 S.W.2d 23 (Tenn. Ct. App. 1991); Nichols v. Metropolitan Bank, 435 N.W.2d 637 (Minn. Ct. App. 1989); Brown v. City of Philadelphia, 2010 WL 4484630, *1 (E.D.Pa. 2010).

Although torts may not typically be contemplated when entering a contract, the Arbitration Agreement specifically includes state law claims based upon tort or intentional torts. (2012 Loan Agreement p. 2). Respondent's factual allegations amount to claims of basic state law intentional torts. Because incidents similar to Respondent's factual allegations are common in repossessions and the Arbitration Agreement expressly includes state law claims based upon tort or intentional torts, Respondent's allegations were foreseeable to the parties when they executed the Arbitration Agreement.

With regard to its finding that Respondent "would not expect the alleged conduct from reading the Repossession Agreement between TitleMax and [Appellant]," the circuit court erred. First, the Repossession Agreement was between TitleMax and Appellant, and there was no evidence that Respondent was ever aware of the agreement. The Repossession Agreement was a general agreement between Appellant and TitleMax, and it applied to all repossessions accomplished by Appellant on behalf of TitleMax. It was not specific to Respondent's default. Thus, Respondent had no knowledge of the Repossession Agreement until it was produced during discovery after she initiated this action. Moreover, Respondent first agreed to the Arbitration Agreement in 2008. (2008 Loan Agreement p. 1-2). However, TitleMax and Appellant did not execute the Repossession Agreement until 2010. (Repossession Agreement p. 1). Therefore, no one, including Respondent, could have been aware of the Repossession Agreement when Respondent signed the Arbitration Agreement in 2008. Thus, Respondent could not rely on the terms of

the Repossession Agreement to honestly claim she did not expect Appellant's alleged conduct when she signed the Arbitration Agreement.

Second, even if Respondent was somehow aware of the Repossession Agreement at the time she signed the Arbitration Agreement, this awareness would make Respondent's factual allegations foreseeable. TitleMax and Appellant included the Repossession Agreement's language regarding the manner in which Appellant would accomplish repossessions because it was foreseeable that altercations occur during repossessions. Also, the Repossession Agreement required Appellant to indemnify TitleMax from lawsuits alleging bodily injury or personal injury arising from Appellant's repossessions precisely because altercations during repossessions are foreseeable. Accordingly, the Repossession Agreement could not have rendered Respondent's factual allegations unforeseeable at the time the parties executed the Arbitration Agreement.

With regard to the affidavit executed by Adam Yount, attorney for TitleMax, after TitleMax's settlement with Respondent, the affidavit cannot overcome the foreseeability of Respondent's factual allegations. In the affidavit, Mr. Yount claimed TitleMax never intended the Arbitration Agreement to cover assaults, batteries, or trespasses. (Affidavit of Adam Yount p. 2). However, in addition to Appellant filing a motion to compel arbitration, TitleMax filed its own motion to compel arbitration. (TitleMax's Motion to Compel Arbitration). In its motion to compel arbitration, TitleMax alleged the loan agreement and accompanying Arbitration Agreement compelled Respondent "to submit all

claims in this action to mandatory arbitration." (TitleMax's Motion to Compel Arbitration). Based on TitleMax's motion to compel arbitration, it seems clear TitleMax fully intended the Arbitration Agreement to encompass Respondent's factual allegations. Mr. Yount's affidavit, which was executed after TitleMax settled with Respondent, directly contravenes TitleMax's position taken in its motion to compel arbitration. Accordingly, Mr. Yount's affidavit carries little weight and does not overcome the above arguments dictating that Respondent's factual allegations were foreseeable at the time the parties executed the Arbitration Agreement.

CONCLUSION

Based on the foregoing, the Arbitration Agreement encompasses Respondent's factual allegations. Appellant respectfully submits the circuit court erred by holding it was required to find a significant relationship between Respondent's factual allegations and the Arbitration Agreement in order to compel arbitration. Appellant further submits the circuit court erred by finding Respondent's factual allegations were unforeseeable to the parties when they executed the Arbitration Agreement. Appellant respectfully requests this Court reverse the circuit court's order and remand this action to the circuit court with instructions to enter an order compelling arbitration of all of Respondent's claims.

SIGNATURE PAGE FOLLOWS

HOWELL, GIBSON & HUGHES, P.A.

By:

Patrick M. Higgins
Steven A. Jordan, Jr.
Post Office Box 40
Beaufort, SC 29901
(843) 522-2400
Attorneys for Appellant

Beaufort, South Carolina

September 14, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

SEP 15 2015

SC Court of Appeals

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas
Civil Action No.: 2013-CP-03-00147
Honorable Perry M. Buckner

Appellate Case No.: 2015-001401

JOYCE MYERS..Respondent,

-vs-

TITLEMAX OF SOUTH CAROLINA, INC. AND AFFORDABLE RECOVERY SOLUTIONS, A/K/A ARS...Defendants,

Of which AFFORDABLE RECOVERY SOLUTIONS A/K/A ARS is........Appellant.

CERTIFICATE OF SERVICE FOR INITIAL BRIEF AND DESIGNATION OF MATTER

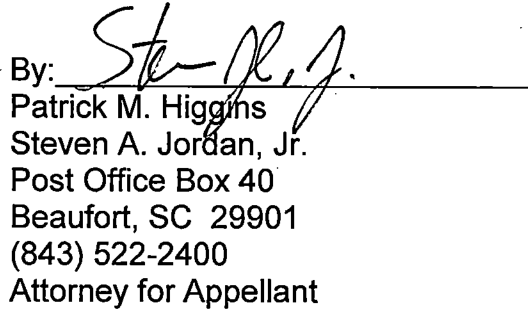
The undersigned counsel hereby certifies that he has served the foregoing Initial Brief of Appellant and Designation of Matter upon all counsel of record by affixing same with proper postage and placing same with the United States Postal Service on 14th day of September, 2015 addressed to the following:

Mark B. Tinsley, Esquire
Gooding and Gooding, P.A.
Post Office Box 1000
Allendale, SC 29810

Adam N. Yount, Esquire
Haynsworth, Sinkler & Boyd, P.A.
Post Office Box 340
Charleston, SC 29402

Robert N. Hill, Esquire
Law Office of Robert Hill
Post Office Box 1323
Lexington, SC 29071

HOWELL, GIBSON & HUGHES, P.A.



By:______________________
Patrick M. Higgins
Steven A. Jordan, Jr.
Post Office Box 40
Beaufort, SC 29901
(843) 522-2400
Attorney for Appellant

Beaufort, South Carolina

September 14, 2015

HOWELL, GIBSON AND HUGHES, P.A.
ATTORNEYS AT LAW
Post Office Box 40
Beaufort, South Carolina 29901-0040
www.hghpa.com

STEPHEN P. HUGHES
PATRICK M. HIGGINS *
ROBERT W. ACHURCH III *
DAVID S. BLACK
MARY BASS LOHR
THOMAS A. BENDLE, JR.

J. ANDREW YOHO
STEVEN A. JORDAN, JR.

JAMES S. GIBSON, JR. *
Of Counsel

*Certified Mediator

25 RUE DU BOIS
LADY'S ISLAND
BEAUFORT, SOUTH CAROLINA 29907

TELEPHONE: 843 – 522-2400
FAX NUMBER: 843 – 522-2429
WRITER'S E-Mail: sjordan@hghpa.com
WRITER'S DIRECT: 843 – 522-2419

RECEIVED
SEP 15 2015
SC Court of Appeals

September 14, 2015

(Via FedEx: 7745 0024 9950)
Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Joyce Myers vs. Titlemax of South Carolina, Inc., and Affordable Recovery Solutions, a/k/a ARS
Civil Action No.: 2013-CP-03-00147
Appellate Case No.: 2015-001401
Our File No: 11402 PMH

Dear Ms. Kitchings:

Please find enclosed herewith for filing Initial Brief of Appellant and Designation of Matter with regard to the above referenced matter. I would appreciate your filing the same and returning a filed clocked copy to me in the enclosed self-addressed, stamped envelope provided for your convenience.

With kindest regards, I am

Yours truly,

HOWELL, GIBSON AND HUGHES, P.A.

Steven A. Jordan, Jr.
SAJ/ad
Enclosure
cc: Mark B. Tinsley (Via U.S. Mail Only)
Adam N. Yount (Via U.S. Mail Only)
Robert N. Hill (Via U.S. Mail Only)

ORIGIN ID:BNFA (843) 522-2400
HOWELL GIBSON HUGHES PA

25 RUE DU BOIS

BEAUFORT, SC 29907
UNITED STATES US

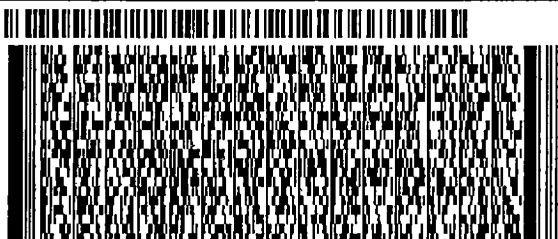
SHIP DATE: 14SEP15
ACTWGT: 1.00 LB
CAD: 106721029/INET3670

BILL SENDER

TO HON. JENNY ABBOTT KITCHINGS
SOUTH CAROLINA COURT OF APPEALS
1015 SUMTER STREET
CLERK OF COURT
COLUMBIA SC 29201

(803) 734-1890 REF: 11402 PMH
INV:
PO: DEPT:

539J2/CBB9/31D0



FedEx Express

J152015062801uv

TUE - 15 SEP 10:30A
PRIORITY OVERNIGHT

TRK# 0201 7745 0024 9950

29201
XH USCA SC-US CAE

RECEIVED
SEP 15 2015
SC Court of Appeals

After printing this label:
1. Use the 'Print' button on this page to print your label to your laser or inkjet printer.
2. Fold the printed page along the horizontal line.
3. Place label in shipping pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.

Warning: Use only the printed original label for shipping. Using a photocopy of this label for shipping purposes is fraudulent and could result in additional billing charges, along with the cancellation of your FedEx account number.
Use of this system constitutes your agreement to the service conditions in the current FedEx Service Guide, available on fedex.com.FedEx will not be responsible for any claim in excess of $100 per package, whether the result of loss, damage, delay, non-delivery,misdelivery,or misinformation, unless you declare a higher value, pay an additional charge, document your actual loss and file a timely claim.Limitations found in the current FedEx Service Guide apply. Your right to recover from FedEx for any loss, including intrinsic value of the package, loss of sales, income interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental,consequential, or special is limited to the greater of $100 or the authorized declared value. Recovery cannot exceed actual documented loss.Maximum for items of extraordinary value is $1,000, e.g. jewelry, precious metals, negotiable instruments and other items listed in our ServiceGuide. Written claims must be filed within strict time limits, see current FedEx Service Guide.