The State of South Carolina
In the Court of Appeals

Appeal from Allendale County
Court of Common Pleas

Honorable Perry M. Buckner

Civil Action # 2013-CP-03-00147

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 the ..... Appellant

Respondent's Final Brief

Robert N. Hill
S.C. Bar # 65074
Law Office of Robert Hill
P.O. Box 1323
Lexington, SC 29071
803-520-4370

Mark B. Tinsley
S.C. Bar # 15597
Gooding & Gooding, P.A.
P.O. Box 1000
Allendale, SC 29810
803-584-7676

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Statement of the Issues

1. Joyce Myers and Titlemax of South Carolina testified that they did not contemplate or intend that their arbitration clause would cover an assault, battery, trespass, or any of the other behavior that Myers alleges against Affordable Recovery Solutions (ARS). Does their testimony support the trial court's finding that Myers lacked assent to arbitrate her claims?

2. Should a reasonable consumer in the course of normal business dealings foresee that a debt collector would trespass on her property and assault and batter her while there?

3. May ARS use Myers's contract with Titlemax to force her to arbitrate her tort claims against ARS?

4. Did ARS waive any right to arbitration by obtaining discovery, taking and participating in depositions and mediation, and by not having its motion heard until the day trial was supposed to begin?

Statement of the Case

ARS repossessed Myers's car. ARS's Initial Brief, p. 3. She alleges that during the repossession men trespassed on to her property and that one of them struck her, threatened and intimidated her, and

shouted profanities at her. ROA 7-11. Myers and Titlemax testified that they did not contemplate or intend that their arbitration clause would cover such claims. ROA 178 ¶ 5, 186 ¶ 3.

ARS is not a party to this arbitration clause; the clause was part of Myers's and Titlemax's 2008 and 2012 loan contracts. ROA 108-114. In these contracts, Titlemax promised Myers that any self-help repossession would be "as allowed by South Carolina Code § 37-5-112." ROA 109, 112. Section 37-5-112 allows self-help repossessions only if they are "without the use of force or other breach of the peace." Titlemax later contracted with ARS to do repossessions and got ARS's promise that ARS would not breach the peace or use force, threat, intimidation or other unlawful means. ROA 210 ¶ 2.

In the arbitration clause, Myers agreed to arbitrate certain disputes that she has against Titlemax and Titlemax's "related third parties." ROA 109 ¶ 2(a), 112 ¶ 2(a). The clause states that it is for the benefit of Titlemax, its successors and assigns, and these "related third parties." ROA 110 ¶ 8, 113 ¶ 8. "Related third parties" are defined and do not include Titlemax's independent contractors. ROA 109 ¶ 1(g), 112 ¶ 1(g).

Titlemax's later contract with ARS identifies ARS as an "an

independent contractor" and gives ARS "complete discretion as to the time, place, manner and form of the repossession" with Titlemax having "no control over any aspect of the transaction." ROA 210 ¶ 6.

After ARS's repossession, Myers sued Titlemax and ARS for trespass, assault and battery, and intentional infliction of emotional distress. ROA 7-11. She alleged *respondeat superior* liability for the trespassers' acts. ROA 7-8 ¶ 5. ARS answered, denied any employee or agency relationship with Titlemax, and demanded strict proof thereof. ROA 13 ¶ 5. Titlemax answered and similarly declined to admit that it and ARS had an employee or agency relationship. ROA 17 ¶ 4, 21 ¶ 4. Afterward, Titlemax and ARS consistently maintained that ARS was an independent contractor. ROA 105 ¶ 9. Titlemax later testified, "ARS is not and never has been an agent of Titlemax. Rather, at all times relevant to the action, ARS was an independent, third-party contractor of Titlemax." ROA 177 ¶ 4.

In its amended answer, Titlemax cross claimed against ARS for contractual indemnity on the claims Myers asserted against Titlemax. ROA 23-24 ¶¶ 22-30.

Neither ARS nor Titlemax raised arbitration in their answers. ROA 12-25. Arbitration was first raised by ARS in a motion made over a

year after suit was filed. ROA 104 ¶ 3. Almost six months later, and around 18 months after suit was filed, a motion for arbitration was filed in Titlemax's name. ROA 55-56. The motion filed in Titlemax's name was filed after Titlemax cross claimed against ARS for indemnity and was filed by an attorney hired by ARS's insurance carrier. ROA 23-25, 55-56, 173 l.22 - 174 l.13.

Before ARS made the motion, it propounded and received responses to three separate sets of interrogatories, a set of production requests, and a set of requests to admit. ROA 104-105 ¶ 4. After it moved to compel, ARS deposed Myers; participated in the deposition of its employee and of a law enforcement officer; and participated in court-ordered mediation. ROA 105 ¶¶ 5-6. ARS then waited until the day the case was scheduled for trial to have its motion heard. ROA 105 ¶ 7.

The only evidence that ARS submitted on its motion was the loan contract and two pages of Myers's deposition testimony about executing the loan contract. ROA 77-91. It did not present any evidence on how Myers's injuries occurred or the injuries' severity. ROA 77-96, 137-164. At the motion's hearing, ARS rejected the trial court's offer to give ARS more time to get rebuttal affidavits. After ARS refused the court's offer for more time, ARS withdrew its objection to

the affidavits that Myers submitted. ROA 143 l.11 - 144 l.13, 162 ll.20-25.

Also during the hearing, Titlemax informed the Court that it had resolved its motion to arbitrate and took no position on ARS's motion to arbitrate. It remained in the case on its cross claim for indemnity against ARS. ROA 139 l.8 - 140 l.16.

The motion was then heard on the merits. Myers argued that she did not assent to arbitrate the type claims that she alleged against ARS, that the claims were too outrageous for a reasonable consumer to foresee during normal business dealings, that ARS could not enforce Titlemax's arbitration clause, and that ARS waived arbitration. ROA 152 l.7 - 161 l.16.

The trial court denied the motion on two grounds. It first found that there was "no meeting of the minds" to arbitrate the conduct alleged against ARS. ROA 3. It secondly cited *Aiken* on "outrageous torts that are unforeseeable to a reasonable consumer" and relied on *Aiken* and *Chassereau* to deny arbitration. ROA 2-3 (citing *Aiken v. World Fin. Corp. of South Carolina,* 373 S.C. 144, 644 S.E.2d 705 (2007); *Chassereau v. Global Sun Pools, Inc.,* 373 S.C. 168, 644 S.E.2d 718 (2007)).

On reconsideration, Myers reminded the court that Titlemax had withdrawn its motion to arbitrate and explained that the attorney who made the withdrawn motion was hired by ARS's insurance carrier. ROA 173 l.22 - 174 l.13. ARS argued in part that the Titlemax affidavit was parol evidence. ROA 72-73 ¶ 5.

The trial court noted that ARS did not object to the Titlemax affidavit when the motion was heard and read the affidavit into the record. ROA 171 l.4 - 172 l.6. The trial court then explained to ARS that, in its view, the conduct alleged also satisfies the *Aiken* and *Chassereau* rule on outrageousness. ROA 174 l.14 - 175 l.12. The court denied the motion to reconsider.

Argument

The order denying arbitration must be affirmed because Myers and Titlemax never assented to arbitrate the type claims that she has against ARS; the alleged misbehavior is too outrageous to be foreseeable in normal business dealings; Myers and ARS lack contractual privity; and ARS waived any rights it may have had.

I. The Myers and Titlemax affidavits support the trial court's finding on Myers's lack of assent to arbitrate.

A party cannot be forced to arbitrate a dispute which she has not agreed to arbitrate. *Chassereau,* 373 S.C. at 171-172, 644 S.E.2d at 720. In this case, the trial court found that there was no meeting of the minds to arbitrate the misbehavior alleged against ARS. ROA 3. If any evidence supports the finding, this Court must affirm. *Partain v. Upstate Automotive Group,* 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010).

Ample evidence supports Myers's lack of assent. Both she and Titlemax—the only parties to the agreement—testified that they did not contemplate or intend to arbitrate the type of clams that she has against ARS. ROA 178 ¶ 5, 186 ¶ 3.

This testimony distinguishes the cases that ARS cites. In those cases, the parties to the arbitration agreement disputed the agreement's scope. So the courts had to construe the arbitration clause to resolve whether the clause encompassed the claims or whether there was a significant relationship. In contrast, Myers and Titlemax agree that Myers's claims are not covered and that their arbitration clause is not as broad as the terms suggest. ROA 178 ¶ 5, 186 ¶ 3.

ARS's swipes at Titlemax's affidavit also fall short. In the trial court, ARS withdrew its objection to the affidavit's timeliness after the court gave it additional time to gather rebuttal affidavits. ROA 143 l.11 - 144 l.13, 162 ll.20-25.[1] It then raised the parol evidence rule—for the first time in its Rule 59 motion—but did not appeal the trial court's ruling that the parol evidence objection was also waived. ROA 171 l.1 - 172 l.6.[2]

On appeal, ARS now says that the Titlemax affiant only "claimed" Titlemax's lack of intent and suggests that he lied. ARS Initial Brief, pp. 5-6, 19-20. ARS's attempt to discredit the Titlemax affidavit is doubly flawed.

ARS first ignores the standard of review. If any evidence supports the finding, this Court affirms without weighing the evidence or judging credibility. *Partain,* 386 S.C. at 491, 689 S.E.2d at 603.

The suggestion of lying is also unfortunate. Titlemax's affiant is

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[1]ARS devotes a 14-line footnote to the affidavit's timeliness without mentioning that it dropped the objection after the trial court offered ARS additional time to respond. ARS Initial Brief, p. 5 n. 2.

[2]"[A]n unappealed ruling, right or wrong, is the law of the case." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). And the ruling was right: "An issue may not be raised for the first time in a motion to reconsider." *Johnson v. Sonoco,* 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009).

Titlemax's attorney who swore under oath. ROA 177-178 ¶¶ 1-5. His sworn testimony that Titlemax did not intend to arbitrate such claims was backed by ARS's promise to Titlemax that ARS would not engage in such abusive misbehavior. ROA 178 ¶ 5, 179 ¶ 2. The suggestion that he lied is an inference from a withdrawn two-page motion, made after Titlemax cross claimed against ARS by an attorney hired by ARS's carrier. ROA 55-56, 139 l.8 - 140 l.6, 173 l.22 - 174 l.13. While Titlemax was controlling its defense, it never moved to arbitrate.

The trial court was entitled to credit sworn testimony over inferences drawn from a withdrawn motion. If ARS wanted to rebut the Titlemax affidavit with actual evidence, it should have accepted the trial court's offer for additional time to get rebuttal affidavits. ROA 143 l.11 - 144 l.13, 162 ll.20-25.

II. *Aiken* applies.

Beyond the affidavits, the face of the complaint—by itself—supports the trial judge's related finding that an objectively reasonable consumer would not foresee the alleged misconduct in the course of normal business dealings. ROA 2-3. This finding puts this case within *Aiken* and its progeny. *See Partain*, 386 S.C. at 493-495, 689 S.E.2d at

604-605 ("bait and switch"); *Chassereau,* 373 S.C. at 172-173, 644 S.E.2d at 720-721 (harassing debt collection activities); *Aiken,* 373 S.C. at 151-152, 644 S.E.2d at 709-710 (identity theft); *Hatcher v. Edward D. Jones & Co.,* 379 S.C. 549, 553-554, 666 S.E.2d 294, 297 (Ct.App. 2008)(unauthorized transfer of funds).

The *Aiken* rule applies even if the claims fall within the arbitration clause's broadly worded terms. In *Partain,* for example, the Supreme Court agreed with this Court that the arbitration clause by its terms applied. *Partain,* 386 S.C. at 492-493, 689 S.E.2d at 604. Yet the Supreme Court reversed because a reasonable consumer would not foresee the alleged bait and switch. *Id.* 493-495, 689 S.E.2d at 604-605.

Chassereau is even closer factually. The consumer there alleged that a debt collector harassed her over the telephone, disclosed private information about her, and defamed her. *Chassereau,* 373 S.C. at 170, 644 S.E.2d at 719. The Court reasoned that a broadly worded arbitration clause did not apply because a reasonable consumer would not foresee and ought not to expect such outrageous misbehavior. *Id.* at 172-173, 644 S.E.2d at 720-721.

ARS responds several ways, including denying the trial court's *Aiken* finding. ARS says, "The circuit court did not find that

Respondent's factual allegations would constitute outrageous conduct by Appellant." ARS Initial Brief, p. 16 n. 6. But this is precisely what the court found: the court quoted the *Aiken* standard on "outrageous torts that are unforeseeable to a reasonable consumer" and explained that it was "[f]ollowing *Aiken* and *Chassereau*" when it found that the conduct alleged, if true, was unforeseeable. ROA 2-3. On reconsideration, the trial court yet again explained to ARS that, in its view, the allegations satisfy the *Aiken* and *Chassereau* rule on outrageousness. ROA 174 l.14 - 175 l.12.

ARS next minimizes Myers's injuries, arguing that it only scratched her and called her a bitch while it was trespassing on her property. ARS Initial Brief, pp. 3-4, 14. For support, it cites a police incident report, medical bills, deposition testimony, and photographs—none of which were submitted to the trial court or argued below. Because these materials were never submitted below, the facts that ARS seeks to glean from them cannot be considered on appeal. *See* Rule 210(c), SCACR ("The Record shall not, however, include matter which was not presented to the lower court or tribunal); Rule 210(h), SCACR (absent inapplicable exceptions, "[t]he appellate court will not consider any fact which does not appear in the Record on Appeal.").

Besides, laying hands on Myers and calling her a bitch to her face is still at least as outrageous as the *Chassereau* telephone calls, the *Partain* bait and switch, the *Aiken* identity theft, and the *Hatcher* unauthorized transfer of funds.

Chassereau also rebuts ARS's further point that Myers knew that Titlemax could repossess the car. In *Chassereau,* the Court noted that the consumer "must have expected" debt collection activities if she defaulted—but "would not have foreseen and would not have expected (and ought not expect)" acts "historically associated with the common law tort of outrage." 373 S.C. at 172, 644 S.E.2d at 720. So too here.

Aiken similarly answers ARS's citations to court cases on repossessions gone bad. The Supreme Court held that court cases recounting misbehavior do not make the behavior foreseeable from the standpoint of a reasonable consumer in the course of normal business dealings. *Aiken,* 373 S.C. at 151 n. 6, 644 S.E.2d at 709 n. 6. And the law books are also filled with cases on other harassing debt collections, bait and switches, and unauthorized transfers of funds.

Lastly, ARS perversely relies on the loan contracts and the statute forbidding breaches of the peace. In the loan contracts, Titlemax promised Myers that any repossession would be "as allowed by South

Carolina Code § 37-5-112." ROA 109, 112. In turn, the statute allows self-help repossessions only if they are "without the use of force or other breach of the peace." S.C. Code Ann. § 37-5-112. ARS similarly promised Titlemax that ARS would not breach the peace or use force, threat, intimidation or other unlawful means during its repossessions. ROA 210 ¶ 2.

So ARS wants this Court to hold that reasonable consumers should foresee breaches of the peace and broken promises to obey the law. This jaded view does not reflect normal business dealings. Normal consumer transactions have not regressed so far.

III. ARS cannot use Myers's arbitration clause.[3]

Myers's lack of assent does not end with the nature of her claims. Her arbitration agreement is with Titlemax, not ARS. She never assented to arbitrate anything with ARS. This lack of privity is fatal. *See R.J. Griffin & Co. v. Beach Club II Homeowner's Ass'n,* 384 F.3d 157, 164 (4th Cir. 2004)(SC law, holding that an attempt at arbitration failed for lack of privity). In the trial court, ARS nevertheless argued

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[3]ARS's lack of privity and waiver were raised below and are properly before this Court. *See I'on v. Town of Mt. Pleasant,* 338 S.C. 406, 526 S.E.2d 716 (2000)(explaining additional sustaining grounds).

that it could invoke the clause because it was Titlemax's agent and because Myers was estopped to claim a lack of privity. ROA 148 l.20 - 150 l.12. Neither contention flies.

1. ARS is not one of the arbitration clause's beneficiaries.

The arbitration clause defines who may enforce it. It states that it is for the benefit of Titlemax, its successors and assigns, and its "related third parties." ROA 110 ¶ 8, 113 ¶ 8. Myers likewise agreed to arbitrate covered claims only against Titlemax and certain "related third parties." ROA 109 ¶ 2(a), 112 ¶ 2(a). These "related third parties" include Titlemax's agents—but not its independent contractors. ROA 109 ¶ 1(g), 112 ¶ 1(g).

To invoke arbitration, ARS told the trial court, "It is undisputed ARS was acting as Titlemax's agent or employer when it repossessed Plaintiff's automobile." ROA 83. But ARS only cited allegations, not evidence, and allegations that ARS specifically denied in its answer. ROA 7-8 ¶ 5, 13 ¶ 5. "Allegations in a Complaint denied in answer are evidence of nothing." *Griffin v. Van Norman*, 302 S.C. 520, 522, 397 S.E.2d 378, 379 (Ct.App. 1990)(en banc).

The evidence shows that ARS acted as an independent contractor.

Before seeking arbitration, ARS maintained that it was an independent contractor. ROA 105 ¶ 9. Its contract with Titlemax confirms that it was "an independent contractor" with "complete discretion as to the time, place, manner and form of the repossession." ROA 210 ¶ 6. And Titlemax testified, "ARS is not and never has been an agent of Titlemax. Rather, at all times relevant to the action, ARS was an independent, third-party contractor of Titlemax." ROA 177 ¶ 4.

Other courts have dealt with this fact pattern: a consumer contracts for a loan or a service and agrees to arbitrate. The arbitration clause specifies beneficiaries and does not include independent contractors. The lender or service provider separately contracts with a debt collector, identifying the debt collector as its independent contractor. The consumer then sues the debt collector and the debt collector wants to arbitrate. Courts uniformly hold that such debt collectors cannot compel arbitration because they, as independent contractors, fall outside the arbitration clause's beneficiaries. *See, e.g., Mims v. Global Credit and Collection Corp.*, 803 F.Supp.2d 1349, 1354-1357 (S.D.Fla. 2011); *Butto v. Collecto, Inc.*, 802 F.Supp.2d 443, 447-450 (E.D.N.Y. 2011); *Lucy v. Bay Area Credit SVC LLC,* 792 F.Supp.2d 320, 324-325 (D.Conn. 2011).

These decisions are spot on. ARS likewise contracted to act as an independent contractor, with all the discretion that independent contractors enjoy, yet now wants to invoke an arbitration clause that does not protect independent contractors.

2. Myers is not estopped to raise ARS's lack of privity.

ARS also raised misplaced estoppel theories. To estop Myers from raising ARS's lack of privity with her, ARS must show that it detrimentally relied on Myers's intentional deception or concealment. *Boyd v. Bellsouth Telephone Telegraph Co., Inc.,* 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006)(stating elements for estoppel). It did not.

a. Myers's claims against ARS are not intertwined with her contract with Titlemax.

Now basic estoppel principles readily apply when a plaintiff seeks a "direct benefit" under the contract. *Pearson v. Hilton Head Hospital,* 400 S.C. 281, 294-296, 733 S.E.2d 597, 604-605 (Ct.App. 2012). The "sine qua non" of this theory is "[t]he plaintiff's *actual dependence* on the underlying contract in making out the claim against the nonsignatory defendant." *Goer v. Jasco Ind., Inc.,* 395 F.Supp.2d 308, 315 (D.S.C. 2005)(emphasis in original).

Pearson is illustrative. The claimant there was estopped because he sought benefits under his contract with a hospital, or under the hospital's contract with a professional recruiter, while trying to avoid both contracts' arbitration clauses. *Pearson,* 400 S.C. at 296-297, 733 S.E.2d at 605.

But that is not this case. Myers is not seeking any benefit under the contract, much less a direct one. Her tort claims do not rely on the loan contract at all.

Two Fourth Circuit decisions illustrate the distinction. In one, a home builder contracted with a developer to build homes in South Carolina. Their construction contract had an arbitration clause. The homeowners association later sued the builder for negligence and breach of the implied warranty of good workmanship. The builder argued that its arbitration agreement with the developer applied because the construction contract benefitted the homeowners. The Fourth Circuit disagreed, holding that estoppel did not apply because claims asserted arose from South Carolina common law, not from the contract with the arbitration clause. *R.J. Griffin,* 384 F.3d at 162-164.

In the second case, South Carolina mortgage holders contracted to arbitrate claims against their mortgage lender. The holders then sued

the insurer over their mortgage-insurance premiums. The insurer argued that it could enforce the arbitration clause because the contract with the lender required mortgage insurance. The Fourth Circuit disagreed, holding that estoppel did not apply because the claims over the mortgage insurance arose extra-contractually. *Brantley v. Republic Mortg. Ins. Co.,* 424 F.3d 392, 395-396 (4th Cir. 2005).

Myers's tort claims likewise exist outside any contract. She is not trying to have her cake and eat it too. She is trying to hold ARS accountable under tort law that applies to all trespassers who scare, assault, and batter property owners.

b. Myers does not claim that Titlemax and ARS acted in concert.

ARS lastly argued a theory involving substantially interdependent and concerted misconduct by the nonsignatory and a signatory to the agreement. *Pearson* noted this theory without suggesting that it, by itself, warrants estoppel. *Pearson,* 400 S.C. at 295, 733 S.E.2d at 604.

Courts across the country reject this theory as an unwarranted expansion of estoppel law, reasoning in part that the theory eliminates

the detrimental reliance requirement.[4]

This Court should join these jurisdictions. In South Carolina, estoppel requires detrimental reliance or prejudice. *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime,* 307 S.C. 339, 344, 415 S.E.2d 384, 387 (1992). So dropping the requirement does not place arbitration "upon the same footing as other contracts." *Volt Information Sciences, Inc. v. Bd. of Trustees of the Leland Stanford Junior University,* 489 U.S. 468, 474 (1989). It singles out arbitration for an unwarranted dispensation from normal estoppel law.

The theory also would not apply here even if the Court wanted to

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[4] *See Hirsch v. Amper Fin. Serv., LLC,* 215 N.J. 174, 192-193, 71 A.3d 849, 859 (2013)("Stated simply, we reject intertwinement as a theory for compelling arbitration when its application is untethered to any written arbitration clause between the parties, evidence of detrimental reliance, or at a minimum an oral agreement to submit to arbitration."); *Goldman v. KPMG LLP,* 92 Cal.Rptr.3d 534, 542, 173 Cal.App.4th 209, 219 (CalApp. 2009)(surveying and joining cases that "have expressly stated that substantially interdependent and concerted misconduct is not, by itself, sufficient for the application of equitable estoppel."); *In Re Merrill Lynch Trust Co., FSB,* 235 S.W.3d 185, 191 (Tex. 2007)("But we have never compelled arbitration based solely on substantially interdependent and concerted misconduct, and for several reasons we decline to do so here."); *B.C. Rodgers Poultry, Inc. v. Wedgeworth,* 911 So.2d 483, 492 (Miss. 2005)(rejecting the "intertwined claims test" where the signatory and nonsignatory lack an alter ego or other close legal relationship and the claims do not depend on the agreement); *Peach v. CIM Ins. Corp.,* 352 Ill.App.3d 691, 696-698, 816 N.E.2d 668, 673-675 (Ill.App. 2004)(rejecting intertwined test because it eliminates the detrimental reliance requirement).

adopt it. For the theory to work, there must be allegations of "coordinated behavior between a signatory and a nonsignatory" defendant. *Aggarao v. MOL Ship Mgmt. Co., Ltd.,* 675 F.3d 355, 374 (4th Cir. 2012). Absent coordinated behavior, there is no concerted action to trigger the concerted action exception to privity. *See Brantley*, 424 F.3d at 396 (holding that estoppel did not apply when the claims against the nonsignatory did not implicate the signatory).

Myers did not allege Titlemax and ARS jointly acted in concert to harm her. She alleged that men trespassed on to her property and that one of them struck her and shouted profanities and threats at her. ROA 8-9 ¶¶ 6, 8. Titlemax's and ARS's alleged liability is based on *respondeat superior* liability for these men's acts. ROA 7-8 ¶ 5.

Myers has since learned that Titlemax made ARS promise that ARS would not breach the peace or use threats and intimidation during its repossessions, that Titlemax had "no control" over the repossession, and that ARS enjoyed "complete discretion as to the time, place, manner and form of the repossession." ROA 210 ¶¶ 2, 6. This destroys the notion that the two acted in concert.

IV. ARS waived any arbitration rights it had.

ARS lastly waived any arbitration rights that it may have had under the Titlemax contract. In evaluating waiver, courts consider the length of time between the action's commencement and the motion to compel arbitration; the extent of discovery taken before moving to compel arbitration; and whether the non-moving party was prejudiced. *Rhodes v. Benson Chrysler Plymouth, Inc.,* 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct.App. 2007). Taking depositions and continuing discovery after moving to arbitrate may likewise constitute a waiver. *Evans v. Accent Manufactured Homes, Inc.,* 352 S.C. 544, 550-551, 575 S.E.2d 74, 76-77 (Ct.App. 2003).

All of these factors cut in favor of finding a waiver. ARS did not plead arbitration in its answer, and said nothing about it until over a year after suit was filed. ROA 104 ¶ 3. During this time, ARS propounded and received responses to three separate sets of interrogatories, a set of production requests, and a set of requests to admit. ROA 104-105 ¶ 4. After it moved to compel, ARS deposed Myers; participated in depositions of its employee and of a law enforcement officer; and participated in court-ordered mediation. ROA 105 ¶¶ 5-6.

ARS then waited until the day the case was scheduled for trial before having its motion heard. ROA ¶ 7. It now uses the fruits of its discovery on appeal, citing deposition testimony, bills, photographs, and a police incident report. ARS Initial Brief, pp. 3-4, 14.

ARS could not have gotten any of this in arbitration. ROA 105 ¶ 7. The arbitration clause warns that "[p]re-arbitration discovery may be limited," and specifically forbids the arbitrator from using "any federal or state rules of civil procedure," which includes the rules granting discovery. ROA 109, 110 ¶ 5, 112, 113 ¶ 5.

The South Carolina Arbitration Act similarly forbids normal pre-trial discovery. Depositions are out unless the witness cannot be subpoenaed for the hearing or is unable to attend the hearing, and parties cannot get documents before the hearing. Document productions are limited to subpoenas duces tecum for witnesses to produce documents at the hearing. S.C. Code Ann. § 15-48-80.

The arbitration forums' rules likewise limit discovery. Of the two forums listed, the National Arbitration Forum no longer arbitrates consumer disputes. *CompuserveCredit Corp. v. Greenwood,* ___ U.S. ___, ___ n. 2, 132 S.Ct. 665, 677 n. 2 (2012)(Ginsburg, in dissent citing the NAF's consent decree to stop handling consumer arbitrations as of

2009). The remaining forum listed does not provide for depositions in consumer disputes, and does not allow document exchanges as a matter of right. Am. Arbitration Ass'n, Consumer Arbitration Rules, Rule 22. The parties are left selecting a local arbitrator to arbitrate under that arbitrator's rules—without being able to apply the normal rules governing discovery. ROA 109-110 ¶¶ 4-5, 112-113 ¶¶ 4-5.

ARS will likely try to minimize all this by arguing that some of the discovery occurred before it knew about the arbitration agreement. But the prejudice to Myers is the same. Myers underwent the time and expense of responding to ARS's three separate sets of interrogatories, a set of production requests, and a set of requests to admit—thus giving ARS pre-hearing evidence that it would never get in arbitration. ROA 104-105 ¶¶ 4, 8.

Besides, ARS knew about the arbitration clause when it moved to compel arbitration. After making the motion, ARS deposed Myers, participated in a deposition of its employee, and participated in a deposition of a law enforcement officer. ROA 105 ¶¶ 5, 7-8.

Depositions can't be considered "limited discovery" in any sense of the phrase. *Rhodes,* 374 S.C. 128 n. 3, 647 S.E.2d at 252 n. 3. The depositions taken here are also indistinguishable from the *Evans*

situation. In that case, a party deposed the plaintiff, and allowed its employee to be deposed, after it moved to compel. This Court affirmed the trial court's finding of waiver, reasoning that the party seeking arbitration bore the onus to halt discovery once it moved to compel. *Evans,* 352 S.C. at 551, 575 S.E.2d at 77. ARS bore the same onus.

That is not all. After taking and participating in the depositions, and gathering responses to three sets of interrogatories, a set of production requests, and a set of requests to admit, ARS participated in court-ordered mediation. ROA 105 ¶ 6. This put Myers to the time and expense of preparing to mediate with ARS and gave ARS a preview of Myers's case that it would not get in arbitration.

This distinguishes the *Dean* mediation. In *Dean,* the party seeking to arbitrate only sent out a single production request before it participated in the required pre-suit mediation. After mediation failed, the party seeking arbitration then moved for arbitration in lieu of answering the complaint. *Dean v. Heritage Healthcare of Ridgeway, LLC,* 408 S.C. 371, 377, 759 S.E.2d 727, 731 (2014). In contrast, ARS got substantially more discovery, including depositions, and chose to participate in court-required mediation while its motion to arbitrate was pending. ARS should not be able to keep arbitration in its hip

pocket as a fall back if mediation failed.

Finally, the Court in *Rhodes,* which affirmed a finding of waiver, emphasized that the party seeking arbitration did not get a ruling until after the case was scheduled for trial. *Rhodes,* 374 S.C. at 125, 128, 647 S.E.2d at 250, 252. This case is worse. ARS did not even get its motion heard until the day the case was scheduled to be tried. ROA 105 ¶ 7.

Conclusion

The trial court properly found that Myers never assented to arbitrate her claims and that the *Aiken* rule applies. Even if ARS could overcome these hurdles, and it cannot, it cannot overcome its lack of privity or its waiver. The order denying arbitration must be affirmed.

Robert N. Hill (SC Bar # 65074)
Law Office of Robert Hill
P.O. Box 1323
Lexington, SC 29071
803-520-4370

Mark B. Tinsley (S.C. Bar # 15597)
Gooding & Gooding, P.A.
P.O. Box 1000
Allendale, SC 29810

Attorneys for the Respondent Joyce Myers

The State of South Carolina
In the Court of Appeals

Appeal from Allendale County
Court of Common Pleas

Honorable Perry M. Buckner

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SC Court of Appeals

Civil Action # 2013-CP-03-00147

Joyce Myers, ... Respondent

vs.

Titlemax of South Carolina, Inc. and Affordable Recovery Solutions a/k/a ARS, of whom

Affordable Recovery Solutions a/k/a ARS is the ..... Appellant

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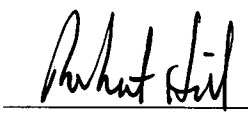
Certificate of Rule 211(b), SCACR Compliance

I certify that the Respondent's Final Brief complies with Rule 211(b), SCACR.



Robert Hill
S.C. Bar # 65074

Law Office of Robert Hill
P.O. Box 1323
Lexington, SC 29071
803-520-4370
attorneyhill@twc.com