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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, Circuit Court Judge

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SC Court of Appeals

Circuit Court Case No.: 2006-CP-02-1230

Court of Appeals Docket No.: 03-27371

Heather Herron, Natalie Armstrong, Michael Ritz, Julie Freeman, Christine Watts, Michael Blease and Michael Watts, individually and for the benefit of all car buyers whom paid "administrative fees" as described below to Defendants, ... Respondents,

v.

Century BMW d/b/a Sonic Automotive; Dick Dyer & Associates, Inc.; Galeana Chrysler Plymouth, Inc. a/k/a Galeana Chrysler Jeep, Inc.; J.L.H. Investments, LP a/k/a Hendrick Honda; Overland, Inc., d/b/a Land Rover of Columbia; Taylor Toyota a/k/a Taylor Investments, Inc.; and Toyota of Greenville, Inc., ... Defendants,

of whom Century BMW d/b/a Sonic Automotive is the ..... Appellant.

RESPONDENTS' FINAL BRIEF

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RESPONDENTS' FINAL BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

COUNTER STATEMENT OF ISSUES ON APPEAL

I. Are the Circuit Court's Factual Findings Supported by the Evidence and Thus, Should the Order Denying Century BMW's Motion to Compel Arbitration be Affirmed?
(Appellant's Issues III, IV, V, and VI.)

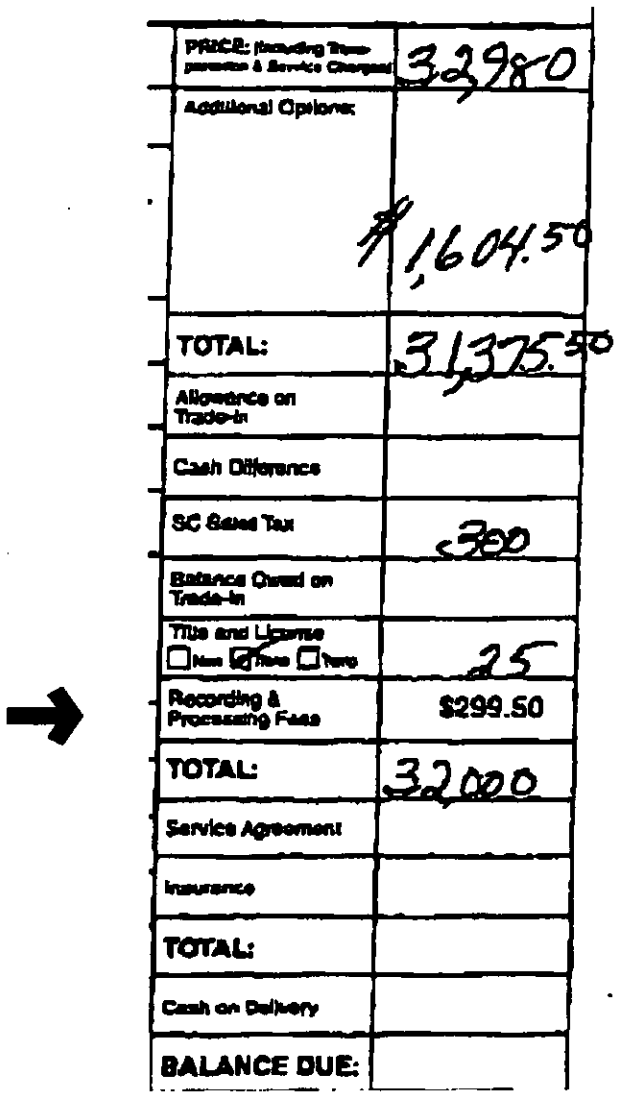
II. Was the Circuit Court Correct in Holding the Arbitration Agreement to be Unenforceable When the Facts in This Case are Just Like Those in Simpson?

III. Did the Circuit Court Correctly Follow the Simpson Court in Viewing the Century BMW Arbitration Agreement With "Considerable Skepticism?"
(Appellant's Issue I.)

IV. Was the Circuit Court Correct in Following the Ruling in Simpson That the Presumption that a Party Has Read and Understood a Contract Does Not Mandate Enforcement of Every Arbitration Agreement?
(Appellant's Issue II.)

COUNTER STATEMENT OF THE CASE

This case was initiated on August 29, 2006. ROA, p. 39. Plaintiffs allege that Appellant Century BMW d/b/a Sonic Automotive ("Century BMW") and the other Defendant Car Dealers are charging illegal procurement fees (often referred to as an "administrative fee," "recording and processing fee," "closing fee," or "dealer documentation and closing fees" (collectively "administrative fees.")). Respondent Century BMW's invoice provides in part:



PRICE: [illegible]	32980
Additional Options:	#1,604.50
TOTAL:	31,375.50
Allowance on Trade-in	
Cash Difference	
SC Sales Tax	300
Balance Owed on Trade-in	
Title and License ☐ New ☑ Here ☐ Trans	25
Recording & Processing Fees	$299.50
TOTAL:	32000
Service Agreement	
Insurance	
TOTAL:	
Cash on Delivery	
BALANCE DUE:	

ROA, p. 1104. The pre-printed and typed-in "Recording and Processing Fees" ($299.50) above is an illegal administrative fee.

The illegal administrative fees are deliberately placed as separate line items on Defendant Car Dealers' invoices. These illegal administrative fees are often placed along with mandatory fees, such as taxes, tags, and title. As here, this implies that the illegal administrative fees, like the payment of taxes, fees for tags, and fees for obtaining title, are separate set fees and that there is no option but to pay the administrative fee with every car purchase. Consequently, car buyers purchase cars based on the total sticker price and are mislead into believing that any discount received is off of the sticker price and that additional illegal administrative fees are special mandatory fees.[1]

Plaintiffs allege that Defendant Car Dealers are charging administrative fees in violation of statutory law *inter alia* S.C. Code Ann. § 37-2-307. S.C. Code Ann. § 37-2-307 is a consumer protection statute that allows a dealership to do what would otherwise be illegal, charge administrative fees, only if the dealership follows strict rules. S.C. Code Ann. § 37-2-307 provides:

> Every motor vehicle dealer charging closing fees on a motor vehicle sales contract shall pay a one-time registration fee of ten dollars during each state fiscal year to the Department of Consumer Affairs. The closing fee must be included in the advertised price of the motor vehicle, disclosed on the sales contract, and displayed in a conspicuous location in the motor vehicle dealership.

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[1]Defendant Car Dealers' conduct is not unlike that found to be an unfair trade practice by an Ohio Court in Motzer Dodge Jeep Eagle, Inc. v. Ohio Attorney General, 642 N.E.2d 20 (Oh. Ct. App. 1994). In 1996, the South Carolina Supreme Court also suggested that charging administrative fees is an unfair trade practice. "[W]e do not imply that such [C]losing fees may not be attacked on other grounds, such as claims for fraud, misrepresentation or unfair trade practices." Fanning v. Fritz Pontiac-Cadillac Buick, 322 S.C. 399, n. 8, 472 S.E.2d 242, n. 8 (1996).

This statute is designed to protect the public and sets forth strict rules that Plaintiffs allege the Defendant Car Dealers have not followed.

Plaintiffs allege Defendant Car Dealers have not availed themselves of the limited exceptions in S.C. Code Ann. § 37-2-307 and that every Defendant Car Dealer did one or more of the following illegal acts:

a. failed to register with the Department of Consumer Affairs. ROA, p. 1177. (sample chart showing dealers that failed to register);

b. failed to individually register annually with the Department of Consumer Affairs;

c. charged illegal "administrative fees" in excess of the amount for which it registered;

d. failed to disclose the illegal "administrative fees" on sales contracts;

e. charged illegal "administrative fees" in excess of their costs. ROA, p. 1186 (chart showing how some car dealers unreasonably charge administrative fees solely for profit);

f. failed to display the charging of illegal "administrative fees" in a conspicuous location in the dealership;

g. advertised deceptively and illegally by failing to include the "administrative fees" in the advertised price. ROA, pp. 1179-1184 (examples of car dealer advertising which fails to disclose the administrative fee in the advertised price as required by S.C. Code Ann. § 37-2-307); and

h. created a closing procedure to illegally add "administrative fees."

Respondent Christine Watts and the other Plaintiffs in this case are South Carolina consumers whom paid illegal administrative fees. Plaintiffs have filed an Amended Complaint which alleges three causes of action:

1. Violation of S.C. Code Ann. § 56-15-110 *et. seq.* ("Dealers Act");
2. Civil Conspiracy; and
3. Declaratory Judgement to determine rights and legal relations under S.C. Code Ann. § 56-15-10 and/or S.C. Code Ann. § 37-2-307 ("Consumer Protection Code").

ROA, pp. 77-147. Respondents are bringing this action both individually and pursuant to S.C. Code Ann. § 56-5-110 for the benefit of all others who paid "administrative fees" to Defendant Car Dealers.

The South Carolina General Assembly has expressly provided that Respondents can bring this action on behalf of all persons who paid an administrative fee. S.C. Code Ann. § 56-15-110 provides:

> (1) In addition to temporary or permanent injunctive relief as provided in § 56-15-40(3)(C), any person who shall be injured in his business or property by reason of anything forbidden in this chapter may sue therefor in the court of common pleas and shall recover double the actual damage by him sustained, and the cost of suit, including a reasonable attorney's fee.
>
> (2) **When such action is on of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for benefit of the whole, including actions for injunctive relief.**
>
> (3) In an action for money damages, if the jury finds that the Defendant acted maliciously, the jury may award punitive damages not to exceed three times the actual damages.
>
> (4) A final judgment, order or decree rendered against a person in any civil, criminal or administrative proceeding under the United States antitrust laws, under the Federal Trade Commission Act, or under this chapter shall constitute prima facie evidence against such person subject to the conditions of the United States Antitrust Law (15 U.S.C.16).

S.C. Code Ann. §56-15-110 (emphasis added).

The initial Complaint included four Plaintiffs and multiple car dealers.[2] ROA, pp. 44-59. On October 31, 2006, prior to any Defendant Car Dealers' Answer, Respondents filed a First Amended Complaint which included Respondent Christine Watts and claims against Appellant Century BMW. ROA, pp. 77-147. On February 5, 2008, Judge Early granted a motion to dismiss filed by the Plaintiffs, which dismissed without prejudice all but the seven Defendants in this action.[3] ROA, p. 14.

On December 29, 2006, Appellant Century BMW filed the motion to compel arbitration at issue. ROA, p. 151. On March 9, 2007, Respondent Watts submitted a brief addressing the motion to compel arbitration, as part of Plaintiff's Memorandum in Opposition to Motions to Dismiss. ROA, p. 173. Appellant Century BMW submitted a brief in support of the motion on March 26, 2007. ROA, p. 334.

On March 26, 2007, the South Carolina Supreme Court, in Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 30, 644 S.E.2d 663, 671 (S.C. 2007), issued an opinion that governs the issues in this motion.[4] In November 2007, Respondent Christine Watts and Appellant Century BMW submitted a second memorandum addressing the Simpson case. ROA, p. 344; ROA, p.

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[2]Respondents' counsel's investigation at that time had revealed that the charging of the illegal administrative fees was an industry-wide cheating technique. Because the charging of illegal administrative fees was industry-wide and the action was of "common or general interest to many persons" it was therefore appropriate under S.C. Code Ann. §56-15-110(2) for Respondents to bring the action against multiple defendants.

[3]The effect of the this ruling was to make the Herron case a seven Plaintiff and seven Defendant action. This motion was filed to address Judge Early's serious concerns on whether the named Plaintiffs had standing to sue Defendants with whom they had not transacted business.

[4]The United States Supreme Court denied certiorari on this decision – MSA of Myrtle Beach v. Simpson, 128 S.Ct. 493 (U.S.2007).

385.

This motion was argued on November 30, 2007. At the hearing, the Court gave the parties the option to take depositions concerning the arbitration agreement. The parties took depositions on January 29, 2008 and January 30, 2008. On February 18, 2008, both parties submitted additional supplemental memoranda based on the deposition testimony. ROA, p. 496; ROA, p. 421. On February 22, 2008, the parties submitted replies to the supplemental memoranda. ROA, p. 643; ROA, p. 667.

On March 10, 2008, the circuit court denied Century BMW's motion to compel arbitration. ROA, p. 1. Century BMW served its notice of appeal on March 12, 2008.

STATEMENT OF FACTS[5]

On January 25, 2005, Plaintiff Christine Watts, a twenty-four year old college student, and her father, Michael Watts, a garage door salesman, purchased a car from Defendant Century BMW. ROA, p. 896, l. 15 - ROA, p. 897, l. 8; ROA, p. 1127; ROA, p. 1101, ¶ 2; ROA, p. 948, ll. 14-20. The vehicle was a graduation present for Ms. Watts. ROA, p. 902, ll. 11-14. The car was purchased to be Ms. Watts's primary source of transportation and was needed so that she could get back and forth to work. ROA, p. 998, ll. 11-20.

After the parties agreed to a price for the car, Century BMW's F&I manager took Ms. Watts and her father into a small cubicle to sign paperwork. ROA, p. 919, ll. 21-25; ROA, p. 928, ll. 9-21; ROA, p. 1025, ll. 15-18; ROA, p. 1025, ll. 23-25; ROA, p. 978, ll. 3-14. Christine

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[5]Respondent Christine Watts's and her father, Michael Watts's, recollections of the events surrounding the execution of the Century BMW arbitration agreement are undisputed. Nobody from Century BMW remembered this transaction. ROA, p. 1015, l. 19 to ROA, p. 1016, l. 12; ROA, p. 1017, ll. 7-22; ROA, p. 1020, ll. 12-16; and ROA, p. 1024, ll. 15-19.

Watts in her affidavit stated that the documents were "hastily presented." ROA, p. 1101, ¶ 4. Century BMW refers to this process as "rolling out the paper." ROA, p. 1025, ll. 15-18 and ROA, p. 1025, ll. 23-25.

The Wattses say they were presented with a big packet of documents containing flags indicating where the Wattses were supposed to sign. ROA, p. 932, ll. 10-20; ROA, p. 990, l. 2 - ROA, p. 991, l. 17. The Wattses signed at least eight different documents.[6] Copies of documents provided by Century BMW signed by the Wattses. Multiple copies of some of the documents were signed by the Wattses. ROA, p. 985, ll. 9-11. At least three of the eight documents presented in the packet were required to be signed by law. ROA, p. 1066, ll. 1-16; ROA, p. 1067, ll. 10-19; ROA, p. 1073, ll. 13-18; ROA, p. 1074, l. 21 to ROA, p. 1075, l. 4. *See also* ROA, p. 930, ll. 7-13. The Century BMW representative whom met with the Watts in the cubicle was the Finance and Income Manager (F&I manager). ROA, p. 1026, ll. 8-19.

The arbitration agreement at issue was one of the documents mixed within the packet. ROA, p. 1022, ll. 7-17. The arbitration agreement is a form contract drafted by Century BMW. ROA, p. 1044, ll. 7-14. The arbitration agreement uses a small font. ROA, p. 1100.

The Wattses say there was no discussion with the Century BMW F&I manager about the

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[6]Century BMW makes an untrue statement that the Wattses "refused to sign at least ten different agreements" in support of an argument that signing the arbitration agreement was optional. Century BMW brief, p. 5. Century BMW is referring to one document that was signed by Michael Watts. See ROA, p. 1108. This document list items that Century BMW explained and tried to "sell" to the Wattses. ROA, p. 920, ll. 3-14 and ROA, p. 922, ll. 7-11. This document on its face states that "All products are optional." ROA, p. 1108. The fact that the Wattses did not purchase items that were explained to them and signed a document that states that "All products are optional" has nothing to do with whether signing the arbitration agreement was optional.

arbitration agreement. ROA, p. 986, ll. 12-15. Century BMW's General Manager did not know what was discussed with the Wattses but stated that he would expect his people to tell the customer that the agreement is "a document providing a remedy for the customer without having to go to court." ROA, p. 1023, l. 8 to ROA, p. 1024, l. 10. The General Manager testified as follows:

> Q: Can you sit here and tell me what this form contains?
> A. I'm not an expert, but I can tell you that this is a document providing remedy for the customer without having to go to court.
> Q. If you were to explain it, that's what you would say?
> A. Yes, sir.
> Q. Is there anything else you'd tell them other than it's a remedy for the customer and you don't have to go to court?
> . . .
> A. No, sir, I would tell them nothing else.
> Q. Okay. And is that what you expect your employees to tell the -- the people?
> A. They're more informed than I.
> Q Well, is that what you expect them to tell them, at least that?
> A. At least that.
> Q. Okay. Is there anything else you expect to tell -- them to tell them?
> A. No, sir.

Id. Anyone would sign the arbitration agreement if given the misleading explanation touted by Century BMW's General Manager.

The General Manager stated that the F&I Manager's "practice" was to present the individual documents and point to where the customer was supposed to sign. ROA, p. 1029, l. 14 - ROA, p. 1030, l. 1. The F&I Manager would place his finger on the document and say "sign here." ROA, p. 1029, l. 1 - ROA, p. 1030, l. 1. This practice leads to only one conclusion, that

signing the document is required in order to purchase a car.[7]

The Wattses understood that they were required to sign the arbitration agreement in order to purchase the car. Christine Watts's affidavit provides as follows: "The 'Arbitration Agreement' was not discussed or explained to me and was given to me on a 'take-it-or-leave-it' basis." ROA, p. 1101, ¶ 5. The Wattses, in their depositions, testified that they believed they were required to sign the arbitration agreement in order to purchase the car. Michael Watts testified as follows:

> Q. And I take it, from what you've said, you didn't object to signing the document at the time.
> A. I didn't know I didn't have to.

ROA, p. 993, ll. 10-12. Christine Watts stated:

> Q. Okay. Let's go to Number 14 [arbitration agreement]. Okay? Was CBM-14 passed to you?
> A. I'm sure that it was in the packet.
> Q. Okay. Is that your signature?
> A. That is correct.
> Q. Did you know what you were signing?
> A. No, I did not.
> Q. Why did you sign it?
> A. I thought I had to to buy the car.

ROA, p. 989, ll. 10-18. Ms. Watts also stated:

> Q. Okay. Okay. Were you of the opinion you had to buy -- that you had to sign the

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[7]This conclusion is further supported by the fact that in over 6,000 transactions, the only person the General Manager could name who was ever allowed to buy a car without signing the arbitration agreement was Brad Martin, Esq., a lawyer for the Defendant Car Dealers in this case. ROA, p. 1037, l. 19 to ROA, p. 1038, l. 14 and ROA, p. 1056, ll. 20-23. Century BMW sells 1,200 cars annually, has used the arbitration agreement since at least 2002, and the General Manager can only recall the lawyer in this case, whom was allowed to buy a car without signing the arbitration agreement. Id.

documents where presented with the flags in order to get the car, or not?

. . .

A. Yes.

. . .

Q. Okay. Any doubt in your mind about that?

. . .

A. No.

ROA, p. 997, ll. 6-17.

Q. Certainly. Why did you think you had to sign any or all of these documents in order to get the car?

A. The way it was presented, I just thought I had to sign everything.

ROA, p. 990, ll. 2-6. The Wattses testimony is clear and the Wattses are the only ones who remember the transaction.

ARGUMENT

I. The Circuit Court's Findings are Supported by Evidence and the Order Denying Century BMW's Motion to Compel Arbitration Should be Affirmed.

The circuit court correctly found that Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 30, 644 S.E.2d 663, 671 (S.C.2007) is the controlling authority. The Simpson court held a car dealer's attempt in a form contract to prevent a consumer from prosecuting statutory rights in arbitration was unconscionable and unenforceable. Simpson, 644 S.E.2d at 668-671. The circuit court correctly applied the Simpson analysis to the facts at issue and found that the Century BMW arbitration agreement to be unenforceable. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (S.C.2007).

The circuit court's factual determinations on arbitrability should be affirmed if there is "any evidence" reasonably supporting the findings.

> Arbitrability determinations are subject to *de novo* review. Nevertheless, **a Circuit Court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings.**

Id. (emphasis added)(internal citations omitted). As discussed below, the evidence here reasonably supports the circuit court's findings that : (A) the Century BMW arbitration agreement is an adhesion contract; (B) the Wattses had an absence of meaningful choice in entering into the arbitration agreement; and (C) the arbitration agreement contains one-sided and oppressive terms. Accordingly, the circuit court's order denying the motion to compel arbitration should be affirmed.

A. The Century BMW Arbitration Agreement is an Adhesion Contract.

The evidence reasonably supports the circuit court's finding that the arbitration agreement is an adhesion contract. "[A]n adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." Simpson, 644 S.E.2d at 669. Adhesion contracts "are standard in the automobile retail industry." Id.

The arbitration agreement is a standard form contract drafted by Century BMW. ROA, p. 1044, ll. 7-14. The arbitration agreement has only blanks that can be filled in depending on the date of the transaction, the VIN number of the vehicle, the name of the customer, and the name of the dealership [Century BMW's parent company, Sonic Automotive, Inc., owns multiple car dealerships]. ROA, p. 1100.

Similarly, the evidence reasonably supports the finding that Century BMW presents the arbitration agreement on a take-it-or-leave-it basis with terms that were not negotiable. Century BMW's procedures and method of presentation lead to the conclusion that the arbitration

agreement must be signed to purchase the car. Century BMW's General Manager stated that the F&I Manager's "practice" was to present the individual documents and place his finger on the paper, pointing to where the customer was supposed to sign and say "sign here." ROA, p. 1029, l. 1 - ROA, p. 1030, l. 1. This practice indicates that signing the document is required in order to purchase a car. This conclusion is further supported by the fact that in over 6,000 transactions, the only person the General Manager could name who ever bought a car without signing the arbitration agreement was Brad Martin, Esq., a lawyer for the Defendant Car Dealers in this case. ROA, p. 1037, l. 19 - ROA, p. 1038, l. 14 and ROA, p. 1056, ll. 20-23.

The Wattses testimony shows that Century BMW presents its arbitration agreement on a take-it-or-leave-it basis.

> Q. Certainly. Why did you think you had to sign any or all of these documents in order to get the car?
> A. The way it was presented, I just thought I had to sign everything.

ROA, p. 997, ll. 6-17; ROA, p. 990, ll. 2-6. *See also* ROA, p. 1101, ¶ 5 ("The 'Arbitration Agreement' was not discussed or explained to me and was given to me on a 'take-it-or-leave-it' basis."); ROA, p. 993, ll. 10-12. Moreover, Plaintiff Watts did not participate in the drafting of the arbitration agreement and had no voice in the formulation of its terms. ROA, p. 1102, ¶ 6.

Century BMW's procedures and the Watts's testimony[8] show that the terms of the arbitration agreement were not negotiable. Furthermore, the arbitration agreement is undisputably a form contract. Thus, the evidence reasonably supports the circuit court's finding that the arbitration agreement is an adhesion contract.

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[8]The Wattses' testimony is the only testimony about the events surrounding the execution of the agreement. The Wattses testified they believed they were required to sign the agreement in order to get the car. Century BMW was unable to produce any witness whom remembered the transaction.

B. The Wattses Had an Absence of Meaningful Choice in Entering Into the Arbitration Agreement.

The circuit court's finding that there was an absence of meaningful choice in agreeing to arbitrate and waive the statutory right to participate in a multi-plaintiff action is supported by the evidence. The Simpson case describes the absence of meaningful choice as follows:

> Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. In determining whether a contract was "tainted by an absence of meaningful choice," courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.

Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. at 25, 644 S.E.2d at 669 (internal citations omitted).

Because an automobile is a "necessity" in everyday life, the Simpson Court found this factor should be considered in determining "whether a consumer had a meaningful choice in negotiating the arbitration agreement." Simpson, 373 S.C. at 26, 644 S.E.2d at 669.

Applying this analysis, the Simpson Court provided as follow:

> [T]he contract between Simpson and Addy involved a vehicle intended for use as Simpson's primary transportation, which is critically important in modern day society. Applying the factors considered by the Fourth Circuit in analyzing arbitration clauses, we also acknowledge Simpson's claim that she did not possess the business judgment necessary to make her aware of the implications of the arbitration agreement, and that she did not have a lawyer present to provide any assistance in the matter. *But see Munoz*, 343 S.C. 531, 542 S.E.2d 360 (failing to factor in the weaker party's status as a consumer in analyzing an unconscionability claim in an arbitration agreement between a consumer and a lender). Similarly, we note that Simpson's allegation that the contract was "hastily" presented for her signature.

Simpson, 373 S.C. at 26, 644 S.E.2d at 670. The circuit court was correct in its application of the Simpson analysis and its finding that the Wattses had an absence of meaningful choice.

i. There was a Disparity in Bargaining Power and Sophistication of the Parties.

The facts here reasonably support the finding that there was a disparity in bargaining power and the relative sophistication between the parties. When the vehicle was purchased, Ms. Watts was a student at the College of Charleston. ROA, p. 948, ll. 16-20; ROA, p. 888, l. 23 to ROA, p. 889, l. 3. Michael Watts sells garage doors. ROA, p. 896, l. 15 to ROA, p. 897, l. 7. The Wattses did not have an attorney present when they signed the agreement. ROA, p. 1102, ¶ 8. The Plaintiffs were not sophisticated and not business concerns. *See* Simpson, 373 S.C. at 26, 644 S.E.2d at 669 ("In determining whether a contract was 'tainted by an absence of meaning choice' courts should take into account...whether the plaintiff is a substantial business concern...").[1]

As noted by the circuit court, Century BMW is owned by Sonic Automotive, Inc., a large corporation that owns dozens of cars dealerships. *See* http://www.sonicautomotive.com. Sonic Automotive, Inc. drafted the arbitration agreement and has engaged in thousands of transactions where arbitration clauses were used. Sonic is a sophisticated car dealer with years of arbitration clause use. ROA, p. 1044, ll. 7-14; ROA, p. 1033, ll. 9-23.

Notably, Century BMW in their brief, does not argue that there was equal bargaining power and sophistication between the parties. As such, the circuit court's finding on this issue was correct and reasonably supported by the evidence.

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[1]The circuit court correctly rejected Century BMW's misleading attempt to argue that Christine Watts should be classified based on her job in 2008 instead of at the time of her purchase. *See* ROA, p. 5. ("Century BMW argues that Ms. Watts is sophisticated because in 2008 she works as an auditor. However, in 2005, when the vehicle was purchased, Ms. Watts was a student at the College of Charleston.")

ii. The Bargaining Process Was Unfair.

The circuit court's finding that there was unfairness in the bargaining process is reasonably supported by the evidence. Century BMW inconspicuously placed the arbitration agreement within a series of documents that included documents that were required to be signed by law and then had its F&I Manager placed his finger on each document (whether required to be signed by law or not) and say sign here. ROA, p. 1029, l. 14 - ROA, p. 1030, l. 1 (point and sign); ROA, p. 1066, ll.1-16 (documents required to be signed by law); ROA, p. 1067, ll. 10-19; ROA, p. 1074, ll. 13-18; ROA, p. 1074; l. 21 - ROA, p. 1075, l. 2; *see also* ROA, p. 930, ll. 7-13. There was nothing telling the Wattses that the arbitration agreement, unlike the documents required to be signed by law was not mandatory. This procedure indicates that signing all of the documents is mandatory and is indicative of unfairness in the bargaining process. Simpson, 373 S.C. at 25, 644 S.E.2d at 669 ("Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue.").

The Watts stated that there was no discussion of the arbitration agreement. ROA, p. 986, ll. 12-15. Century BMW's General Manager did not know what was discussed with the Wattses but stated that he would "expect" his people to tell the customer that the agreement is "a document providing a remedy for the customer without having to go to court." ROA, p. 1023, l. 8 - ROA, p. 1024, l. 10. The circuit court correctly found that this statement to be "sorely lacking because the arbitration agreement in actuality takes away remedies and statutory rights." ROA, p. 6. The lack of a Century BMW full explanation is further evidence showing the circuit court was correct in finding that there was a fundamental unfairness in the bargaining process.

iii. There Was an Element of Surprise by the Inclusion of the Arbitration Agreement.

The circuit court's finding that there was an element of surprise involved in the inclusion of the arbitration agreement is reasonably supported by the evidence. The circuit court correctly found that none of the signatories of the arbitration agreement (the Wattses nor the F&I manager) understood what they were signing. Neither of the Wattses had ever participated in an arbitration nor had any understanding of arbitration. ROA, p. 901, ll. 19-21; ROA, p. 959; ll. 3-6; ROA, p. 1102, ¶ 7.

Similarly, Century BMW's Rule 30(b)(6) representative as the person most knowledgable on the arbitration agreement testified as follows:

> Q. Okay. Does Courtney James [the F&I Manager] know anymore about how arbitration works than you, or would you say you're better?
>
> MR. BLACK: It's Corey James.
>
> MR. LEWIS: Corey James. Mr. James.
>
> A. I would say neither one of us would be involved in the process or actually been through the process.
>
> Q. Or know anything about it?
>
> A. Not much.
>
> Q. Or what the rules are or what you have to do; do you know any of that?
>
> A. No, sir.

ROA, p. 1031, l. 18 - ROA, p. 1032, l. 6.

Century BMW's General Manager has thirty-two years worth of experience in the car industry, has dealt with the subject arbitration agreement since 2002, and does not understand the arbitration agreement. ROA, p. 1052, ll. 10-12. Similarly, the F&I manager, whom presented the arbitration agreement to the Wattses, does not understand the agreement. ROA, p. 1031, l. 18

- ROA, p. 1032, l. 6. If Century BMW's own people do not understand the agreement, how were the Wattses, whom were in a little cubicle with the F&I Manager with his finger pointing on the document, supposed to understand the agreement?

Even if the arbitration agreement was easily understood, a point which is denied, the explanation the General Manager would "expect" to be given to the customers is misleading and unfair. The General Manager testified as follows:

Q: Can you sit here and tell me what this form contains?
A. I'm not an expert, but I can tell you that this is a document providing remedy for the customer without having to go to court.
Q. If you were to explain it, that's what you would say?
A. Yes, sir.
Q. Is there anything else you'd tell them other than it's a remedy for the customer and you don't have to go to court?
...
A. No, sir, I would tell them nothing else.
Q. Okay. And is that what you expect your employees to tell the -- the people?
A. They're more informed than I.
Q Well, is that what you expect them to tell them, at least that?
A. At least that.
Q. Okay. Is there anything else you expect to tell -- them to tell them?
A. No, sir.

ROA, p. 1023, l. 9 - 1024, l. 10. The circuit court correctly found that this explanation is misleading because the arbitration agreement takes away rights otherwise available by law. ROA, p. 6. The expected Century BMW explanation makes it sound like arbitration is a great deal for the customer. It appears from this explanation that the customer is not giving up anything but instead gaining an extra remedy, the ability to get relief without going to court.

iv. Use of a Car is a Necessity.

There is also evidence to support the circuit court's finding that use of the car was a necessity to Ms. Watts. The car was purchased to be Ms. Watts's primary source of

transportation and was purchased so that she could get back and forth from work. ROA, p. 998, ll. 11-20. Century BMW argues that the vehicle was not necessity because Christine Watts previously owned a Mitsubishi Montero. As discussed by the circuit court, in its order, the fact that Ms. Watts previously owned another vehicle does not defeat the fact that use of a car is a necessity. ROA, pp. 7-8. The circuit court cited Simpson and stated: "[the plaintiff in Simpson, prior to purchasing the car in that case, owned a 2001 Toyota 4-Runner and the South Carolina Supreme Court expressly found that the car purchased was a necessity. Simpson, 644 S.E.2d at 663. The car purchased by Ms. Watts, like the car purchased in Simpson, was purchased to be her primary source of transportation." ROA, pp. 7-8. Century BMW, in its brief, makes no effort to distinguish Simpson. Thus, the circuit court's finding that use of the car was a necessity for Ms. Watts is supported by the evidence and consistent with the Supreme Court's finding in Simpson.

As discussed above, there was an abundance of evidence on the record which supports the circuit court's finding that there was a "fundamental unfairness" in the bargaining process. Therefore, this finding should not be disturbed on appeal.

C. The Century BMW Arbitration Agreement Contains One-Sided and Oppressive Terms.

The circuit court's findings that the Century BMW arbitration agreement contains oppressive and one-sided terms are supported by the evidence. In analyzing this factor, the circuit court cited the South Carolina Supreme Court in Simpson, which stated:

> The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution. *Carolina Care Plan,* 631 S.C. at 555, 606 S.E.2d at 758. In our opinion, this rule has two applications in the present case. First, this arbitration clause violates statutory law because it prevents Simpson from receiving the mandatory statutory remedies to which she may be entitled in her underlying SCUTPA and Dealers Act claims. Second, unconditionally permitting the weaker party

> to waive these statutory remedies pursuant to an adhesion contract runs contrary to the underlying statutes' very purposes of punishing acts that adversely affect the public interest. Therefore, under the general rule, this provision in the arbitration clause is unenforceable.

Simpson, 373 S.C. at 30, 644 S.E.2d at 671 (citing the "strong public policy notions behind the enactment of the...Dealers Act."). ROA, p. 8. The circuit court correctly applied this analysis here.

i. The Century BMW Arbitration Agreement Contains One-Sided Terms.

The circuit court's finding that the prohibition of multi-plaintiff suits and class actions in the Century BMW arbitration agreement is one-sided is supported by the evidence. In addressing this issue, the circuit court stated:

> Although styled as a mutual prohibition on representative class actions, it is difficult to envision the circumstances on which the provision might negatively impact Century BMW, because car dealers typically do not sue their customers in class action lawsuits. Such a one-sided contract is unconscionable. *See* Finkel v. Cingular Wireless, LLC, 828 NE2d 812, 820-821 (Ill.App. 5 Dist.,2005)("cellular telephone service providers typically do not sue their customers in class action lawsuits. Thus, Cingular's provision barring class arbitration is a one-sided limitation on its customers' ability to seek relief...such a one-sided limitation that could effectively deny plaintiffs their day in court is substantively unconscionable."). *See also* Szetela v. Discover Bank, 97 Cal.App. 4th 1094 (2002)(Holding a similar clause unconscionable and one-sided because "credit card companies typically do not sue their customers in class action lawsuits.").

ROA, p. 9. Century BMW, in its Appellant Brief, does not challenge this finding. This is because the circuit court was correct. The class action waiver does not inhibit Century BMW's rights because Century BMW is not going to bring a class action against its customers. The waiver, instead, is a device designed to insulate Century BMW from liability by preventing it customers from asserting class action and multi-plaintiff cases against it. The circuit court's finding that the class action waiver is one-sided is undisputed by Century BMW and should not

be disturbed on appeal.[5]

ii. The Century BMW Arbitration Agreement Contains Oppressive Terms

The circuit court was correct in finding that the arbitration agreement contains oppressive terms that violate public policy and statutory law. The Century BMW arbitration agreement contains oppressive terms. ROA, pp. 8-11. In analyzing this factor, the Simpson court stated:

> The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution. *Carolina Care Plan,* 631 S.C. at 555, 606 S.E.2d at 758. In our opinion, this rule has two applications in the present case. First, this arbitration clause violates statutory law because it prevents Simpson from receiving the mandatory statutory remedies to which she may be entitled in her underlying SCUTPA and Dealers Act claims. Second, unconditionally permitting the weaker party to waive these statutory remedies pursuant to an adhesion contract runs contrary to the underlying statutes' very purposes of punishing acts that adversely affect the public interest. Therefore, under the general rule, this provision in the arbitration clause is unenforceable.

Simpson, 644 S.E.2d at 671(citing the "strong public policy notions behind the enactment of the...Dealers Act.").

The circuit court found that: "the Century BMW arbitration agreement here, like the arbitration agreement in Simpson, attempts to take away Plaintiff Watts's statutory rights." ROA, p. 9. The Dealers Act provides substantive rights to those harmed by violations. S.C. Code Ann. §56-15-110(2) provides:

> (2) When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for benefit of the whole. Including actions for injunctive relief.

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[5]The arbitration agreement is so one-sided that even Century BMW's own lawyer, Brad Martin, refused to sign it when he purchased a vehicle. ROA, p. 1038, ll. 1-19. Mr. Martin is the only customer that the General Manager could name in over 6,000 car purchases without signing the arbitration agreement. ROA, p. 1037, ll. 9-25; ROA, p. 1056, ll. 20-23; ROA, p. 1038, ll. 1-19. If the agreement is so bad that Mr. Martin will not sign it, the Court should not enforce it against Ms. Watts.

S.C. Code Ann. §56-15-110(2) provides statutory rights to plaintiffs including the right to bring a claim on behalf of a group and injunctive relief on behalf of a group. The statute was "[o]bviously enacted...because consumers' remedies at common law were deemed inadequate." *See* Kucharski v. Rick Hendrick Chevrolet, LP, 2002 WL 313860990 (SC Ct. App.2002). As stated by the Supreme Court in Simpson, the purpose behind the Dealers Act is to "punish[ ] acts that adversely affect the public interest." Simpson, 373 S.C. at 30, 644 S.E.2d at 671. The statutory protection given in §56-15-110(2) serves the purposes behind the Dealers Act because it protects consumers and deters dealers from engaging in bad conduct.

The circuit court properly found the Century BMW arbitration agreement's attempted prohibition of group suits prevents Plaintiff Christine Watts from effectively vindicating her statutory rights. ROA, p. 10. S.C. Code Ann. §56-15-110(2) provides a statutory right to bring a claim on behalf of a group. The circuit court noted that: "this protection is necessary because otherwise parties with nominal individual claims, but significant collective claims, would be left with limited avenues for relief and a wrongdoer car dealer with little checks on its abuses of law."[6] ROA, p. 10. This statutory right makes it economical for a car purchaser who has been harmed by violation of the statute to bring claims against a car dealer. The circuit court was correct in finding that Century BMW's attempt to take this right away is violative public policy.

Moreover, the circuit court was correct in finding that "Plaintiff Christine Watts's statutory right, as one harmed Plaintiff, to seek group injunctive relief, when an action is of common or general interest to many persons, cannot be effectively vindicated under the Century

[6]The South Carolina Supreme Court has stated that it would not enforce the type of class action waiver at issue in this case. "[P]reclusion of class-wide or consolidated arbitration in an adhesion contract, even if explicit, undermines principles favoring expeditious and equitable case disposition absent demonstrated prejudice to the drafter of the adhesion contract." Bazzle v. Green Tree Financial Corporation, 351 S.C. 244, 569, S.E.2d 349 (2002) (*R'vd on other grounds*).

BMW arbitration agreement." ROA, p. 10. Century BMW, in its brief, does not dispute that Respondent Christine Watts cannot obtain group injunctive relief under the arbitration agreement. This is contrary to S.C. Code Ann.§56-15-110(2) which is designed so that one person can stop a car dealer from perpetrating wrongdoing against many car purchasers. The potential for a group of plaintiffs to collectively pursue a claim against a car dealer serves as a deterrent to prevent car dealers from engaging in wrongful conduct. The circuit court correctly found that these statutory rights cannot be vindicated under the Century BMW arbitration agreement.[7] ROA, pp. 8-10.

The circuit court's refusal to enforce the Century BMW arbitration agreement is consistent with the South Carolina Supreme Court's statements that they will not enforce this type of arbitration clause. "[P]reclusion of class-wide or consolidated arbitration in an adhesion contract, even if explicit, undermines principles favoring expeditious and equitable case disposition absent demonstrated prejudice to the drafter of the adhesive contract." Bazzle v. Green Tree Financial Corp., 569 S.E.2d 349, 361 (S.C.2002)(*R'vd on other grounds*). Similarly, the circuit court's order is consistent with courts in other jurisdictions which have found similar arbitration agreements to be unenforceable. *See* Tillman v. Commercial Credit Loans, Inc., 655 S.E.2d 362 (N.C.2008); Cooper v. QC Financial Services, Inc., 503 F.Supp2d 1266, 1290 (D.Ariz.,2007); Eagle v. Fred Martin Motor Co., 809 NE2d 1161 (Ohio App. 2004)(concluding provision preventing right to proceed through a class action or as a private attorney general were

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[7]Century BMW raises in a footnote the argument that "the Attorney General's Office can seek class-wide equitable relief for any violation of the Dealers Act" in support of the proposition that somehow taking away Christine Watts's statutory rights is permissible. This argument fails for two reasons. First, Century BMW never raised this argument below and it is not proper on appeal. Second, the General Assembly specifically gave individual car purchasers the right to bring the group action and to seek group relief. This specific grant of a statutory right to car purchasers is significant and should not be taken away in this context.

both against public policy and the underlying purpose of the Consumer Sales Practices Act and thus were unenforceable). Lozada v. Dale Baker Oldsmobile, Inc., 91 F. Supp. 2d 1087 (W.D. Mich. 2000)(arbitration clause involving the sale of automobiles providing for waiver by buyer's or right to proceed by way of a class action was substantially unreasonable and unconscionable); State Ex Rel. Dunlap v. Berger, 567 SE2d 265 (W.Va.Ct.App. 2002). Such clauses are unconscionable because they insulate Defendants from significant exposure brought about when otherwise small claims are grouped together.

Century BMW's argument that somehow the South Carolina Supreme Court in Simpson ruled that class action waivers in adhesion contracts are enforceable is wrong. The plaintiff in Simpson did not raise this issue or argue that arbitration agreement was unenforceable due to a class action waiver. Accordingly, this issue was not before the Supreme Court and not decided in the Simpson case. *See* Gathings v. Robertson Brokerage Co., Inc., 295 S.C. 112, 118, 367 S.E.2d 423, 427 (S.C.App.,1988)("Appellant courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.").

The circuit court's findings that the Century BMW arbitration agreement contains oppressive terms, violates statutory law, and public policy are reasonably supported by the evidence. These findings are also consistent with the "strong public policy reasons" behind the enactment of the Dealers Act and consistent with the Dealers Act's purpose of "punishing acts that adversely impact the public interest." Simpson, 373 S.C. at 30, 644 S.E.2d at 671.

For the reasons set forth above, the circuit court's findings that: (A) the Century BMW arbitration agreement is an adhesion contract; (B) the Wattses had an absence of meaningful choice; and (C) that the arbitration agreement contains one-sided and oppressive terms are all

supported by the evidence and should not be disturbed on appeal. Accordingly, the circuit court's order denying Century BMW's motion to compel arbitration should be affirmed.

II. This Facts in this Case are Just Like Simpson and Thus the Circuit Court Was Correct in Holding the Arbitration Agreement to be Unenforceable.

The South Carolina Supreme Court in Simpson v. MSA of Myrtle Beach, 373 S.C. 14, 644 S.E.2d 663 (S.C.2007), found a similar form contract in an automobile transaction to be unconscionable and unenforceable. The facts in this case mirror those in Simpson. Included below is a chart comparing the significant facts in Simpson to the facts in this case.

Simpson Significant Facts	Facts in This Case
The Defendant used a form contract. 373 S.C. at 27, 644 S.E.2d at 669.	The contract here is a form contract. ROA, p. 1044, ll. 7-14.
Vehicle was a necessity because it was for plaintiff's primary source of transportation. 373 S.C. at 27, 644 S.E.2d at 670.	The vehicle here is also a necessity because it was to be Christine Watts's primary source of transportation and was needed to get back and forth from work. ROA, p. 1101, ¶ 3; ROA, p. 998, ll. 11-20.
The plaintiff did not understand the implications of arbitration. 373 S.C. at 27, 644 S.E.2d at 670.	The Wattses had no understanding of arbitration. ROA, p. 901, ll. 19-21; ROA, p. 959, ll. 3-6; ROA, p. 1102, ¶ 7.
The plaintiff did not have a lawyer present when she signed the arbitration agreement. 373 S.C. at 27, 644 S.E.2d at 670.	The Wattses did not have a lawyer present when they signed the arbitration agreement. ROA, p. 990, ll. 7-9; ROA, p. 1102, ¶ 8.
The agreement was hastily presented for plaintiff's signature. 373 S.C. at 27, 644 S.E.2d at 670.	The agreement was hastily presented for the Wattses' signatures. ROA, p. 1101, ¶ 4.
The agreement purported to take away statutory rights under the Dealers Act. 373 S.C. at 30, 644 S.E.2d at 671.	The Century BMW arbitration agreement attempts to take away statutory rights to bring a group action and obtain a group injunctive relief under the Dealers Act. *See* S.C. Code Ann. §56-15-110(2).

The agreement contained text in small font. 373 S.C. at 28, 644 S.E.2d at 670.	The text of the arbitration agreement here is in small font. ROA, p. 1100 and ROA, p. 1106.
The agreement was drafted by a corporate entity who was a superior party. 373 S.C. at 28, 644 S.E.2d at 670.	The agreement was drafted by Sonic Automotive, a multi million dollar corporation. ROA, p. 1044, ll. 7-14. Michael Watts sells garage doors and at the time Ms. Watts signed the agreement she was a 24 year old student. ROA, p. 896, l. 15 - ROA, p. 897, l. 4; ROA, p. 1127; ROA, 948, ll. 14-20. Clearly, Century BMW was the superior party.
The agreement purported to take away rights otherwise available by law. 373 S.C. at 28-30, 644 S.E.2d at 670-671.	The arbitration agreement here attempts to take away statutory rights to bring a group action and obtain a group injunctive relief which are provided in the Dealers Act and otherwise available by law.
The plaintiff believed the agreement was presented on a take-it or leave-it basis. 373 S.C. at 26-27, 644 S.E.2d at 669.	The Wattses were led to believe the arbitration agreement was presented on a take-it or leave-it basis and that they had to sign it to get the car. ROA, p. 933, ll. 10-12; ROA, p. 985, ll. 18-22; ROA, p. 989, ll. 10-18; ROA, p. 990, ll. 2-6; ROA, p. 997, ll. 6-17; ROA, pp. 1101-1102, ¶ 5.

As shown in the above chart, the facts in this case are just like the facts in Simpson. Therefore, the circuit court was correct in finding that the Century BMW arbitration agreement, like the arbitration agreement in Simpson, was unenforceable.[8]

[8]In addition to Simpson, the North Carolina Supreme Court's decision in Tillman v. Commercial Credit Loans, Inc., 655 S.E.2d 362 (N.C.2008) also supports a finding that the arbitration agreement here is unenforceable.

III. The Circuit Court Correctly Followed the Simpson Court and Viewed the Century BMW Arbitration Agreement with "Considerable Skepticism."

Century BMW argues that the circuit court's analyzing the contract with "considerable skepticism" was erroneous and "violate[s] United States Supreme Court's Mandate that State courts place arbitration agreements on equal footing with all other contracts." *See* Century BMW Brief, p. 10. Importantly, the circuit court applied the exact analysis adopted by the South Carolina Supreme Court in Simpson. *See* Simpson v. MSA of Myrtle Beach, 373 S.C. 14, 644 S.E.2d 663 (S.C.2007)(adopting rationale of Ohio Courts in analyzing arbitration agreements by automobile retailers and stating "We...proceed to analyze this contract between a consumer and automobile retailer with 'considerable skepticism'.").

Essentially, Century BMW argues that this Court should reject the South Carolina Supreme Court's analysis in Simpson because it is allegedly inconsistent with the United States Supreme Court precedent and Federal Law. This argument fails. The United States Supreme Court refused to take certiorari over the Simpson case. MSA of Myrtle Beach v. Simpson, 128 S.Ct. 493 (U.S.2007). Additionally, a Federal Court in South Carolina has applied the Simpson court's "considerable skepticism" analysis to another automobile adhesion contracts. *See* Knox v. Joe Gibson's Auto World Inc., 2008 WL 2077361, C.A. No.: 7:07-4020-HMH (May 8, 2008)("In light of the South Carolina Supreme Court's admonition that adhesion contracts between a consumer and an automobile retailer regarding arbitration, such as the one at issue in the instant case, should be analyzed 'with considerable skepticism.' The court finds that the agreement is unconscionable and unenforceable against the plaintiffs.").

Furthermore, the South Carolina Supreme Court's treatment of an adhesion contract between an automobile retailer and a consumer with "considerable skepticism" is not, as Century

BMW argues, inconsistent with United States Supreme Court precedent and Federal Law.[9] The South Carolina Supreme Court is not treating all arbitration agreements with "considerable skepticism." Instead, the "considerable skepticism" analysis only applies to adhesion contract between an automobile retailer and a consumer. Accordingly, arbitration agreements, as a whole, are being placed on equal footing with other contracts and Century BMW's argument fails.

The United States Supreme Court refused to take certiorari over the Simpson case and a Federal Court in South Carolina has applied the considerable skepticism analysis. Thus, Century BMW's argument that the Simpson case's "considerable skepticism" analysis violates United States Court precedent and Federal law should be rejected. This Court should affirm the circuit court's use of the South Carolina Supreme Court's "considerable skepticism" analysis.

IV. The Circuit Court Was Correct in Following the Ruling in Simpson that the Presumption the a Party has Read and Understood a Contract Does Not Mandate Enforcement of All Arbitration Agreements.

Century BMW wrongly argues that the presumption that a party has read and understood[10] an arbitration agreement automatically binds Respondent Christine Watts to arbitration. This exact argument was rejected by the South Carolina Supreme Court in Simpson. The Simpson court stated:

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[9]Additionally, Century BMW's argument that the circuit court's order is inconsistent with the Snowden v. Checkpoint Cashing, 290 F.3d 631 (4th Cir. 2002) is misplaced. The plaintiff in Snowden was not asserting that the arbitration agreement at issue there was unconscionable because it took away statutory right. In this case, the Century BMW arbitration agreement impermissibly seeks to take away Respondent Christine Watt's statutory right under the Dealers Act to bring claims on behalf of a group. As such, the decision in Snowden is not on point.

[10]As discussed in Argument I(B)(ii), p. 16, it is unfair to expect the Wattses to understand the arbitration agreement when Century BMW's General Manager and F&I Manager, with years of experience and whom deal with the arbitration agreement on a regular basis, do not understand the agreement. Accordingly, the circuit court was correct in finding that this presumption does not require arbitration here.

> Moreover, regardless of the general legal presumptions that a party to a contract has read and understood the contract's terms, we also find it necessary to consider the otherwise inconspicuous nature of the arbitration clause in light of its consequences. The loss of the right to a jury trial is an obvious result of arbitration. However, this particular arbitration clause also required Simpson to forego certain remedies that were otherwise required by statute. While certain phrases within other provisions of the additional terms and conditions were printed in all capital letters, the arbitration clause in its entirety was written in the standard small print, and embedded in paragraph ten (10) of sixteen (16) total paragraphs included on the page. Although this Court acknowledges that parties are always free to contract away their rights, we cannot, under the circumstances, ignore the inconspicuous nature of a provision, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Simpson by law. Furthermore, and contrary to Addy's argument, the present transaction may be distinguished from that in *Carolina Care Plan, Inc. v. United HealthCare Services, Inc.*, 361 S.C. 544, 606 S.E.2d 752 (2004), where both parties were sophisticated business interests in an arms-length negotiation.

Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 27-28, 644 S.E.2d 663, 670 (S.C.,2007). In its analysis, the Simpson court cited the following factors in deciding that the presumption of reading and understanding does not require arbitration: use of a small font; the inconspicuous nature of the provision; the fact that the agreement was drafted by a superior party; and that the agreement took away significant statutory rights.

All of the factors cited by the Simpson court are present in this case. The Century BMW arbitration agreement contains small font. *See* ROA, p. 2 ("the arbitration agreement uses a small font. . . ."). Century BMW inconspicuously placed the arbitration agreement within a series of documents. *See* ROA, p. 6. ("Century BMW inconspicuously placed the arbitration agreement within a series of documents that included documents that were required to be signed by law and then had its F&I manager point on each document (whether required to be signed by law or not) and said 'sign here'."); *see also* ROA, p. 990, l. 2 - ROA, p. 991, l. 17 (testimony that arbitration agreement was included within a packet of documents with flags on individual documents indicating where to sign). Century BMW drafted the arbitration agreement and is the

superior party.[11] The arbitration agreement attempts to take away important statutory rights, including the right to seek group relief and the ability to obtain group injunctive relief. Thus, the circuit court's ruling that the arbitration agreement was unenforceable, even though the Wattses had an opportunity to read the contract, is consistent with the South Carolina Supreme Court ruling in Simpson. Accordingly, Century BMW's argument that the fact that the Wattses may have had an opportunity to read the arbitration agreement is outcome determinative and mandates arbitration here, should be rejected.

CONCLUSION

For the foregoing reasons, the circuit court's order denying the motion to compel arbitration should be affirmed.

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[11] See detailed discussion in Argument I(B)(i), p. 15.

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_____, 2008

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, Circuit Court Judge

Circuit Court Case No.: 2006-CP-02-1230

Court of Appeals Docket No.: 03-27371

Heather Herron, Natalie Armstrong, Michael Ritz, Julie Freeman, Christine Watts, Michael Blease and Michael Watts, individually and for the benefit of all car buyers whom paid "administrative fees" as described below to Defendants, ... Respondents,

v.

Century BMW d/b/a Sonic Automotive; Dick Dyer & Associates, Inc.; Galeana Chrysler Plymouth, Inc. a/k/a Galeana Chrysler Jeep, Inc.; J.L.H. Investments, LP a/k/a Hendrick Honda; Overland, Inc., d/b/a Land Rover of Columbia; Taylor Toyota a/k/a Taylor Investments, Inc.; and Toyota of Greenville, Inc., ... Defendants,

of whom Century BMW d/b/a Sonic Automotive is the ..... Appellant.

PROOF OF SERVICE

I, Margarita Sosa, an employee with the law firm of Lewis & Babcock, L.L.P., attorneys for the Respondents, do hereby certify that I have served **Respondents' Final Brief** upon opposing counsel in this action by mailing a copies thereof by United States Mail, postage prepaid, on September 30, 2008 to the following addresses:

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of whom Century BMW d/b/a Sonic Automotive is the ..... Appellant.

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that Respondents' Final Brief complies with Rule 211(b), SCACR.

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