THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Deziree Ross, Respondent,

vs.

Hoover Automotive, LLC d/b/a Hoover Chrysler Jeep Dodge Ram Summerville and Chrysler Capital, LLC, Appellants.

Appellate Case No. 2016-001120

RECEIVED
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SC Court of Appeals

Appeal from Berkeley County
J.C. Nicholson, Jr., Circuit Court Judge
Civil Action No. 2015-CP-08-2457

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ISSUE ON APPEAL

Whether the Circuit Court erred in denying Appellants' Joint Motion to Dismiss or Stay and Compel Arbitration pursuant to Aiken v. World Finance Corporation of South Carolina, 373 S.C. 144, 644 S.E.2d 705 (2007).

STATEMENT OF THE CASE

The civil action arises out of the June 2015 sale of a vehicle to Respondent Deziree Ross (Ross) by Appellant Hoover Automotive, LLC (Hoover), a car dealership in Summerville. Appellant Chrysler Capital, LLC (Chrysler Capital) financed the sale.

Ross filed this civil action in the Court of Common Pleas for Berkeley County in October 2015. Ross pleaded various causes of action against both Hoover and Chrysler Capital, including: (1) violation of the Dealer's Act; (2) violation of the UTPA; (3) Fraud; (4) Constructive Fraud; (5) Negligence; (6) Negligent Misrepresentation; (7) Negligent Supervision; and (8) Unjust Enrichment.

Hoover and Chrysler Capital both timely answered the Complaint, and jointly filed a Motion to Dismiss or Stay and Compel Arbitration. The basis for the motion was that Ross had signed an Arbitration Agreement as part of the deal, and Hoover and Chrysler Capital took the position that the Arbitration Agreement was enforceable pursuant to the Federal Arbitration Act (FAA).

Ross opposed the motion on the basis that her claims against Hoover and Chrysler Capital were based on "illegal and outrageous acts" unforeseeable to a reasonable consumer in the context of normal business dealings, which implicated an exception to enforceability of the Arbitration Agreement announced in Aiken v. World Finance Corporation of South Carolina, 373 S.C. 144, 644 S.E.2d 705 (2007).

The parties submitted memoranda to the Circuit Court, which heard the motion on April 12, 2016. The Court took the motion under advisement, and subsequently issued a Form 4 Order denying the motion, entered on April 28, 2016. Hoover and Chrysler Capital served their joint Notice of Appeal on counsel for Ross on May 20, 2016. This Court entered the Notice of Appeal on May 25, 2016.

FACTUAL BACKGROUND

On June 11, 2015, Ross entered into a contract with Hoover for the purchase of a new 2015 Jeep Patriot and the trade-in of her prior vehicle. Buyer's Order No. 1. As part of the contract, Ross executed an Arbitration Agreement requiring arbitration of:

> all claims, demands, disputes, or controversies of every kind or nature that may arise between [Plaintiff and Hoover] concerning any of the negotiations leading to the sale, lease or **financing** of the vehicle, terms and provisions of the sale, lease or **financing agreement, arrangements for financing**, purchase of insurance, purchase of extended warranties or service contracts, the performance or condition of the vehicle, or any other aspect of the vehicle and its sale, lease or **financing**...pursuant to 9 U.S.C. Section 1 et seq. [the Federal Arbitration Act or FAA]....

Arbitration Agreement (emphasis added).

Also as part of the deal, Ross applied for financing, as evidenced in the original Retail Installment Sale Contract. Finance Agreement No. 1. The terms of the financing were that Ross would receive $19,500 for her trade-in, and pay $644.46 per month for seventy-five months for the new Jeep. The lender was Chrysler Capital.

Approximately three weeks later, the finance and insurance (F&I) manager for Hoover learned that Chrysler Capital was denying the loan. The F&I manager allegedly[1] drafted a new

[1] Hoover does not know for sure that the F&I manager drafted or signed the new contract documents as alleged by Respondent Ross. For purposes of this appeal, Hoover understands that the Court will view the allegations in a light most favorable to Ross.

contract with more favorable terms for Ross. Buyer's Order No. 2; Finance Agreement No. 2. The new terms were that Ross would receive $21,188.07 for her trade-in, and pay $598.57 per month for seventy-five months for the new Jeep. The trade allowance went up over $1,600 and the monthly payment went down almost $50. The F&I manager allegedly signed the Buyer's Order and Finance Agreement for Ross. Ross alleges that she did not authorize him to do that, and was unaware that new sales documents were even being prepared.

That same day, the F&I manager allegedly learned that Finance Agreement No. 2 was also denied by the lender. The manager allegedly then drafted another contract, with even more favorable terms for Ross. Finance Agreement No. 3. These new terms were that Ross would receive $21,188.07 for her trade-in, and pay $532.74 per month for seventy-five months for the new Jeep. The monthly payment was over $100 lower than the amount set forth in the original contract signed by Ross. The reason for the substantially lowered payment was that the interest rate was lowered by approximately five points. This loan was approved by Chrysler Capital. Ross alleges that like Finance Agreement No. 2, she did not authorize anyone to execute Finance Agreement No. 3 on her behalf, and was unaware that it was being prepared.

Hoover was also unaware that its F&I manager was allegedly drafting new sales documents, and did not learn of this allegation until Ross discovered the issue in July 2015 through correspondence with Chrysler Capital. The lender had also been unaware that Ross herself had not signed the new contracts. Hoover promptly fired the F&I manager after examining the facts.

Ross still has the new Jeep and has been making payments. Chrysler Capital stands willing to continue to honor the sale and the loan, which again are on much better terms than the original deal to which Ross agreed.

STANDARD OF REVIEW

"The determination of whether a claim is subject to arbitration is 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." Aiken, 373 S.C. at 148, 644 S.E.2d at 707 (citations omitted).

ARGUMENT

The Arbitration Agreement should be enforced pursuant to the FAA, which controls here. Ross has not argued that the FAA does not control. Ross has not argued that the Arbitration Agreement is unenforceable on the basis of unconscionability. The only basis for not enforcing the Arbitration Agreement raised by Ross is her claim that the F&I manager's conduct constituted "illegal and outrageous acts" unforeseeable to a reasonable consumer in the context of normal business dealings, which would allow her to escape the Arbitration Agreement pursuant to Aiken v. World Finance. For context, however, Hoover and Chrysler Capital wish to briefly set forth the enforceability of the Arbitration Agreement pursuant to the FAA. Hoover and Chrysler Capital will then explain why the Aiken exception does not apply.

I. The FAA Controls.

The FAA provides that a written provision in a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction shall be "valid, irrevocable, and enforceable." 9 U.S.C. § 2 (1988). The United States Supreme Court has interpreted the words "involving commerce" broadly. The words "involving commerce" are the functional equivalent of "affecting commerce," which typically indicates Congress's intent to exercise its commerce power in full. Allied–Bruce Terminix Co. v. Dobson, 513 U.S. 265, 274 (1995).

Here, the contract involves interstate commerce. Contracts to purchase or finance vehicles generally involve interstate commerce. See York v. Dodgeland of Columbia, Inc., 406 S.C. 67,

79, 749 S.E.2d 139, 145 (Ct. App. 2013) (citing Stout v. J.D. Byrider, 228 F.3d 709, 715 (6th Cir. 2000) for the proposition that contracts for the purchase and financing of a vehicle involve interstate commerce). The lender here, Chrysler Capital, is a foreign corporation. Complaint at ¶ 3; Answer of Chrysler Capital at ¶ 3.

In addition, the Arbitration Agreement here specifically provides that Plaintiff "acknowledges that the vehicle and other aspects of the sale, lease or financing transaction are involved in, affect, or have a direct impact upon interstate commerce." Arbitration Agreement.

Accordingly, the FAA controls.[2]

II. The FAA Requires Arbitration of This Dispute.

The FAA provides that arbitration agreements are valid save upon "such grounds as exist at law or in equity for the revocation of any contract." 9. U.S.C. § 2. One such ground is unconscionability. Here, the Arbitration Agreement is not unconscionable, even if deemed a contract of adhesion. See York, 406 S.C. at 86, 749 S.E.2d at149 (providing that adhesion contracts are not *per se* unconscionable).

The Arbitration Agreement does not contain oppressive or one-sided terms. It does not prevent the arbitrator from awarding legally recoverable damages to either party. Both parties have mutuality of remedy..

Further, the claims asserted by Plaintiff fall squarely within the scope of the Arbitration Agreement. The Agreement is broad, and requires arbitration of "all claims, demands, disputes,

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[2] Because the FAA applies, the retail buyers order here is not required to comply with the requirements of S.C. Code Ann. § 15-48-10(a). Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996) (where the FAA applies, it preempts the notice provisions of the South Carolina Uniform Arbitration Act). Nevertheless, the contract did comply with the South Carolina Arbitration Act, as the Buyer's Order prominently displayed a notice that arbitration pursuant to the state statute would be required. Buyer's Order No. 1.

or controversies of every kind or nature," without limitation to contract claims as opposed to tort or statutory claims. Arbitration Agreement. The Agreement specifically includes claims related to the "sale, lease or financing of the vehicle, terms and provisions of the sale, lease or financing agreement, arrangements for financing...or any other aspect of the vehicle and its sale, lease or financing." Id. All of Plaintiff's claims relate directly to the financing of the vehicle.

In a case involving an almost identical arbitration provision, the Supreme Court found that a claim of bait-and-switch by a dealer fell directly within the terms of the arbitration agreement. Partain v. Upstate Auto. Group, 386 S.C. 488, 492–93, 689 S.E.2d 602, 604 (2010). Since the plaintiff's claim was "encompassed by the terms of the arbitration clause," the Court did not need to even reach the question whether the claim bore a "significant relationship" to the arbitration clause. Id.

Like the claims in Partain, all of Ross's claims fall within the plain terms of the Arbitration Agreement in this case. At the very least, the claims bear a significant relationship to the terms of the Arbitration Agreement. See id. (discussing the two-prong analysis of: (1) whether the claims fall directly within the terms of the agreement; and if not, then (2) whether the claims bear a "significant relationship" to the agreement). The only question for the Court here is whether the allegations in this case give rise to the exception to arbitration enforcement found in Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 644 S.E.2d 705 (2007), in which the Supreme Court held that it would "refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings."

III. The Aiken Exception Does Not Apply.

In refusing to enforce arbitration agreements in the context of "illegal and outrageous acts" unforeseeable to a reasonable consumer in the context of normal business dealings, our Supreme

Court has not intended "to exclude all intentional torts from the scope of arbitration, but only those outrageous torts, which although factually related to the performance of the contract, *are legally distinct from the contractual relationship of the parties.*" Partain, 386 S.C. at 493–94, 689 S.E.2d at 605 (quotation omitted, emphasis added).

Here, the wrongful conduct alleged by Ross is that an F&I manager amended the contract without her authorization in order to help her obtain the loan that she had wanted, and under better terms than those to which she admittedly agreed. Even if the allegations are true, and the employee's conduct is not to be condoned, the conduct is not the "illegal and outrageous" conduct necessary to implicate the Aiken exception to arbitration enforcement. The contract between the parties was allegedly modified without Plaintiff's consent. That contractual relationship is at the heart of each claim asserted by Plaintiff. It cannot be successfully argued that the claims are legally distinct from that contractual relationship. When measured against the Partain standard, it is clear that Plaintiff's claims are not legally distinct from the contractual relationship and thus not outrageous.

Aiken is easily distinguished from the facts here. That case involved allegations that employees of the lender stole the plaintiff's personal information two years after the transaction and used it for personal gain; that is, they committed identity theft. 373 S.C. at 147, 644 S.E.2d at 707.

Aiken and Partain can also be distinguished on another ground. Those cases both involved claims of fraud perpetrated upon the consumer plaintiff, while the case here involves a claim that an employee allegedly overstepped in trying to help the consumer, Ross. If anyone was defrauded by the employee's alleged conduct, it was Hoover and Chrysler Capital. The Court should look beyond the mere label of "fraud" and other causes of action pleaded by Ross, and look closely at

the substance of the factual allegations when determining whether the "illegal and outrageous acts" exception applies. Under these facts, the exception should not apply.

IV. Aiken v. World Finance and Its Progeny Should Be Overruled.

As recently explained by Chief Justice Pleicones, with the concurrence of Justice Kittredge, the South Carolina appellate opinions adopting and applying the "illegal and outrageous acts" exception to arbitration enforcement should be overruled. Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc., Op. No. 27655 (S.C. Sup. Ct. filed Aug. 17, 2016).[3] The basis for the Chief Justice's position is that the exception is unique to arbitration agreements, and is not generally applicable as a basis of a claim or defense to a contract action. As such, the exception is in violation of the FAA and the opinion of the United States Supreme Court in AT&T Mobility, L.L.C. v. Concepcion, 563 U.S. 333, 131 S. Ct. 1740, 179 L.Ed.2d 742 (2011).

Considering the recentness of Chief Justice Pleicones's comprehensive opinion setting forth this legal position, Appellants Hoover and Chrysler Capital respectfully incorporate the position as set forth in the opinion instead of trying to expand upon it, state it in different words, or simply reproduce it herein.

CONCLUSION

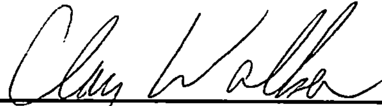
Defendants Hoover and Chrysler Capital respectfully request that the Court reverse the Circuit Court's Order denying the Motion to Dismiss or Stay and Compel Arbitration. The FAA controls, and it requires that the Arbitration Agreement between the parties be enforced. The terms of the Arbitration Agreement here encompass all of Ross's claims.

[3] Justices Hearn and Beatty concurred in the majority result, but dissented from the opinion that Aiken v. World Finance and its progeny should be overruled. Acting Justice Toal dissented from the entire opinion. Consequently, Aiken remains in force.

While Ross has pleaded fraud and other various causes of action beyond mere breach of contract, the factual allegations in support of the claims do not implicate the "illegal and outrageous acts" exception to arbitration enforcement found in Aiken.

Finally, as set forth by Chief Justice Pleicones in his recent opinion in Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc., Aiken and its progeny should be overruled, and the "illegal and outrageous acts" exception should no longer be recognized.

Respectfully submitted,



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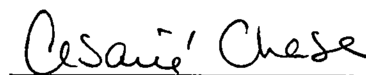
CERTIFICATE OF SERVICE

The undersigned employee of Walker & Reibold, LLC hereby certifies that on this date she has served the Initial Brief of Appellants, the Designation of Matter to Be Included in the Record on Appeal, and the Certificate Pursuant to Rule 209(c), SCACR, upon William C. Crantford, attorney for Respondent, by first-class U.S. mail, postage paid, to 568 Savannah Highway, Suite A, Charleston, South Carolina 29407.

Respectfully submitted,



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Jenny Abbott Kitchings
Clerk of Court – SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

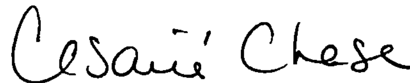
Re: Deziree Ross v. Hoover Automotive - Appellate Case No. 2016-001120

Dear Ms. Kitchings:

Enclosed please find an original and copy of Appellants' Initial Brief, Designation of Matter, Certificate Pursuant to Rule 209(c) and a Certificate of Service for filing in connection with the above-referenced matter. Please time-stamp the copies and return same to the runner to return to me.

Thank you for your assistance with this matter.

Sincerely,



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Enclosures
cc: William C. Crantford, Esq.