THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2015-CP-08-2457

Deziree Ross,

Respondent,

v.

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

Appellants.

Appellate Case No. 2016-001120

INITIAL BRIEF OF RESPONDENT

William C. Crantford
Crantford Meehan, Attorneys at Law
568 Savannah Highway, Suite A
Charleston, South Carolina 29407
(843) 376-4030
Attorney for Respondent

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STATEMENT OF THE CASE

On October 25, 2016, Deziree Ross brought this action alleging (1) violations 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 against Hoover Automotive, LLC and Chrysler Capital, LLC. Defendants answered the Complaint, and jointly filed a Motion to Dismiss or Stay and Compel Arbitration. alleging Doe's claim was precluded by judgment in a prior contract action between the parties.

On April 12, 2016, Defendants motion was argued before The Honorable Nicholson, Jr., in Berkeley County Court of Common Pleas. Judge Nicholson issued an Order denying Defendants motion on April 28, 2016, stating, "Defendant's Motion is denied because Plaintiff never signed the subsequent contracts and is not bound by the arbitration clause." Judge Nicholson did not address the Defendants arguments on whether the Federal Arbitration Act and/or "illegal and outrageous acts" standard in Aiken v. World Finance Corporation of South Carolina, 373 S.C. 144 (2007) apply. Defendants did not file a motion pursuant to Rule 59(e) of the South Carolina Rule of Civil Procedure. Defendants served their Notice of Appeal on May 20, 2016.

FACTS

On June 11, 2015, Ross, a pregnant single mother of one, visited Hoover at its business located at 195 Mary Meade Drive, Summerville. Ross' visit was for the purpose of obtaining a larger car for her growing family. As a result of Hoover's efforts, Ross and Hoover entered into a purchase agreement labeled "Buyers Order" for the new Jeep Patriot SUV. This agreement called for Ross to trade-in her 2014 Ford Focus. Hoover's employee then took Ross through the financing process for the Jeep. Plaintiff was forthright and truthful in all respects as to the various questions

which Hoover's employee asked of her regarding her personal, financial information, and credit application information. Ross' income and debt were also available to Hoover and Chrysler through any national credit reporting agency during the financing application process. Hoover then represented to Ross that she had been approved for financing by Chrysler Capital. Unknown to Ross, she has actually been denied financing on June 11 and Hoover kept this information from her. They had Ross sign the retail installment contract and arbitration agreement. Ross then left the dealership.

In July 2015, Ross contacted Chrysler Capital to inquire about undelivered financial information. Chrysler Capital informed Ross that they had just received a contract and it was dated July 30, 2015 from Hoover. Chrysler then teleconferenced Hoover into a call with Ross. Hoover falsely stated the Ross had come back into the dealership and signed the contract. In reality Hoover had prepared at least two additional contracts and submitted them for financing. Both of these contracts are dated June 30, 2015 and contained forged signatures of Ross. In addition to the first contract being denied, the second one was also denied. Hoover was changing the numbers around on the contracts to have her approved in an effort to cover up the forgeries and denials. Ross has not received discovery responses yet to determine if Hoover also forged her income to obtain the loan in her name.

Ross wanted to return the car after she found out she was denied financing on the first contract and Hoover had been forging her name. As a result of the fraudulent acts of the Defendants, Ross is now indebted to Chrysler in excess of $22,800 and including interest in an amount exceeding $39,900. The Defendants now have made Ross apart of the fraud using her name, social security number, credit report, and other personal information to obtain a loan in her name. Hoover was investigated by Berkeley County Sheriff's Office for the fraud and has fired at

least one employee in conjunction with the fraud.

ARGUMENTS

I. Appellant Failed to File a Motion Pursuant to Rule 59(e) Asking the Lower Court to Rule on the Issues or to Reconsider its Order.

"It is a litigant's duty to bring to the court's attention any perceived error, and the failure to do so amounts to a waiver of the alleged error." SCDOT v. First Carolina Corp. of S.C., 372 S.C. 295, 301 (2007). In order to be preserved for appellate review, issues and arguments must have been "(1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." Walterboro Community Hosp. v. Meacher, 392 S.C. 479, 493 (Ct. App. 2010) (quoting SCDOT v. First Carolina Corp. of S.C., 372 S.C. 295, 301-302 (2007).

Courts sitting in an appellate capacity are limited "to consider only the precise question that was before the trial judge and that was ruled on by him or her." State v. Witten, 375 S.C. 43, 47 (Ct. App. 2007). "When a trail judge makes a general ruling on an issue, but does not address the specific argument raised by the appellant and the appellant does not make a motion to alter or amend pursuant to Rule 59(e), SCRCP, to obtain a ruling on the argument, the appellate court cannot consider the argument on appeal." Floyd v. Floyd, 365 S.C. 56, 73 (Ct. App. 2005). When an issue or argument has been raised to but not ruled upon by the lower court, a party must file a motion pursuant to Rule 59(e) of the South Carolina Rule of Civil Procedure in order to preserve the issue for appeal.

Since the circuit court never ruled on whether the FAA applies and/or whether to employ the Aiken standard, it was incumbent upon Appellant to specifically ask the circuit court in a Rule 59(e) motion. See Jones v. State Farm Mutual Automobile Insurance Co., 364 S.C. 222,

235 (Ct. App. 2005). ("An issue is not preserved where the trial court does not explicitly rule on an argument and the appellant does not make a Rule 59(e) motion to alter or amend the judgment." Jones v. State Farm Mutual Automobile Insurance Co., 364 S.C. 222, 235 (Ct. App. 2005). Finally, Hoover's argument on overruling Aiken v. World Finance should not preserved for appeal. Hoover failed to raise this argument at the lower court.

II. If the Court finds Appellant's Argument Regarding the Aiken v. World Finance Exception was Ruled on in the Trial Court and is Considered on Appeal, it Does Apply.

The South Carolina Supreme Court has ruled, "arbitration clauses are not applicable to illegal and outrageous acts unforeseeable to a reasonable consumer in the context of normal business dealings." Timmons v. Starkey, 389 S.C. 375, 378 (2010).

Hoover, is incorrect in stating that it's employee's actions of forging Ross' signature on multiple contracts is not, "illegal and outrageous." Despite Hoover's contentions, our courts have held that stealing from a customer or illegally using a customer's information, is an unforeseeable illegal act, not subject to arbitration. Id.

The Court in Timmons stated, "we agree that, in the abstract, it is probable that where an employee of an investment company steals money from an investor's account, that illegal act would not be found to be foreseeable from the investor's standpoint, and thus the transaction would not be subject to arbitration." Id.

In Aiken v. World Finance Corporation of South Carolina, 373 S.C. 144 (2007), "The theft of personal information was outrageous conduct that plaintiff could not possibly have foreseen when he agreed to do business with [finance company]. Consequently, the plaintiff could not have intended to submit the dispute to arbitration." Partain v. Upstate Automotive

Group, 386 S.C. 488, 494 (2010) (quoting Aiken, at 151.).

On the same day it issued Aiken, the Court applied the rule in Chassereau v. Global-Sun Pools Inc., 373 S.C. 168 (2007). Chassereau sued an above-ground pool manufacturer and one of its employees after she received threatening phone calls from the employee who was attempting to collect money. Chassereau alleged the employee repeatedly called her at her work, disclosed private information to third parties, and made defamatory statements about her. The Supreme Court affirmed the trial court's refusal to compel arbitration. "Our opinion in Aiken unequivocally provides that although these types of uncivilized acts often arise in the course of performance of contracts containing arbitration clauses, South Carolina courts will not interpret arbitration clauses to apply to such acts which are outrageous and unforeseen." Id., 172 through 173.

In Partain v. Upstate Automotive Group, the court addressed the enforceability of an arbitration clause in the context of purchasing a vehicle from a dealership. In Partain, the Plaintiff was the victim of a bait-and-switch scheme where he was sold a different truck than the one he contracted to purchase. Id. The plaintiff sued the dealership for fraud and the defendant moved to compel arbitration under an almost identical arbitration agreement in the instant case. Relying in part on Aiken, the South Carolina Supreme Court held that the arbitration clause did not apply because the alleged wrongful actions constituted "'illegal and outrageous acts' unforeseeable to a reasonable consumer in the context of normal business dealings." Id. The Court reasoned that the plaintiff could not have contemplated that he was agreeing to arbitrate claims arising from allegedly fraudulent conduct. Id.

As in Aiken, Purtain, and Chassereau, this case involves conduct that is outrageous and outside the foreseeability of a reasonable consumer, thereby negating the arbitration clause. The

allegations here are that Hoover's employees, forged financial documents, unlawfully used Ross' personal financial information, fraudulently inflated Ross' income, and inflated values of vehicles on multiple alleged contracts. Hoover intentionally tried to cover up the forgeries after Ross discovered the fraudulent conduct. The intentional conduct by Hoover resulted in a criminal investigation and subsequent termination of its employee. No reasonable consumer would reasonably foresee that a generic arbitration agreement would encompass conduct that includes taking advantage of a pregnant single vulnerable mother by forging her name to multiple retail installment contracts, fraudulently manipulating contract figures, and committing what essentially amounts to wire fraud. It would be difficult to see how Hoover's conduct is not the type of outrageous and unforeseen our Courts have outlined in the above decisions. Therefore, pursuant to controlling South Carolina authority, the claims set forth in Ross' complaint are not covered by the arbitration clause.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the circuit court.

Respectfully submitted,

September 29, 2016

William C. Crantford
Crantford Meehan, Attorneys at Law
568 Savannah Highway, Suite A
Charleston, South Carolina 29407
(843) 376-4030
Attorney for Respondent

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date he served the Initial Brief of Respondent upon H. Clayton Walker, Jr. and Reynolds H. Blankenship, Jr., attorneys for Appellants, by first-class U.S. mail, postage paid, to Post Office Box 61140, Columbia, South Carolina 29260.

September 30, 2016

William C. Crantford
568 Savannah Highway, Suite A
Charleston, South Carolina 29407
(843) 376-4030
Attorney for Respondent

CRANTFORD MEEHAN
ATTORNEYS AT LAW
568 Savannah Highway, Suite A | Charleston, SC 29407 | 843.376.4030

September 30, 2016

VIA HAND-DELIVERY
Jenny Abbot Kitchings
Clerk of Court – SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Ross v. Hoover Automotive – Appellate Case No. 2016-001120

Dear Ms. Kitchings:

Enclosed please find an original and copy of Respondent's Initial Brief and Certificate of Service for filing. Please stamp the copies and return the same.

That you for your assistance in the above.

Very truly yours,

William C. Crantford

Enclosures

Cc: Clay Walker, Esq.