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

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

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

ISSUES ON APPEAL

I. Application of the outrageous torts exception from Aiken v. World Finance Corporation of South Carolina, 373 S.C. 144, 644 S.E.2d 705 (2007), is properly before the Court.

II. The circuit court erred in finding that the outrageous torts exception applies under these facts.

III. The outrageous torts exception should be abandoned.

ARGUMENT IN REPLY

Respondent Ross incorrectly argues that the sole issue raised and argued by either party to the circuit court, or considered and ruled on by the circuit court, is not properly before the Court because Appellants did not file a Rule 59(e) motion for clarification of the circuit court's Form 4 Order denying their motion to compel arbitration. That sole issue is whether the Aiken v. World Finance outrageous torts exception to arbitration enforcement applies in this case. The record on appeal is complete and contains the parties' circuit court memoranda, the transcript of the hearing, and the circuit court's form order, all of which demonstrate that the outrageous torts exception was the sole issue being considered and had to be the sole issue ruled upon. This appeal is therefore proper pursuant to Bailey v. Segars, 346 S.C. 359, 364–65, 550 S.E.2d 910, 913 (Ct. App. 2001).

For the reasons set forth in Appellants' initial brief, the outrageous torts exception does not apply under these facts. Appellants do not expand upon those arguments in this reply brief.

Finally, Hoover and Chrysler Capital acknowledge that they did not argue to the circuit court that the outrageous torts exception should be abandoned. The issue was recently raised by Chief Justice Pleicones in Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc., Op. No. 27655 (S.C. Sup. Ct. filed Aug. 17, 2016), in which Justice Few did not participate.[1]

[1] Justice Few did not participate in Parsons. Acting Justice Toal served in his stead.

Appellants believe that the full Supreme Court may wish to reconsider the issue, should this case go that far. Appellants understand that this Court is currently bound by the Supreme Court majority decision in Parsons, and are hopeful that Respondent will accept this Court's reversal of the circuit court's order on the merits and proceed to arbitration without further appellate litigation.

I. Application of the outrageous torts exception from Aiken v. World Finance Corporation of South Carolina, 373 S.C. 144, 644 S.E.2d 705 (2007), is properly before the Court.

Appellants argued to the circuit court that the arbitration clause here is governed by and enforceable pursuant to the FAA. Respondent did not challenge these assertions to the trial court. As briefed by both sides, and as argued at the hearing by both sides, the entire case turned on one narrow issue: whether the outrageous torts exception applied to render the arbitration agreement unenforceable. R. pp. 10–14, pp. 24–27, pp. 29–43. In a Form 4 Order, the circuit court held:

> This matter came before the Court on Defendant's [sic] Motion to Dismiss or Stay and Compel Arbitration filed on January 25, 2016 and argued before the Court on April 12, 2016. Defendant's [sic] Motion is denied because Plaintiff never signed the subsequent contracts and is not bound by the arbitration clause.

R. p. 1.

The language of the Form 4 Order demonstrates that the court found that because of the allegation that Respondent did not sign or authorize the subsequent Finance Agreements submitted by Hoover to Chrysler Capital, Respondent was not bound by the arbitration agreement. That was Respondent's argument pursuant to Aiken v. World Finance. Respondent's argument that the circuit court somehow found otherwise, or that it is unclear what the circuit court found, disregards everything contained in the record on appeal, including the memoranda submitted by both parties to the circuit court and the transcript of the hearing.

The Court should disregard Respondent's argument and find the appeal proper pursuant to Bailey v. Segars, 346 S.C. 359, 364–65, 550 S.E.2d 910, 913 (Ct. App. 2001), in which this Court held that a party did not need to file a Rule 59 motion to preserve various arguments in support of a JNOV motion. The trial court had denied all post-trial motions in a Form 4 Order with a simple holding that "[p]ost trial motion by Defendant [sic] are denied." Bailey, 346 S.C. at 364, 550 S.E.2d at 910. The trial court did not expressly address and rule upon each individual argument raised by the appellant. This Court held that despite the lack of express rulings, and the existence of only a general ruling by the trial court, all arguments in support of the JNOV motion were preserved without a Rule 59 motion. The reason was that the record on appeal was "complete" with "the motion for JNOV and memorandum in support thereof, the transcript of the hearing on the post-trial motion, and the trial court's order denying the motion." Id. at 365, 550 S.E.2d at 913 (distinguishing Vespiazianni v. McAlister, 307 S.C. 411, 412–13, 415 S.E.2d 427, 428 (Ct. App. 1992) (finding an issue not preserved where the trial court had issued a simple Form 4 Order and the parties had not included the transcript of the motion hearing in the record on appeal)).

As in Bailey, the record on appeal in this case is complete. The record contains Appellants' motion to compel arbitration, Appellants' memorandum in support of the motion, Respondent's memorandum in opposition, the full transcript of the hearing, and the circuit court's order denying the motion. The fact that the circuit court issued a lightly worded Form 4 Order does not eliminate the fact that the parties and the court were focused on the sole issue of the outrageous torts exception to enforcement of arbitration agreements. The memoranda and transcript demonstrate that no other issue was even raised.

The cases cited by Respondent in her response brief do not involve similar facts. Brief of Respondent at 3–4. State v. Witten, 375 S.C. 43, 47, 649 S.E.2d 505, 507 (Ct. App. 2007), involved

a jury charge request that was not preserved for appeal since counsel had not stated a reason to support the jury charge at trial. Floyd v. Floyd, 365 S.C. 56, 73, 615 S.E.2d 465, 474 (Ct. App. 2005), involved a party who tried to challenge the amount of an attorney fee award for the first time on appeal. Jones v. State Farm Mutual Automobile Insurance Co., 364 S.C. 222, 234, 612 S.E.2d 719, 725–26 (Ct. App. 2005), involved a party who had generally raised an issue to the trial court, but had failed to set forth a legal argument in support of the issue, and therefore failed to preserve it for appeal.

The facts of this case do not implicate the holdings of any of those cases. This case is controlled by Bailey, where the record on appeal and the circuit court's order clearly demonstrate that the circuit court entertained and ruled upon the only issue raised by either party: whether the outrageous torts exception applies pursuant to Aiken v. World Finance. The Court should find the issue preserved and properly before the Court on appeal.

II. The circuit court erred in finding that the outrageous torts exception applies under these facts.

For the reasons set forth in Appellants' initial brief, the Court should reverse the Order denying Appellants' motion to compel arbitration. The facts of this case do not involve the "illegal and outrageous" conduct necessary to implicate the Aiken v. World Finance exception to arbitration enforcement.

III. The outrageous torts exception should be abandoned.

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).

Appellants acknowledge that they did not raise this argument to the circuit court.

Considering the recentness of Chief Justice Pleicones's raising the issue in a case in which the full Supreme Court did not participate, however, Appellants Hoover and Chrysler Capital believe that the full Supreme Court may wish to revisit the issue if this case goes that far.

CONCLUSION

The record on appeal is complete and contains the parties' circuit court memoranda, the transcript of the hearing, and the circuit court's form order. That record demonstrates that the sole issue raised by the parties and ruled upon by the Court was the applicability of the outrageous torts exception from Aiken v. World Finance. This appeal is therefore proper pursuant to Bailey v. Segars, 346 S.C. 359, 364–65, 550 S.E.2d 910, 913 (Ct. App. 2001). Appellants were not required to file a Rule 59 motion for clarification of the circuit court's Form 4 Order denying the motion to compel arbitration.

For the reasons set forth in Appellants' initial brief, the outrageous torts exception does not apply under these facts, and the circuit court's order denying the motion to compel arbitration should be reversed. Appellants do not expand upon those arguments in this reply brief.

Finally, Hoover and Chrysler Capital acknowledge that they did not argue to the circuit court that the outrageous torts exception should be abandoned by our Courts. The issue was recently raised by Chief Justice Pleicones in Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc., in which Justice Few did not participate. Appellants believe that the full Supreme Court may wish to reconsider the issue in this case, should this case go that far. Appellants understand that this Court is currently bound by the Supreme Court majority decision in Parsons. Appellants are hopeful that this Court will reverse the order denying the motion to compel arbitration, and that Respondent will accept this Court's decision without further appellate proceedings.

Respectfully submitted,

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November 28, 2016

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CERTIFICATE OF COMPLIANCE WITH RULE 211(b), SCACR

Counsel for Appellants certify that their final briefs comply with Rule 211(b), SCACR.

Respectfully submitted,

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