THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Resident Circuit Judge

APPELLATE CASE NO. 2017-000142

Cali Alyson Emory, individually and in a representative capacity for all others similarly situated.....Appellant

vs.

Thag, LLC d/b/a Myrtle Beach Mitsubishi.....Respondent

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN ORDERING BILATERAL ARBITRATION AS OPPOSED TO ALLOWING THE ARBITRATOR TO CONSIDER CLASS ALLEGATIONS?

STATEMENT OF THE CASE

I. Procedural History

On February 12, 2016, the Appellant Cali Alyson Emory filed this action individually and in a representative capacity for all others similarly situated. Appellant initially demanded a Jury Trial. The Respondent filed an Answer on or about June 10, 2016. The Appellant filed an Amended Complaint on June 23, 2016 demanding arbitration rather than a Jury Trial. The Respondent answered that Complaint on or about October 5, 2016.

On June 23, 2016, the Appellant filed a Motion to Compel Arbitration pursuant to the South Carolina Uniform Arbitration Act. On August 17, 2016, the Respondent filed a Motion to Stay Proceedings and Compel Bilateral Arbitration. The Court heard oral arguments on these motions on September 7, 2016. On September 15, 2016, the Court issued a written Order denying both the Appellant's Motion and the Respondent's Motion and requiring that the case proceed in Circuit Court. On September 23, 2016, the Respondent filed a Motion to Alter or Amend the Court's September 15, 2016 Order.

The Court then amended its original Order and on January 12, 2017 filed its Order granting Motion to Alter or Amend, holding, "(1) That the S.C. Act does not apply, (2) That the FAA applies, and (3) The Court will appoint Karl Folkens as the Arbitrator pursuant to §5 of the FAA." None of these three specific holdings is at issue on this appeal. The Court further held that the arbitration shall proceed as a bilateral case involving only the individual Appellant Cali Alyson Emory as opposed to allowing Cali Alyson Emory to represent a class of persons. This holding concerning Bilateral versus Class Wide Arbitration is the subject of this appeal.

II. Statement of the Facts

On or about May 28, 2014, the Appellant purchased a new vehicle from the Respondent Myrtle Beach Mitsubishi. The Respondent Myrtle Beach Mitsubishi had the Appellant sign a Purchase Agreement with a pre-printed "closing fee" of $499.00.

The Contract of Sale contains two arbitration clauses. The arbitration clause on the front page of the contract states as follows:

> All claims, disputes, and other matters of any kind or nature in question arising out of, in connection with, or relating to, the purchase of the above described vehicle, shall be decided by arbitration in accordance with the Commercial Arbitration Association. The award by the arbitrator(s) shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction therein.

The second arbitration clause on the reverse side of the Contract of Sale states as follows:

> 10. Any controversy or claim arising out of or relating to this contract, or breach thereof, shall be settled in the County Seat where the dealership is located by arbitration pursuant to the Uniform Arbitration Act of South Carolina (S.C. Code §15-48-10) in accordance with the Rules of the American Arbitration Association, and judgment of the award rendered by the arbitrator(s) may be entered in any Court having jurisdiction thereof.

ARGUMENT

I. THE TRIAL COURT ERRED IN ORDERING THAT THE CASE PROCEED AS BILATERAL ARBITRATION AS OPPOSED TO CLASS WIDE ARBITRATION.

While both the Appellant and the Respondent agree that the arbitration clauses are valid, the parties disagree on whether the matter can proceed in arbitration on behalf of a class. The lower court ordered "bilateral" (non-class) arbitration. Appellant maintains that the arbitrator may consider the Class allegations and may certify this case as a class action.

The present case has been styled as a Class Action under the Dealers Act. The Dealers Act specifically provides for class actions. S.C. Code Ann. §56-15-110(2) provides "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 the benefit of the whole, including actions for injunctive relief."

The South Carolina Supreme Court addressed class actions under the Dealers Act in the case of Herron v. Century BMW, 387 S.C. 525, 693 S.E.2d 394 (2010) (Herron I). The Court found that an Arbitration Agreement which prohibited class actions in direct contravention of the Dealers Act is against public policy. The Court noted that in addition to specifically providing for class actions, the Dealers Act also provides that "Any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable." S.C. Code §56-15-130. The Court went on to hold, "Stated succinctly, the Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act and that any contract prohibiting a class action suit violates our State's public policy and is void and unenforceable." (Emphasis added.) The Court affirmed the Trial Court's Order in result, denying the Motion to Compel Arbitration.

Shortly after the opinion in Herron I was issued, The United States Supreme Court published its opinion in the case of AT&T Mobility, LLC v. Concepcion, 563 U.S. 333 (2011). In Concepcion, The United States Supreme Court overturned a decision of the California Courts which invalidated a class action waiver in an arbitration provision based upon the preemption of the FAA. The United States Supreme Court then accepted certiorari on the Herron I case and remanded the Herron I case with instructions for the South Carolina Supreme Court to reconsider

its opinion in Herron I in light of the Concepcion case. The South Carolina Supreme Court affirmed Herron I because the issue of preemption had not been preserved for review in the South Carolina proceedings. Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011). (Herron II).

The arbitration agreement in Herron I contained a class action waiver. The Court struck the waiver on public policy grounds but implied that the waiver was severable and the arbitration clause could be saved. The Court struck the entire arbitration clause at the Defendant's request. The Arbitration Agreement in the present case DOES NOT have a class action waiver. Therefore, the present case is EVEN STRONGER than Herron I and this Court has even more reason to deny the Respondent's request for bilateral arbitration.

In 2015, the United States Supreme Court once again overturned a California decision denying arbitration. In DirecTV v. Imburgia, 577 U.S. ____ (2015), the Court addressed an arbitration clause which contained a class action waiver with a self-defeating clause. The waiver specified that the entire arbitration provision was unenforceable if the "law of your state" made class-action waivers unenforceable. The lower court reasoned that since the law of California did not allow class action waivers, and since that rule was the "law of your state" the entire arbitration agreement was unenforceable by its own self-defeating terms. The Supreme Court disagreed, reasoning that the lower court had asked the wrong question. The court stated, "Thus the underlying question of contract law at the time [the lower court] made its decision was whether the 'law of your state' included invalid California law. We must now decide whether answering that question in the affirmative is consistent with the [FAA]." (Emphasis in original.) Id. at ____.

Citing Concepcion, the Court concluded that the California law against class waivers was invalid because it did not place arbitration agreements on equal footing with all contracts. The California law targeted arbitration agreements. The Court held, "After examining the grounds upon which the Court of Appeal rested its decision, we conclude that California courts would not interpret contracts other than arbitration contracts the same way. Rather, several considerations lead us to conclude that the court's interpretation of this arbitration contract is unique, restricted to that field." Id. at ____. Therefore, the self-defeating clause was not triggered and the arbitration clause was valid.

The facts of the present case, however, are very different from the facts of DirecTV. The first and foremost distinction is that DirecTV and prior cases concerned the States' attempts to defeat arbitration altogether, which would frustrate the liberal Federal Policy in favor of arbitration as set forth in the FAA. In the present case, however, the Appellant has specifically requested arbitration. The Appellant agrees that the Contract of Sale drafted by the Respondent specifically provides for arbitration. The Appellant is not trying to avoid arbitration.

The second distinction is that the arbitration clauses in the present case contain no class action waivers. Therefore, there is no conflict between the state's public policy of allowing class actions under the Dealers Act and the FAA's liberal policy favoring arbitration. Both of these interests can be served.

The Third distinction is that the class action provision of the Dealers Act applies to all situations which arise under the Act. It does not target arbitration as the California law did in DirecTV. The class action provision of The Dealers Act allows for a class action in any contract to purchase a vehicle, with or without an arbitration clause. The Dealers Act was adopted in 1962, long before arbitration became popular. In 1962, the South Carolina legislature

could not possibly have intended to target arbitration clauses. There is no evidence in the record to suggest that arbitration clauses were used in Automobile purchase Agreements in 1962. The purpose of providing for class actions under the Dealers Act was most certainly to provide a practical economical remedy for a large group of car buyers who have suffered the same type harm. The purpose was not to defeat arbitration clauses, or to frustrate the purposes of the FAA.

In Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662 (2010), the U.S. Supreme Court held that imposing class arbitration on parties who have not agreed to authorize class arbitration was inconsistent with the Federal Arbitration Act. The arbitration clause in Stolt-Nielsen was "silent" as to class action treatment in arbitration. In the present case, however, the arbitration clauses cannot be said to be silent as to class action treatment.

The entire agreement between the dealer and the purchaser is subject to the provisions of the South Carolina Manufacturers, Distributors and Dealers Act (Dealers Act). The Dealers Act is very specific in terms of the rights of consumers to band together in a class action. S.C. Code Ann. §56-15-110(2) provides "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 the benefit of the whole, including actions for injunctive relief." This is a specific consumer remedy recognizing that some losses suffered by consumers may be so small that the loss would not warrant the filing of a single action. The Dealers Act recognizes that consumers are particularly vulnerable to abusive fees charged by dealers and therefore specifically provides for consumers to band together to seek justice against these unscrupulous charges and activities.

The arbitration clauses contained in the purchase agreement in this case cannot be read separately from the requirements and the protections provided by the Dealers Act. These

protections are presumed to be a part of any contract and therefore the arbitration clauses are not silent as to whether a class action can be brought in arbitration. The provisions of the Dealers Act are required in every Contract of Sale. As stated by the South Carolina Supreme Court in Herron I, the class action provision is non-waivable.

The contract was entered in Horry County, South Carolina. Both parties are residents of South Carolina. Presumably, the Respondent has a South Carolina Dealer's license. The Respondent is subject to the Dealers Act and is charged with knowledge of the Class Action provisions of the Act. All parties to the transaction are aware of the application of the Dealers Act. Therefore, the Contract of Sale is NOT SILENT as to class actions. The Arbitration Clause makes specific reference to the application of South Carolina law (the Uniform Arbitration Act). The contract acknowledges the application of South Carolina law, which would include the Dealers Act and the provision for Class Actions.

CONCLUSION

The Appellant requests the Court to reverse the lower court order for bilateral arbitration and require the arbitrator to follow the Dealers Act provision for class action treatment.

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