

STATE OF SOUTH CAROLINA
 COUNTY OF CHARLESTON
 IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2016 CP-10-4112

JANE DOE, an adult woman over the age of 18

TCSC, LLC, d/b/a HENDRICK TOYOTA OF NORTH CHARLESTON

RECEIVED

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : Plaintiff Defendant

Self-Represented Plaintiff

MAY 23 2017
 SC Court of Appeals

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)**
 Affirmed; Reversed; Remanded; Other

FILED
 APR - 5 PM 2:52
 JILLIE J. ARMSTRONG
 CLERK OF COURT

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : The Motion to Compel Arbitration is denied. Formal Order to Follow.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

[Signature]
 Circuit Court Judge

2060
 Judge Code

4/4/2017
 Date

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STATE OF SOUTH CAROLINA }
COUNTY OF CHARLESTON }

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NUMBER: 2016-CP-10412

JANE DOE, an adult woman over
the age of 18, }

Plaintiff, }

v. }

TCSC, LLC, d/b/a HENDRICK
TOYOTA OF NORTH
CHARLESTON, }

Defendant. }

RECEIVED
MAY 23 2017
SC Court of Appeals
FILED
2017 APR 27 PM 2:58
JULIE J. ARMSTRONG
CLERK OF COURT

**ORDER DENYING DEFENDANT'S MOTION
TO COMPEL ARBITRATION AND STAY LITIGATION**

This matter came before the court for a hearing on Defendant's Motion to Compel Arbitration and to stay the instant litigation under the Federal Arbitration Act, 9 U.S.C. §1, *et seq.*, [the "FAA"] which was filed on December 9, 2016. The Plaintiff filed a Memorandum in Opposition to Defense Motion to Compel Arbitration on February 17, 2017 and a Supplemental Memorandum in Opposition to Defense Motion to Compel Arbitration on February 22, 2017. Oral argument was heard in the matter on February 22, 2017 from Edward D. Buckley, Jr., attorney for the Defendant and Anthony E. Forsberg, attorney for the Plaintiff. At the conclusion of the argument, the court took the matter under advisement. Upon further consideration of the oral argument, a review of the written submissions of the parties and the record before the court, additional oral argument was requested. In advance of that additional argument, Plaintiff filed an Affidavit of Jane Doe in Support of Plaintiff's Memoranda in Opposition to Defendant's Motion to Compel Arbitration on March 31, 2017. The parties reconvened before the court on April 4, 2017

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with Edward D. Buckley, Jr. and Nicholas J. Rivera appearing on behalf of the Defendant and Anthony E. Forsberg appearing for the Plaintiff. Based on the oral arguments, submissions of the parties, the record before the court and the caselaw of this State, for the following reasons, I hereby find that the Defendant's Motion to Compel Arbitration and to stay the instant litigation is DENIED.

SUMMARY OF THE CASE

On or about June 11, 2011, Plaintiff purchased a 2011 Toyota RAV 4 from Rick Hendrick Toyota Scion of North Charleston, the Defendant in this matter. It is alleged that as part of that vehicle purchase sales documentation, she was presented with and signed a document entitled "Arbitration Agreement", which document was attached to the Defendant's Motion to Compel Arbitration and which forms the contract basis for the Defendant's motion. That document states, in pertinent part:

Any claim or dispute, whether in contract, tort, statute or otherwise...between you and us...which arises out of or relates to your credit application, purchase, lease or condition of this vehicle, your purchase, lease agreement or financing contract or any resulting transaction or relationship...shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action.

The Plaintiff acknowledges in her filed Affidavit that she did sign the Arbitration Agreement.

The Complaint alleges that some four years and seven months later, on December 16, 2015, Plaintiff found herself at the same dealership to receive service on her previously purchased 2011 RAV 4. During that visit, she spoke with Richard Smith, an employee and salesman for the Defendant. As she was curious to see if she could potentially afford to purchase a new car, Smith had the Plaintiff complete a credit application, and in doing so the dealership collected personal and private identifying data from the Plaintiff including her name, address, telephone number and birth date, among other information. After discussing some potential vehicles for purchase and the cost of the same, the Plaintiff did not choose to purchase a new vehicle from the Defendant dealership

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that day. Plaintiff alleges that Smith thereafter persisted in contacting the Plaintiff by telephone over the following weeks in order to convince her to buy another car from the Defendant dealership.

Ultimately the Plaintiff purchased a vehicle from a different dealership. The Complaint alleges that on January 19, 2016 at 10:20 am, Smith called from the Defendant dealership to follow up on the Plaintiff as a prospective sale. The Plaintiff informed him that she had already purchased a vehicle elsewhere. It is then alleged that within ten minutes of learning that the sales lead he had been working since December 15, 2015 was dead, on January 19, 2016 at 10:30 am, Richard Smith, acting as an employee and agent of the Defendant, posted the following ad on Backpage.com, a sexually oriented website used to offer and solicit sexual encounters including prostitution:

Needing it Now - 35

Posted: Tuesday, January 19, 2016 10:30 am

I really need a good pounding. My husband is always out of town and I can host. 843-XXX-XXX (redacted).
Send pictures and ask for [Jane Doe]

Poster's age: 35

Location: Charleston, Mt. Pleasant
Post ID: 12XXXXX81 charleston

Finally, the Plaintiff states in her Complaint that thereafter, within hours, she began to receive phone calls and texts on the personal and private cell phone number she had given the dealership through Smith from individuals indicating (in explicit terms) that they sought to meet with her for sexual encounters in response to the Backpage.com advertisement posted by the employee of the Defendant. It is this disturbing, outrageous and incredibly invasive internet posting which forms the basis of the Plaintiff's allegations in the instant litigation.

The Plaintiff initiated litigation against the Defendant alleging several causes of action sounding in tort, specifically the torts of Outrage, Intentional Infliction of Emotional Distress,

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Invasion of Privacy, Defamation/Libel Per Se, General Negligence, Gross Negligence, Negligent Hiring, Negligent Training and Negligent Supervision. The Defendant filed an Answer on October 11, 2016 and thereafter moved to compel arbitration on December 9, 2016 relying upon the existence of the 2011 Arbitration Agreement.

It is the Plaintiff's position that the Arbitration Agreement she signed in 2011 as part of her separate and distinct purchase transaction of a vehicle from the Defendant's dealership did not contemplate such outrageous acts as were allegedly committed against her in 2016 and as such, the 2011 Arbitration Agreement does not apply to the torts alleged to have been committed by the Defendant and its agents, servants and employees. This court agrees.

STANDARD OF REVIEW

The Arbitration Agreement at issue herein is governed by the FAA¹, but the FAA's "Savings Clause", 9 U.S.C.A. § 2 (West), states, in pertinent part:

A written provision in any...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, save upon such grounds as exist at law or in equity for the revocation of any contract.

Arbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate. *Towles v. United Healthcare Corp.*, 338 S.C.29, 524 S.E.2d 839 (Ct. App. 1999). *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007). Arbitration will be denied if a court determines that no agreement to arbitrate existed. *Lucey v. Meyer*, 401 S.C. 122, 139, 736 S.E.2d 274, 283 (Ct. App. 2012). In determining whether an agreement to arbitrate exists, "the court should apply ordinary state-law principles that govern the formation of contracts." *Johnson v. Circuit City Stores*, 148 F.3d 373, 377 (4th Cir.1998) (quoting

¹ The parties to this case concede as much in their respective briefs.

Exhibit 2

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)); see also *Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir.1997) (“Courts decide whether there is an agreement to arbitrate according to common law principles of contract law.”). Additionally, the U.S. Supreme Court has held that “[a]rbitration is a matter of contract, and the FAA requires courts to honor parties’ expectations.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351, 131 S. Ct. 1740, 1752, 179 L. Ed. 2d 742 (2011).

LAW AND ANALYSIS

In her two memoranda filed in opposition to the Defendant’s Motion to Compel Arbitration and at oral argument, the Plaintiff raised several grounds for denying the enforceability of the Arbitration Agreement, which are summarized as follows: (1) the “outrageous and unforeseeable torts exception” prevents arbitration of her present claims, (2) that there was no meeting of the minds as to the Arbitration Agreement, (3) that the Arbitration Agreement constituted an adhesion contract and (4) that the Arbitration Agreement was unconscionable and therefore unenforceable.

For reasons more fully explained herein below, I conclude as a matter of law that the outrageous and unforeseeable torts alleged to have been committed against the Plaintiff in this matter in January 2016 could not have been contemplated by the parties when they entered into the 2011 Arbitration Agreement. I further find that by applying the expectations of a reasonable man, it could not have been the intention of the parties to include such outrageous torts in the 2011 Arbitration Agreement so there was no meeting of the minds between the parties. I find that because a party cannot be required to submit to arbitration a dispute which she has not agreed to submit, the 2011 Arbitration Agreement does not apply to the present dispute that has arisen between the parties. Finally, I find that the Arbitration Agreement constituted an unconscionable adhesion contract which is voidable at law. On essentially similar facts, the Supreme Court of South Carolina has reached

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the same conclusion, which precedent I find supports my determination on the matter under consideration.

I. The Outrageous and Unforeseen Torts Exception Applies to This Case

In the matter of *Aiken v. World Finance Corp. of SC*, 373 S.C. 144, 644 S.E.2d 705 (2007), the consumer plaintiff signed several arbitration agreements in connection with obtaining loans from the defendant company. In order to apply for those loans, the plaintiff was required to provide certain non-public, personal information to the defendant. At some point thereafter, employees of the defendant misappropriated the personal and private information of the plaintiff and used it to obtain sham loans and to pocket the proceeds of those loans. Upon learning his personal information had been misused in this fashion, the plaintiff brought an action against the defendant business for outrage and emotional distress, negligence, negligent hiring and supervision and unfair trade practices. The defendant answered, moved to dismiss and also filed a motion to compel arbitration. The trial court denied the defendant's motion to compel arbitration. Thereafter the Court of Appeals affirmed. On certiorari, affirming the lower court, the South Carolina Supreme Court held:

Both state and federal policy favor arbitration of disputes and unless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596–97, 553 S.E.2d 110, 118–19 (2001). However, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit. *Id.* at 596, 553 S.E.2d at 118. Given these principles, courts generally hold that broadly-worded arbitration agreements apply to disputes in which a “significant relationship” exists between the asserted claims and the contract in which the arbitration clause is contained. *Id.* at 598, 553 S.E.2d at 119 (quoting *Long v. Silver*, 248 F.3d 309 (4th Cir.2001)).

Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 149–150, 644 S.E.2d 705, 708 (2007)

I find that the matter presently before this trial court is squarely on point with the *Aiken* case. The torts allegedly committed against the Plaintiff in the matter *sub judice* bear absolutely no

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relationship, much less a significant relationship, to the 2011 Arbitration Agreement's stated scope of:

Any claim or dispute, whether in contract, tort, statute or otherwise...between you and us...which arises out of or relates to your credit application, purchase, lease or condition of this vehicle, your purchase, lease agreement or financing contract...

Counsel for the Defendant stated during oral argument that the reason the Plaintiff found herself at the dealership in December of 2015 was because of an ongoing relationship which had commenced with her purchase of the 2011 Toyota RAV 4 in June of 2011. Specifically, counsel argued that the dealership had occasionally sent mailers to the Plaintiff in order to entice her to trade in her 2011 vehicle for another. Essentially, the Defendant argued that but for the 2011 car purchase, the Plaintiff would not have been sent the trade-in mailers and therefore would not have found herself present in the dealership nor would she have independently contemplated the potential of purchasing another vehicle from the dealership. I find this claimed connection to be too tenuous to bring the December 2015 meeting between Plaintiff and Smith or the January 2016 alleged tortious acts under the penumbra of the 2011 Arbitration Agreement. Again, I find support for this opinion within the four corners of the *Aiken* case which states:

[Defendant] primarily argues that because [Plaintiff's] contracts with [Defendant] gave the conspirators access to [Plaintiff's] information in order to carry out their crimes, there is a significant relationship between [Plaintiff's] claims and the underlying loan agreement, thereby warranting arbitration. **We find this argument unpersuasive.** In our opinion, the "relationship" asserted by [Defendant] between [Plaintiff's] tort claims and the parties' prior dealings under the loan agreements hardly rises to the level of "significant." Applying what amounts to a "but-for" causation standard essentially includes every dispute imaginable between the parties, which greatly oversimplifies the parties' agreement to arbitrate claims between them. **Such a result is illogical and unconscionable.** See *Seifert v. U.S. Home Corp.*, 750 So.2d 633, 638 (Fla.1999) ("[T]he mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one 'arising out of or relating to' the agreement."). See also, *The Vestry and Church Wardens of the Church of the Holy Cross v. Orkin Exterminating Co., Inc.*, 356 S.C. 202, 209, 588 S.E.2d 136, 140

(Ct.App.2003) (“[T]he mere fact that an arbitration clause might apply to matters beyond the express scope of the underlying contract does not alone imply that the clause should apply to every dispute between the parties.”). (emphasis added)

Aiken v. World Finance Corp. of SC, 373 S.C. 144, 149, 644 S.E.2d 705, 708 (2007).

In other words, a plaintiff’s claims raised in a Complaint must have a significant relationship to the contract for the arbitration agreement to cover the lawsuit in question. Adopting the language of our Supreme Court, I find the mere fact that the Plaintiff may have received a trade-in mailer from the Defendant, or that she had returned to the dealership to service her car purchased in 2011, is insufficient to create a “significant relationship” between the asserted claims and the 2011 Arbitration Agreement. Likewise, I find the suggestion of Defendant that the dispute would not have arisen but for the existence of the 2011 sales contract including the Arbitration Agreement and the consequent relationship between the parties is insufficient by itself to transform the present dispute into one “arising out of or relating to” the 2011 Arbitration Agreement. To avoid an illogical and unconscionable result, I find that the 2011 Arbitration Agreement has no application to the alleged 2016 torts.

In analyzing the proper application of law in *Aiken*, the Supreme Court went on to state:

...[W]e pronounce a more definitive rule for determining whether a significant relationship exists between a dispute between parties to a contract and the underlying contract, thereby implicating an arbitration agreement in the contract. Because even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law, this Court will 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.

In this case, we find the theft of [Plaintiff’s] personal information by [Defendant’s] employees to be outrageous conduct that [Plaintiff] could not possibly have foreseen when he agreed to do business with [Defendant]. Consequently, in signing the agreement to arbitrate, [Plaintiff] could not possibly have been agreeing to provide an alternative forum for settling claims arising from this wholly unexpected tortious conduct. Accordingly, we hold that [Plaintiff’s] claims for unanticipated and unforeseeable tortious conduct by [Defendant’s] employees are not within the scope

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of the arbitration agreement with [Defendant].

This Court merely seeks, as a matter of public policy, to promote the procurement of arbitration in a commercially reasonable manner. To interpret an arbitration agreement to apply to actions completely outside the expectations of the parties would be inconsistent with this goal.

Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007) (emphasis supplied).

Just as in *Aiken*, it would be absurd for this court to find that the Jane Doe Plaintiff in this action, acting as a reasonable person at the time she was purchasing her car in 2011, would have foreseen that nearly five years later upon a return visit to the same dealership an employee would misappropriate her personal, private information and place it on a sex website. The *Aiken* Court stated in a footnote:

[T]he rule we set forth today is based on the concept of the expectations of a “reasonable man,” a standard deeply rooted in tort law. Therefore, a determination of foreseeability under the rule is to be made from the standpoint of the injured party; not this Court. We do not believe that this Court should proclaim that fraudulent acts such as identity theft are foreseeable in the course of normal business dealings

Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007).

Likewise, this trial court will not proclaim as foreseeable the outrageous and tortious acts of the Defendant or Defendant’s employees in this matter. As she sat across from a salesperson in June of 2011, signing documents to consummate the purchase of her new car, including the very Arbitration Agreement at issue in this motion, the Plaintiff could never have foreseen the outrageous events that unfolded on January 19, 2016. If the possibility of such alleged tortious conduct by the Defendant had been foreseeable, any reasonable consumer most certainly would not have agreed to buy a vehicle from that dealership. There can be no question that in 2011 the Plaintiff herein did not knowingly agree to arbitrate her present claims arising out of such unforeseeable and outrageous conduct. As a matter of public policy, as the facts are virtually indistinguishable, it would be

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inconsistent with the law of the *Aiken* case for this court to find that the instant Plaintiff's claims arising from the outrageous and unforeseeable conduct of the Defendant's employee are subject to the 2011 Arbitration Agreement. I find that they are not.

II. The Continued Viability of the Outrageous and Unforeseen Torts Exception Despite the *Concepcion* line of U.S. Supreme Court Cases

The Defendant also argued in support of its Motion to Compel Arbitration that by way of the Supremacy Clause, the *Concepcion*² line of US Supreme Court cases trump South Carolina law on the issue of whether the Federal Arbitration Act, 9 U.S.C. §1, *et seq.*, displaces state laws prohibiting outright the arbitration of a particular type of claim. While it may be true that the FAA does have this effect on state laws directly addressing *only* arbitration agreements, this court is not confronted with a State law, rule or caselaw that "outright prohibits" a particular type of claim. Rather, in keeping with the Savings Clause of the FAA³, since the 2011 Arbitration Agreement in this case is a contract, and since South Carolina and US Supreme Court case law requires courts to honor the parties' expectations⁴ embodied in their contracts, the "outrageous and unforeseeable tort exception" - which our Supreme Court has held is grounded in the general contract principle of effectuating the parties' contractual expectations - can apply equally to any contract. As such, the exception is a

² The U.S. Supreme Court cases of *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 116 S.Ct. 1652, 134 L.Ed. 2d 902 (1996), *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740, 179 L.Ed. 2d 742, 563 U.S. 333 (2011) and *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463, 193 L.Ed.2d 365 (2015) were all briefed and argued by the Defendant at oral argument.

³ A written provision in any...contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C.A. § 2 (West)

⁴ "Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351, 131 S. Ct. 1740, 1752, 179 L. Ed. 2d 742 (2011)

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“ground that exists in law or at equity for the revocation of any contract” as contemplated by the FAA’s Savings Clause, 9 U.S.C. § 2 (West) and does not conflict with Federal substantive law of arbitrability.

Further buttressing my conclusion in this matter is the more recent case of *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 791 S.E.2d 128, (2016), reh'g denied (Oct. 24, 2016). In that matter, the South Carolina Supreme Court addressed the Supremacy Clause argument and reaffirmed the viability of what has come to be known as the “outrageous and unforeseeable torts exception” to the policy of the United States and South Carolina courts favoring arbitration of disputes. It is upon this exception that the Plaintiff relies, among other things, in resisting the defense’s motion to compel arbitration. In *Parsons*, a majority of the Court held that the “outrageous and unforeseeable torts exception” remains a viable principle of law in South Carolina after *Concepcion*, because it embodies a generally applicable principle of contract law, that being effectuating the intent of the parties, a bedrock principle of contract law that is not applicable only to arbitration contracts.

In the concurring and dissenting opinion of Justice Hearn, it was stated that abolishing the exception, which the defendant in this motion argued is applicable only to arbitration, could lead to absurd results, such as forcing parties to arbitrate behavior that they clearly did not contemplate upon entering the contract or arbitration agreement. *Id.* at 791 S.E. 2d 128, 134-135. *See also, Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1214 (11th Cir. 2011) (“Even though there is [a] presumption in favor of arbitration, the courts are not to twist the language of the contract to achieve a result which is favored by federal policy but contrary to the intent of the parties.” (additional citation omitted) (internal quotation and alteration marks omitted)); *See also, e.g., Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008) (explaining a contract “interpretation which

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establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided”). It is this absurd result the Defendant seeks and which this court refuses to allow.

In her dissent in *Parsons*, which was joined by Justices Hearn and Beatty (thus resulting in a majority of the Court preventing Justices Pleicones and Kittredge from overruling *Aiken* and its progeny) Acting Justice Jean Toal stated eloquently, “[a]s I read our precedents, the so-called ‘outrageous and unforeseeable tort exception to arbitration’ is merely a label for this Court’s application of a longstanding contract principle - effectuating the parties’ contractual expectations.” *Parsons*, at 791 S.E. 2d 128, 137. She characterized the label attached to the exception as “...a misnomer. *The analysis underlying the exception - defining the scope of the agreement by effectuating the parties’ contractual expectations - is equally applicable to contracts and arbitration agreements.*” *Id.* at 137. (emphasis added).

Because the legal principle of effectuating the parties’ expectations relative to a contract applies equally to arbitration agreements and other contracts alike, this court finds that doing so is contemplated by the FAA’s Savings Clause and therefore is a proper ground upon which to determine whether to apply the Arbitration Agreement at issue here. I find that the parties could not reasonably have expected the alleged torts to have occurred and therefore they could not have agreed to arbitrate them.

III. No Meeting of the Minds

South Carolina common law has long required that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the agreement. *Hughes v. Edwards*, 265 S.C. 529, 220 S.E.2d 231 (1975). The “meeting of minds” required to make a contract is not based on secret purpose or intention on the

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part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893–894 (1989). In the instant case, the Defendant seeks to enforce an arbitration agreement entered into during the purchase of an automobile in 2011 in order to prevent the Plaintiff from bringing personal injury claims in State Court which arose not from the “credit application, purchase, lease or condition of [that] vehicle” as stated in the 2011 Arbitration Agreement, but rather which arose from the wrongful conduct of the Defendant’s employee nearly five (5) years after the unrelated vehicle purchase was consummated. Certainly no reasonable person presented with the 2011 Arbitration Agreement as part of a car sales package would ever conceive that the agreement could extend to cover the Plaintiff’s present claims of wrongdoing on the part of the Defendant and its employee. Considering the mechanics of a typical car sale, a buyer presented with multiple pages of documentation to sign in order to close the deal would never consider that an arbitration agreement which refers to potentially having to arbitrate claims arising from the “credit application, purchase, lease or condition of this vehicle” could reasonably include arbitrating claims arising if a salesperson outrageously violated the personal privacy of the buyer some five years after the fact in connection with a wholly separate, potential, unconsummated car deal. In this particular case, the Defendant did not bring this possibility to the attention of the Plaintiff, nor did she ever contemplate it, as stated in her Affidavit. As there was no meeting of the minds on this essential and material term when the parties entered into the 2011 Arbitration Agreement, the arbitration contract is deemed void *ab initio*. If no contract existed, it cannot be used to subject the Plaintiff’s present claims to arbitration.

Arbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate. *Towles v. United Healthcare Corp.*, 338 S.C.29, 524 S.E.2d 839

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(Ct. App. 1999); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007). Arbitration will be denied if a court determines no agreement to arbitrate existed. *Lucey v. Meyer*, 401 S.C. 122, 139, 736 S.E.2d 274, 283 (Ct. App. 2012). In determining whether an agreement to arbitrate exists, “the court should apply ordinary state-law principles that govern the formation of contracts.” *Johnson v. Circuit City Stores*, 148 F.3d 373, 377 (4th Cir.1998) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995)); see also *Arrants v. Buck*, 130 F.3d 636, 640 (4th Cir.1997) (“Courts decide whether there is an agreement to arbitrate according to common law principles of contract law.”). Applying the common law contract principle that there must be a meeting of the minds, I find no agreement to arbitrate existed between these parties.

IV. The Unconscionability of Arbitration Agreement and Adhesion Contract

Pursuant to the South Carolina Commercial Code, a contract, or a clause of a contract, may be attacked at law if it was unconscionable at the time it was made. S.C. Code Ann. § 36–2–302 (1976). As recognized by the FAA’s Savings Clause, this is a separate ground which exists at law or in equity for the revocation of any contract which does not apply solely to arbitration contracts. “If the court finds that a contract clause was unconscionable at the time it was made, the court may refuse to enforce the contract clause or limit the application of the unconscionable clause to avoid any unconscionable result.” S.C. Code Ann. § 36–2–302(1) (1976), *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 397, 498 S.E.2d 898, 903 (Ct. App. 1998). Unconscionability is characterized by the “absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” *Fanning v. Fritz’s Pontiac–Cadillac–Buick Inc.*, 322 S.C. 399, 402, 472 S.E.2d 242, 245 (1996) (emphasis added) (citing *Jones Leasing v. Gene Phillips and*

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Assocs., 282 S.C. 327, 318 S.E.2d 31 (Ct. App.1984)), *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 902 (Ct. App. 1998).

“A determination whether a contract is unconscionable depends upon all the facts and circumstances of a particular case.” *Holler v. Holler*, 364 S.C. 256, 269, 612 S.E.2d 469, 476 (Ct. App. 2005), quoting 17A Am. Jur. 2d *Contracts* § 279 (2004). Absence of meaningful choice on the part of one party speaks to the fundamental fairness of the bargaining process. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E. 663 (2007). “In determining whether a contract was tainted by an absence of meaningful choice, courts 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.” *Id.* at 25, 644 S.E.2d at 669. As the South Carolina Supreme Court noted in *Simpson*, the “loss of the right to a jury trial” and foregoing statutorily provided remedies are also relevant to this determination. *Id.* at 27, 644 S.E.2d at 670. Furthermore, an adhesion contract for the purchase of an automobile receives “considerable skepticism”. *Id.* at 27, 644 S.E.2d at 669–670.

An adhesion contract is a standard form contract offered on a “take-it-or-leave-it” basis where the terms are not negotiable. *Munoz v. Green Tree Fin. Corp.*, 343 S.C 531, 541, 542 S.E.2d 360, 365 (2001). As explained in *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 86, 749 S.E.2d 139, 148–149 (Ct. App. 2013), in the context of a typical vehicle sale, aside from the name of the desired vehicle and cost figures dependent upon the agreed price, the remaining terms of a vehicle sale, many of which are quite significant, are pre-printed and, presumptively, non-negotiable. Such pre-printed terms include, *inter alia*, disclaimers of warranty, arbitration provisions, prejudgment interest, attorney’s fees, choice of law, and severability clauses. In the case *sub judice*, the Plaintiff

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alleged by Affidavit that the 2011 Arbitration Agreement was one of many documents presented to her during the consummation of the purchase of the 2011 Toyota RAV4 from the Defendant. As stated in her filed Affidavit, the closing documents were hastily presented and they were apparently represented as necessary to close the deal on the vehicle.

I find that the Arbitration Agreement, as part of the overall package of sales documents, was an adhesion contract and accordingly, as the South Carolina Supreme Court has opined, warrants considerable skepticism by this trial court. In *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 26, 644 S.E.2d 663, 669 (2007), quoting the Ohio Supreme Court, our Supreme Court held that “the presumption in favor of arbitration clauses is substantially weaker when there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature. *In this situation there arises considerable doubt that any true agreement ever existed to submit disputes to arbitration.*” *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 700 N.E.2d 859, 866 (1998).

In determining if an arbitration agreement even existed, in addition to looking at whether there was a meeting of the parties’ minds, this court looks at the nature of the injuries alleged to have been 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 agreement; and the conspicuousness of the arbitration agreement. See, *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E. 663 (2007). In examining these issues, it is clear that the Plaintiff’s alleged injuries were not of the type normally considered in a commercial consumer setting such as a vehicle sale. Furthermore, it is likewise obvious that in the grand scheme of things, the Plaintiff in this matter is not a substantial business concern of the Defendant; she is but one customer purchasing one vehicle from a major

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automotive sales giant. Her overall impact on the business of the Defendant is presumably negligible. It is obvious to the court that in the context of the 2011 sales transaction, the Defendant possessed substantially more bargaining power than the Plaintiff and used that power to its advantage in consummating the vehicle sale in 2011. Additionally, the Plaintiff, when compared to a car dealership, lacks the level of business sophistication relative to the dealership and its sales people in the context of making a car deal. In the “take it or leave it” type of transaction that is a typical car deal, the Plaintiff is normally at a disadvantage. Whether there was any surprise in the inclusion of the Arbitration Agreement in this case is plain to see by the nature of the present dispute: the Plaintiff could never have suspected that the type of injuries she allegedly suffered at the hands of the Defendant and its employee could be subject to binding arbitration. The 2011 Arbitration Agreement itself is unconscionable to the extent it abrogates the Plaintiff’s right to have a jury of her peers hear and decide the merits of her present claims. This court has the power to either refuse to enforce the Arbitration Agreement as a whole contract or limit the application of the unconscionable clause to avoid an unconscionable result. I find that the Arbitration Agreement is unenforceable as a whole.

CONCLUSION

In resisting the Defendant’s Motion to Compel Arbitration, the Plaintiff herein has sought for the court to define the scope of the parties’ contractual expectations relative to the Arbitration Agreement at issue. For the reasons exhaustively explained herein, I conclude that the Arbitration Agreement does not apply to the outrageous and unforeseeable torts alleged by the Plaintiff. I also conclude that the 2011 car sale which produced the Arbitration Agreement was a wholly separate and distinct event compared to the 2015 meeting between Plaintiff and Defendant’s employee Richard Smith and his alleged actions taken in 2016 with regard to the Plaintiff’s personal and

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private identifying information. The Arbitration Agreement simply does not relate to or cover the alleged tortious actions of the Defendant and its employees, servants and agents.

I further conclude that there was no meeting of the minds, nor could there ever have been a meeting of the minds between the parties, as to the unforeseeable actions of the Defendant's employee Richard Smith and the prospective applicability of the Arbitration Agreement to such acts. Given that there was no meeting of the minds to include such acts in the Arbitration Agreement, it is axiomatic that there can be no contract to include them, and if there is no contract, there is no agreement to arbitrate the present dispute arising between the Plaintiff and the Defendant.

Finally, I additionally conclude that the 2011 Arbitration Agreement was an unconscionable adhesion contract, worthy of considerable skepticism by this court and I conclude that, based on all of the facts and circumstances of the present matter, there is no doubt that a true agreement never existed between these parties to submit the Plaintiff's present disputes with the Defendant to binding arbitration.

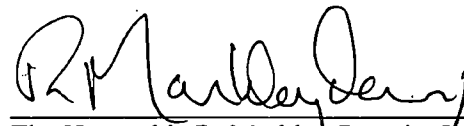
Based on the allegations of the Complaint, the briefs submitted by the parties, oral arguments and the information contained in the record, for the reasons set forth herein above, I hereby

ORDER that the Defendant's Motion to Compel Arbitration is **DENIED**. I further

ORDER that this matter is not stayed and that the parties shall proceed with litigation forthwith.

AND IT IS SO ORDERED!

April 26, 2017
Charleston, SC


The Honorable R. Markley Dennis, Jr.
Presiding Circuit Court Judge for the
Ninth Judicial Circuit

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