THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 2016-CP-26-00937

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

v.

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

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT CORRECTLY REVIEW THE PARTIES' AGREEMENT TO ARBITRATE, WHICH BOTH SIDES CONCEDE IS VALID UNDER THE FEDERAL ARBITRATION ACT, AND DETERMINE THAT THERE WAS ONLY AN AGREEMENT TO PARTICIPATE IN BILATERAL, NOT CLASS, ARBITRATION?

COUNTERSTATEMENT OF THE CASE AND FACTS

I. The Contract for Sale.

This appeal arises from the trial court's threshold determination of arbitrability based on the language of a Contract for Sale ("Contract") entered between the parties, Cali Emory ("Buyer") and Myrtle Beach Mitsubishi ("Seller"), for the sale of an automobile. The Contract provides that it relates to "this contract" (R. at 67, ¶ 10), that it is between "DEALER, and the undersigned Buyer(s)" (R. at 66, BAILMENT AGREEMENT), and that it applies to disputes relating to "the above described vehicle." (*Id.*).

The Contract includes two provisions addressing arbitration. (R. at 66-67). On the front page in the second paragraph under a heading labeled BAILMENT AGREEMENT is the following language:

> 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.

(emphasis added).

Paragraph 10 on the reverse side of the Contract states as follows:

> 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.

(emphasis added). There are no other references to arbitration in the Contract and there are no other arbitration agreements contained in any other documents.

II. The Trial Court's Order Addressing Arbitrability.

The trial court's order addressed two motions filed in conjunction with the Seller's Amended Complaint: (1) the Buyer's motion to compel arbitration pursuant to the South Carolina Uniform Arbitration Act ("SC Act") (R. at 48), and (2) Seller's motion to stay proceedings and compel bilateral arbitration pursuant to the Federal Arbitration Act ("FAA") (R. at 55-71).[1] The trial court initially denied both motions because it found there was no agreement to arbitrate pursuant to the SC Act because the notice provisions of S.C. Code Ann. § 15-48-10 had not been met. (R. at 6-8).

In response to this ruling, Buyer filed a second amended complaint (R. at 21-25), and Seller filed a motion to alter or amend and to hold in abeyance, arguing that the trial court failed to recognize that the FAA preempts the SC Act and that there was a valid agreement to arbitrate under the FAA (R. at 72-74). Seller also renewed its arguments as to the forum for arbitration and its request that any arbitration be between the Buyer and Seller only, and not on behalf of a class. Buyer conceded that there was a valid agreement to arbitrate under the FAA, but argued that the arbitration should proceed under the SC Act and that the arbitrator "may consider the Class allegations and may certify this as a class action." (R. at 75-80).

After receiving the parties' initial briefings, the trial court posed two questions by email, "(1) briefly clarify your position on the substantive law to apply to the arbitration, and (2) whether the issue of class-wide vs. bilateral arbitration is an issue of contract interpretation for the arbitrator or for the Court." (R. at 92). Both parties' responses to the second question indicated that the issue of whether the case could proceed as a class action was a question of arbitrability to be determined by the trial court. (R. at 93-101).

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[1] The Seller has taken the consistent position throughout this case that there is a valid agreement to arbitrate pursuant to the FAA. (See R. at 26; R. at 32-33; R. at 40-41).

The trial court considered all of these arguments and the language of the Contract and granted the motion to alter or amend by order dated January 11, 2017, compelling bilateral arbitration pursuant to the FAA. (R. at 1-5). This appeal followed.

ARGUMENT

As an initial matter, Buyer does not contest the following rulings by the trial court: "(1) [t]hat the S.C. Act does not apply, (2) [t]hat the FAA applies, and (3) [t]he Court will appoint Karl Folkens as the arbitrator pursuant to Section 5 of the FAA." (Appellant's Brief at 1 ("None of these three specific holdings is at issue in this appeal.")). The sole argument on appeal relates to the trial court's determination on the threshold, substantive matter of arbitrability as to whether this action should proceed between the named parties or as a class arbitration.

Because the parties agree that the Contract is governed by the FAA, substantive questions will be guided by federal law. *Henderson v. Summerville Ford-Mercury Inc.*, 405 S.C. 440, 449, 748 S.E.2d 221, 226 (2013). To the extent state law conflicts, it is preempted by the FAA. *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 400, 540 S.E.2d 864, 866 (Ct. App. 2000); *see Doctor's Assocs. v. Casarotto*, 517 U.S. 681 (1996).

I. As a general rule, questions of arbitrability are to be decided by courts, including whether the parties have agreed to class arbitration.

Both parties argued to the trial court that this issue was one of arbitrability to be decided by the court and cited *Dell Webb Communities, Inc. v. Carlson*, 817 F.3d 867 (4th Cir. 2016), *cert. denied sub nom. Carlson v. Del Webb Communities, Inc.* (U.S. Dec. 5, 2016). (R. at 93-101). As set forth there:

> Because the primary goal in enforcing an arbitration agreement is to discern and honor party intent, and because of the fundamental differences between bilateral and class arbitration—which change the nature of arbitration altogether—we hold that whether parties agree to class arbitration is a gateway question for the court.

Id.; *accord Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746 (3rd Cir. 2016) (holding that the availability of class arbitration is a substantive dispute for the court to decide); *Reed Elsevier, Inc. ex rel. Lexis Nexus Div. v. Crockett,* 734 F.3d 594 (6th Cir. 2013) (same). Thus, the trial court correctly considered this question in issuing its order.

II. The parties agreed to arbitrate disputes relating to "this contract" and "the purchase of the above described vehicle," but not the disputes of other buyers relating to other vehicles and other contracts. Therefore, the trial court correctly ordered that this matter proceed on behalf of the Buyer and the Seller only.

"[T]he central or 'primary' purpose of the FAA is to ensure that 'private agreements to arbitrate are enforced according to their terms.'" *Henderson*, 405 S.C. at 449, 748 S.E.2d at 226 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 682 (2010)). For this reason, parties cannot be forced to arbitrate on a class-wide basis absent "a contractual basis for concluding that the party agreed to do so." *Stolt-Nielsen S.A.*, 559 U.S. at 684. Further, "[a]n implicit agreement to authorize class-action arbitration, [ ] is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate." *Id.* at 685. "[T]he differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Id.* at 687.

The Fourth Circuit has provided a lengthy discussion of the reasons parties might agree to bilateral arbitration rather than class arbitration, explaining as follows:

> When parties agree to forgo their right to litigate in the courts and in favor of private dispute resolution, they expect the benefits flowing from that decision: less rigorous procedural formalities, lower costs, privacy and confidentiality, greater efficiency, specialized adjudicators, and—for the most part—finality. These benefits, however, are dramatically upended in class arbitration, which brings with it higher risks for defendants. *See* [*Stolt-Nielsen S.A.*, 559 U.S. at 662] (contrasting the high stakes of class-action arbitration with its limited scope of judicial review).
>
> . . .

> [I]n bilateral arbitration, the lack of rigorous procedural rules greatly increases the speed and lowers the cost of the dispute resolution, but in class arbitration, procedural formality is required, reducing—or eliminating altogether—these advantages. This is because the arbitrator must determine, before ruling on the merits, whether to certify the class, whether the named parties satisfy mandatory standards of representation and commonality, how discovery will function, and how to bind absent class members. [*AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 348–49 (2011)]. In turn, costs and time increase. *See id.* (finding that the average bilateral arbitration begun between January and August 2007 reached a final disposition in four-to-six months, whereas none of the class arbitrations initiated as of September 2009 had resulted in a final merits award, and the average time from filing to resolution—through settlement, withdrawal, or dismissal, not judgment on the merits—was 630 days).

Dell Webb Communities, Inc., 817 F.3d at 875-76.

Given this background, the trial court correctly reasoned, "the question before the Court is 'whether the parties *agreed to* authorize class arbitration.' *Stolt-Nielsen S.A.*, 559 U.S. at 687 (emphasis in original)." (R. at 4). From there, the trial court looked to the parties' agreement, the Contract. (R. at 4-5).

In this case, the Contract does not mention class actions or Seller's other customers. It does, however, specify that it relates to "this contract,", that it is between "DEALER, and the undersigned Buyer(s)," and that it applies to disputes relating to "the above described vehicle." (R. at 66-67). The arbitration clauses themselves are limited to claims relating to "the purchase of the above described vehicle" and "this contract." (*Id.*). This language indicates an intent that any arbitration be between the parties to the Contract only and not claims relating to other contracts, other vehicles, and other buyers. There is no language in the Contract that would give rise to any other inference.

"The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). Contracts in South Carolina will be construed according to their

plain language and "if the language is perfectly plain and capable of legal construction, it determines the rights and obligations of the parties." *Holden v. Alice Mfg., Inc.*, 317 S.C. 215, 221, 452 S.E.2d 628, 631 (Ct. App. 1994); *see Ashley River Properties I, LLC v. Ashley River Properties II, LLC*, 374 S.C. 271, 280, 648 S.E.2d 295, 299 (Ct. App. 2007) (applying general rules of contract construction to arbitration agreement). In this case, the language of the Contract reflects no intent beyond the parties to the Contract, this transaction, and this vehicle. Therefore, the trial court correctly found there was not a contractual basis for class-wide arbitration.

III. This analysis based on United States Supreme Court precedent and the language of the Contract is not changed based on Buyers' arguments under S.C. Code Ann. § 56-15-110(2).

The FAA makes agreements to arbitrate "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. § 2; *see AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336 (2011). That is all the trial court sought to do in this case by ordering bilateral arbitration based on the language of the Contract.

Buyer seeks to avoid clear United States Supreme Court precedent, relying on *Herron v. Century BMW*, 387 S.C. 525, 693 S.E.2d 394 (2010) ("Herron I"), *cert. granted, judgment vacated sub nom. Sonic Auto., Inc. v. Watts*, 563 U.S. 971 (2011), and *opinion reinstated*, 395 S.C. 461, 719 S.E.2d 640 (2011) ("Herron II"). The United States Supreme Court vacated that opinion and remanded it "to the Supreme Court of South Carolina for further consideration in light of *[] Concepcion* . . . ." This order vacating Herron I, makes it clear that there is not a non-waivable right to bring a class arbitration under S.C. Code Ann. § 56-15-110 and that *Concepcion* applies to claims such as this one. The South Carolina Supreme Court reinstated the ruling in Herron I because the issue of federal preemption under the FAA had not been raised in

that case, not because there is a non-waivable right to bring class actions under S.C Code Ann. § 56-15-110(2). *Herron II*, 395 S.C. at 470, 719 S.E.2d at 644-45.

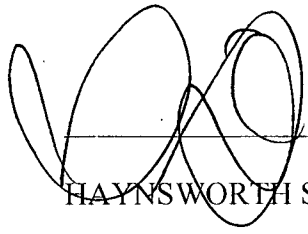
As shown in case after case under the FAA as cited above, state law provisions that interfere with the terms of a contractual agreement to arbitrate will be invalidated. These holdings are not limited to cases where there has been an express waiver of class arbitration. *See Stolt-Nielsen S.A.*, 559 U.S. at 687 (finding no agreement to arbitrate on behalf of class where agreement was silent on issue). Here, unlike Herron I, the issue of preemption has been fully raised and the parties agree that there is an agreement to arbitrate under the FAA. Thus, Herron I is inapplicable, and the Court must be guided by federal precedent cited above.

Additionally, S.C. Code Ann. § 56-15-110(2) is not directed to arbitration. Instead, it is aimed solely at actions "in the court of common pleas." Buyer concedes she agreed to arbitration; however, she has argued that she somehow has a non-waivable right to a class arbitration under this statute even after the decision of the United States Supreme Court in Herron I. Nothing in the statute confers such a right, nor could it, because the FAA preempts state law that would invalidate the terms of parties' agreements to arbitrate. Buyers' argument purports to expand the agreement beyond its terms and to commit the parties to class arbitration by implication in direct violation of *Stolt-Nielsen S.A.*

CONCLUSION

For all of these reasons, the trial court correctly applied the mandates of the United States Supreme Court and the terms of the parties' Contract in finding that the parties agreed to submit their claims to bilateral arbitration only and ordering that arbitration proceed accordingly.

Respectfully submitted,



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June 12, 2017

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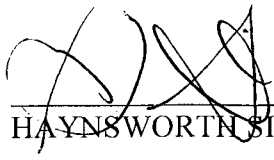
CERTIFICATE OF COMPLIANCE

I certify that the Final Brief of Respondent in this matter complies with Rule 211(b), SCACR.

(Signature Page Follows)

Respectfully submitted,



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