THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2016-CP-10-4112

Appellate Case No. 2017-001216

Jane Doe, an adult woman over the age of 18,

Respondent,

v.

TCSC, LLC, d/b/a Hendrick Toyota of North Charleston,

Appellant.

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

Hendrick[1] appeals the circuit court's denial of its motion to stay this lawsuit and compel Doe's[2] claims to arbitration. In essence, the lower court concluded that Doe's claims are outside the scope of the parties' Arbitration Agreement and thus not arbitrable. This is erroneous on two levels. First off, quite simply, the court should never have even ruled on arbitrability at all because the Arbitration Agreement clearly and unmistakably provides that it is governed by the FAA[3] and that the threshold question of arbitrability is itself to be decided *in arbitration, not in court.* Secondly, even assuming, *arguendo*, that the arbitrability question was properly before the court for a decision on the merits, the court gave the wrong answer because it improperly applied an arbitration-specific principle of state law (South Carolina's "outrageous and unforeseen torts" exception to arbitration enforcement) which is preempted by the FAA, and it also misapplied certain general contract principles of state law. Respectfully, the circuit court should be reversed and this suit stayed in favor of arbitration.

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[1] "Hendrick" is Defendant/Appellant TCSC, LLC, d/b/a Hendrick Toyota of North Charleston.

[2] "Doe" is Plaintiff/Respondent Jane Doe, an adult woman over the age of 18.

[3] The "FAA" is the Federal Arbitration Act, 9 U.S.C. §§ 1-16. It is undisputed that the Arbitration Agreement is governed by the FAA.

STATEMENT OF ISSUES ON APPEAL

I. **Did the circuit court err in denying Hendrick's motion to stay this lawsuit and compel Doe's claims to arbitration?**

A. **Does the Arbitration Agreement clearly and unmistakably provide that the threshold question of arbitrability is itself to be decided in arbitration, not in court, such that the court erred by even ruling on arbitrability at all?**

B. **Even assuming, *arguendo*, that the arbitrability question was properly before the court for a decision on the merits, did the court give the wrong answer? In other words, is the court's decision on arbitrability erroneous on the merits?**

(1) **In concluding that Doe's claims are not arbitrable, did the court improperly apply an arbitration-specific principle of state law (South Carolina's "outrageous and unforeseen torts" exception to arbitration enforcement) which is preempted by the FAA?**

(2) **Did the court misapply general contract principles of state law?**

(a) **Did the court err in concluding that Doe's claims are not arbitrable on the basis of its finding that there was no "meeting of the minds."**

(b) **Did the court err in concluding that Doe's claims are not arbitrable on the basis of its finding that the Arbitration Agreement is an unconscionable adhesion contract?**

(c) **Did the court err in concluding that Doe's claims are not arbitrable on the basis of its finding that the 2011 transaction and Doe's interaction with Smith in late 2015/early 2016 are wholly separate and distinct events, such that the Arbitration Agreement does not cover the alleged tortious acts underlying Doe's claims?**

STATEMENT OF THE CASE[4]

Doe bought a new car from Hendrick in 2011, and she brought the car back in to the dealership for service from time to time thereafter, the last of those times on or about December 16, 2015. (*See* generally Compl.; Aff. of Jane Doe; Hr'g Tr. [from Feb. 22, 2017] p. 5:15-19; Hr'g Tr. [from April 4, 2017] pp. 3:20-5:4.)

In the weeks leading up to that final service visit, Doe had received mailings expressing Hendrick's interest in buying the car back from her and offering to appraise it for free. (Compl. ¶ 7.) As Doe herself had some interest in potentially buying a new car, and in assessing whether it made financial sense to do so, she was curious to know the car's trade-in value and how much credit she qualified for. (Compl. ¶¶ 9-11.) So, when Doe brought the car in for service on or about December 16, 2015, she agreed to have it appraised, and she also agreed to submit a credit application. (Compl. ¶¶ 8-10.)

A Hendrick salesman named Richard Smith ("Smith") helped Doe with the appraisal and credit application, and as part of the credit application process, Doe

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[4] In order to provide "a concise history of the proceedings, insofar as necessary to an understanding of th[is] appeal," as directed by Rule 208(b)(1)(C), SCACR, some background facts are necessary. To avoid including "contested matters" in this statement of the case, as Rule 208(b)(1)(C) also requires, the factual summary it contains is intended to be consistent with the position reflected in Doe's complaint, as well as in her affidavit and in her counsel's appearances before the court. To be clear, however, this is done solely for the purpose of this appeal, and Hendrick reserves all rights to contest Doe's position outside the context of this appeal.

gave Smith certain personal information, including, her date of birth, telephone number, home address, and email address. (Compl. ¶¶ 9-12.)

With the car appraised and Doe's credit checked, Smith attempted to interest Doe in purchasing a new car, but after he had showed Doe two vehicles, both of which she felt were too expensive, Doe told Smith that she needed to leave to get to work and, in any event, that she would have to discuss any potential purchase with her husband. (Compl. ¶¶ 13-15.) Though Smith urged Doe to go ahead (before leaving the dealership) and set a date to come back to with her husband, she declined, explaining that her family's schedule was too busy to make advance plans for a return visit and that she would have to call Smith back. (Compl. ¶¶ 16-18.)

Over the next eight or nine days, "Smith called [Doe] almost daily and, on some occasions, called twice in one day," leaving a number of voice messages. (Compl. ¶¶ 19-20.) He continued to call into the New Year, though less frequently. (Compl. ¶ 21.)

Doe has specifically identified only one call from Smith that she actually answered,[5] his last, which is when Doe told Smith that she had bought a new car

[5] Otherwise on this subject Doe's complaint speaks in general terms. (*See* Compl. ¶ 21 ("The majority of the time [Doe] did not answer the calls.").)

from another dealership. (Compl. ¶ 22.) That call took place on or about January 19, 2016, at about 10:00 in the morning. (Compl. ¶ 22.)

Some ten minutes after that call ended, as Doe would later come to learn, Smith went on an adult website posing as Doe (using her first name) and advertised that she wished to be contacted for sexual encounters, identifying her location as "Charleston, Mt. Pleasant" and giving out her telephone number. (Compl. ¶¶ 23-24.) And soon thereafter Doe began receiving strange calls and text messages in response to "her ad" on the website. (Compl. 25-31.) Alarmed, Doe and her husband wanted to know the reason for this sudden flurry of unwanted overtures, and ultimately, with the help of a private investigator and the police, they figured out what Smith had done. (Compl. ¶¶ 32-46.)

Doe commenced this action on August 9, 2016. (*See generally* Summons; Compl.) Though she has not sued Smith himself, she claims that Hendrick is vicariously liable, under the doctrine of *respondeat superior*, for outrage/intentional infliction of emotional distress, invasion of privacy, and defamation on account of Smith's posting of the "ad" and also that Hendrick is directly liable for its negligent hiring, training, and/or supervision of Smith. (*See generally* Compl.)

After timely answering Doe's complaint,[6] Hendrick promptly moved to stay the action and compel arbitration under the terms of an Arbitration Agreement that had been entered into when Doe bought the car from Hendrick in 2011. (Def's Mot. Compel Arbitration.) A one-page, standalone document, the Arbitration Agreement includes the following language:

> **Arbitration Agreement**
>
> . . . . .
>
> **PLEASE REVIEW – IMPORTANT – AFFECTS YOUR LEGAL RIGHTS**
>
> 1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.
>
> . . . . .
>
> Any claim or dispute, whether in contract, tort, statute, or otherwise (including the interpretation and scope of this Arbitration Agreement, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arise 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 (including any such relationship with third parties who do not sign your purchase, lease agreement, or financing contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. If federal law provides that a claim or dispute is not subject

[6] (Answer.)

to binding arbitration, this Arbitration Agreement shall not apply to such claim or dispute. Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis . . . . Arbitration shall be conducted by the American Arbitration Association . . . (www.adr.org), or any other organization that you choose subject to our approval. You may get a copy of the rules of these organizations by contacting the arbitration organization or visiting its website.

Arbitrators shall be attorneys or retired judges and shall be selected pursuant to the applicable rules. The arbitrator shall apply governing substantive law in making an award. The arbitration hearing shall be conducted in the federal district in which you reside unless the seller of the vehicle is a party to the claim or dispute, in which case the hearing will be held in the federal district where this Arbitration Agreement was executed. We will advance your filing, administration, service or case management fee and your arbitrator or hearing fee all up to a maximum of $2500, which may be reimbursed by decision of the arbitrator at the arbitrator's discretion. Each party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law. . . . Any arbitration under this Arbitration Agreement shall be governed by the Federal Arbitration Act (9 U.S.C. §1 et. Seq.) and not by any state law concerning arbitration.

You and we retain any rights to self-help remedies, such as repossession. You and we retain the right to seek remedies in small claims court for disputes or claims within that court's jurisdiction, unless such action is transferred, removed or appealed to a different court. Neither you nor we waive the right to arbitrate by using self-help remedies or filing suit. Any court having jurisdiction may enter judgment on the arbitrator's award. . . .

(Arbitration Agreement [in the record both as Exhibit A to Def's Mot. to Compel Arbitration and as an attachment to Aff. of Jane Doe] (bold print and capitalization in original).)

The circuit court heard Hendrick's motion twice, first on February 22, 2017, at which time the court expressed its intention to grant the motion. (*See generally* Hr'g Tr. [from Feb. 22, 2017].) But the court then held a second hearing on April 4, 2017, and, at that time, announced it was denying the motion, its written orders to that effect (Form 4 first, then formal) filed April 5 and 27, 2017, respectively. (*See generally* Hr'g Tr. [from April 4, 2017]; Form 4 Order Denying the Dealership's Motion to Compel Arbitration, filed April 5, 2017; Formal Written Order Denying Defendant's Motion to Compel Arbitration and Stay Litigation, filed April 27, 2017.) In concluding that Doe's claims were not arbitrable, the court found that South Carolina's "outrageous and unforeseen torts" exception to arbitration enforcement (the "Outrageous Torts Exception") applied to preclude arbitration of the claims, as did certain general contract principles of state law. (*See generally* Formal Order.)

This appeal timely followed via notice served May 17, 2017.

ARGUMENT

I. The circuit court erred in denying Hendrick's motion to stay this lawsuit and compel Doe's claims to arbitration.

A. The Arbitration Agreement clearly and unmistakably provides that the threshold question of arbitrability is itself to be decided in arbitration, not in court, such that the court erred by even ruling on arbitrability at all.

"[I]t is up to the [contracting] parties to determine whether a particular matter is primarily for arbitrators or for courts to decide." *BG Group, PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1206 (2014). "If the contract is silent on the matter of who primarily is to decide 'threshold' questions about arbitration . . . courts presume that the parties intend courts, not arbitrators, to decide . . . disputes about 'arbitrability.'" *Id.* "These include questions such as 'whether the parties are bound by a given arbitration clause,' or 'whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.'" *Id.* (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002)). But this presumption does not hold where the parties have "clearly and unmistakably provide[d] otherwise . . . ." *See AT&T Technologies, Inc. v. Comm'ns Workers of Am.*, 475 U.S. 643, 649 (1986) ("*Unless the parties clearly and unmistakably provide otherwise*, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.") (emphasis added); *One Belle Hall Property Owners Assoc., Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 59,

791 S.E.2d 286, 291 (Ct. App. 2016) ("The question of the arbitrability of a claim is an issue for judicial determination, *unless the parties provide otherwise.*") (emphasis added). In other words, it is indeed the arbitrator, not the court, who is to decide the question of whether the parties agreed to arbitrate when the parties have clearly and unmistakably provided that the arbitrator is to do so.

Here, the parties clearly and unmistakably provided that "the interpretation and scope of th[e] Arbitration Agreement, and the arbitrability of the claim or dispute" at hand were to "be resolved by neutral, binding *arbitration* and *not by a court action.*" (Def.'s Mot. Compel Arbitration, Ex. A [Arbitration Agreement] (emphasis added).) Respectfully, in the face of this clear and unmistakable language, the circuit court erred by even ruling on the issue of arbitrability at all.

B. Even assuming, *arguendo*, that the arbitrability question was properly before the court for a decision on the merits, the court gave the wrong answer. In other words, the court's decision on arbitrability is erroneous on the merits.

(1) In concluding that Doe's claims are not arbitrable, the court improperly applied an arbitration-specific principle of state law (the Outrageous Torts Exception) which is preempted by the FAA.[7]

South Carolina first specifically articulated the Outrageous Torts Exception in *Aiken v. World Finance Corporation of South Carolina*, 373 S.C. 144, 644 S.E.2d 705 (2007). According to the exception, outrageous torts, which are unforeseeable to the reasonable consumer and legally distinct from the contractual relationship between the parties, are not subject to arbitration. *Id.* at 151-52, 644 S.E.2d at 709.

In this case, the circuit court applied the Outrageous Torts Exception in concluding that Doe's claims are not arbitrable,[8] and the issue Hendrick now presents to this Court boils down to whether the exception violates the FAA's mandate that courts must place arbitration agreements on equal footing with all other contracts. *E.g. Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)

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[7] Again, to be clear, there is *no* question in this case about whether the FAA governs the Arbitration Agreement: the parties agree it does, as the circuit court noted in reaching the same conclusion itself. (Def.'s Mem. Supp. Mot. Compel Arbitration pp. 5-6; Pl.'s Supplemental Mem. Opp'n Mot. Compel Arbitration pp. 1-2; Order Den. Mot. Compel Arbitration p. 4, n.1.)

[8] (*See* Formal Order pp. 6-12.)

("[With the FAA,] Congress precluded States from singling out arbitration provisions for suspect status, *requiring instead that such provisions be placed upon the same footing as other contracts.*") (emphasis added) (internal quotations and citation omitted); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (instructing that Section 2 of the FAA is the "'primary substantive provision of the Act.'") (quoting *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)); 9 U.S.C. § 2 (providing that a written arbitration agreement "shall be valid, irrevocable, and enforceable, *save upon such grounds as exists at law or in equity for the revocation of any contract.*") (emphasis added); *Moses H. Cone*, 460 U.S. 1, 24-25 (instructing that Section 2 of the FAA provides that a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exists at law or in equity for the revocation of any contract" and that it "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act," which requires that "questions of arbitrability . . . be addressed with a healthy regard for the federal policy favoring arbitration," and that "any doubts concerning the scope of arbitrable issues . . . be resolved in favor of arbitration."); *Concepcion*, 563 U.S. at 339 (instructing that, while a court may set aside arbitration agreements by state-law defenses that govern the validity, revocability, and enforceability of contracts generally, it may not do so "by defenses that apply only

to arbitration or derive their meaning from the fact that an agreement to arbitrate is at issue").

The question of whether the Outrageous Tort Exception violates, and is thus preempted by, the FAA (the "Preemption Question"), has already been the subject of debate in our state's Supreme Court. The case of *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 791 S.E.2d 128 (2016), resulted in three separate opinions on the subject: one by Chief Justice Pleicones (joined by Justice Kittredge), endorsing the view that the exception is preempted by the FAA, and one by each of Justice Hearn (joined by Justice Beatty) and Acting Justice Toal, endorsing the view that it is not. Of course, counting the respective subscribers to these opinions reveals that only two members of the Court (Pleicones and Kittredge) voted "yes" on the Preemption Question while a three-judge majority (Hearn, Beatty, and Toal) voted "no." But that majority view is not controlling precedent because, at least to Hendrick's reading of the various *Parsons* opinions, an answer to the Preemption Question was not, in fact, necessary to the Court's decision of the appeal, with Justices Hearn and Beatty concurring in the result of Chief Justice Pleicones' lead opinion even though they disagreed with his (and Justice Kittredege's) view on the Preemption Question—and in any event, the answer to the Preemption Question is controlled by *federal*, *not* *South Carolina*, law. Still, although none of them rise to the level of

controlling precedent, the *Parsons* opinions do, however, nicely frame both sides of the debate over the Preemption Question, with those voting "yes" viewing the Outrageous Torts Exception as violating the FAA's commandment that arbitration agreements be placed on equal footing with all other contracts, while the "no" votes view the exception, notwithstanding its name, as merely the embodiment of a generally applicable contract principle: effectuating the intent of the parties—this latter view being shared by the circuit court in the instant case. (Formal Order pp. 10-12.)

Besides commending Justice Pleicones' analysis to this Court, which Hendrick hereby does in support of its appellate challenge to the circuit court's reliance on the Outrageous Torts Exception, Hendrick would underscore some seemingly plain flaws in contrary view (i.e., the one endorsed by the other judges finding against preemption).

Those who would find the Outrageous Torts Exception not to be a "defense[] that appl[ies] only to arbitration or derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue"[9] give unduly short shrift to the fact that the only "rule" to which this specific "exception" applies is *arbitration* enforcement. Were it to be merely the embodiment of the general principle of contract law about effectuating the intent of the parties, there would never have

[9] *Concepcion*, 563 U.S. at 339.

been any reason for the Outrageous Torts Exception to have been so expressly and particularly identified as a standalone concept to begin with. Of course, in any event, as Justice Pleicones ably explains, proper FAA analysis looks beyond the mere appearance of a state law's general applicability and to whether, in practice, it frustrates the FAA's objectives by having a disproportionate impact on arbitration agreements; and *never* has the Outrageous Torts Exception been applied to void a contract itself, "only to change the forum from arbitration to the courtroom based on the outrageous manner in which the underlying contract was breached." *Parsons*, 418 S.C. at 12, 791 S.E.2d at 133, n.6. Thus, even if it "were correct that the outrageous torts exception is a general contract principle, it is so disproportionately applied in South Carolina that it unquestionably stands as an obstacle to the FAA's cited objectives in violation of *Concepcion*." *Id.*

Lastly, besides its undeniably disproportionate impact on arbitration agreements, the practical effect of the Outrageous Torts Exception is not merely to effectuate the intent of the parties, but rather to establish a legal presumption about their intent, and, at that, a presumption that not only ignores what would otherwise be considered plain language expressing that intent (in the form of a broadly worded arbitration clause, e.g., "any" claims) but also is necessarily premised on a fundamentally dim view of arbitration that is antithetical to the favored status that it must be accorded under the governing federal law, and which, purportedly, it is

to be given under our state's law. *Moses H. Cone*, 460 U.S. at 24-25 (instructing that "questions of arbitrability . . . be addressed with a healthy regard for the federal policy favoring arbitration," and that "any doubts concerning the scope of arbitrable issues . . . be resolved in favor of arbitration."); *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007) ("There is a strong presumption in favor of the validity of arbitration agreements."); *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 630, 667 S.E.2d 1, 6 (Ct. App. 2008) ("The policies of the United States and this State favor arbitration of disputes.").

(2) The court misapplied general contract principles of state law.

(a) The court erred in concluding that Doe's claims are not arbitrable on the basis of its finding that there was no "meeting of the minds."

According to the circuit court, there was no "meeting of the minds" because, at the time Doe entered into the Arbitration Agreement in 2011, she never contemplated that it could extend to cover her present claims; thus, the Arbitration Agreement is void *ab initio*, and no enforceable agreement to arbitrate ever existed between the parties. (*See* Formal Order pp. 12-14.) Respectfully, the court's analysis is misguided from the start, as it mistakes a matter of contract *interpretation* for a matter of contract *formation*.

A "meeting of the minds" is a matter of contract *formation*. *See, e.g., Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009) ("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 contract.") (emphasis added). On the other hand, whether a duly formed contract covers a given situation that arises after it was formed is simply a matter of contract interpretation, i.e., a matter not of determining whether the parties made a deal, but what deal they made. *See, e.g., Gilstrap v. Culpepper*, 283 S.C. 83, 86, 320 S.E.2d 445, 447 (1984) (explaining that, in construing a contract, the court's duty is "limited to the interpretation of the contract made by the parties themselves . . ."); *Maccaro v. Andrick Dev. Corp.*, 280 S.C. 96, 100, 311 S.E.2d 91, 94 (Ct. App. 1984) ("[N]either law nor equity requires every term or condition to be set forth in a contract. Where an implied term is necessary to effectuate the intention of the parties, the law will supply it.") (internal citations omitted).

Here, there can be no question that the Arbitration Agreement was, in fact, duly formed and was not void *ab initio*. One who signs a contract is bound by its terms, even if she signed it without reading it. *Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) (citing *Sims v. Tyler*, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981)) ("A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not

read it."). A person signing a document is responsible for reading the document and making sure of its contents. *Id.* One who signs a written instrument has the duty to exercise reasonable care to protect herself. *Id.* Anyone challenging the enforceability of an arbitration agreement bears the burden of proving the provision is unenforceable. *Green Tree Fin. Corp. Ala. v. Randolph*, 531 U.S. 79, 91 (2000); *see also First Baptist Church of Timmonsville v. George A. Creed & Son, Inc.*, 276 S.C. 597, 599, 281 S.E.2d 121, 123 (1981) (holding that "a party to a contract incorporating an arbitration provision cannot escape the obligation of such a provision by simply declaring: 'But I did not read the whole agreement.'"). In this case, Doe expressly admits that she "did have the opportunity to read the [Arbitration Agreement] prior to signing [it]," and that she did, in fact, "review it." (Aff. of Jane Doe ¶¶ 10, 12-13).

Moreover, "'a party to a written contract, where there is no ambiguity or indefiniteness in the essentials, cannot say their minds did not meet.'" *Time Warner Cable v. Condo Servs., Inc.*, 381 S.C. 275, 672 S.E.2d 816 (2009) (quoting *Parker v. Byrd*, 309 S.C. 189, 193-94, 420 S.E.2d 850, 853 (1992) (internal citations omitted). Implicit in the circuit court's analysis is the notion that for any arbitration agreement to be valid at all, it must, specifically identify every single potential claim that might one day arise within its coverage, each such potentiality an essential and material term, the omission of even one of them rendering the

entire agreement void *ab initio*. The court cites no legal authority to support such an unworkable rule—and, of course, there is none whatsoever for it to have cited. Again, respectfully, the court's "meeting of the minds" analysis is wholly misplaced.

(b) The court erred in concluding that Doe's claims are not arbitrable on the basis of its finding that the Arbitration Agreement is an unconscionable adhesion contract.

After observing that the Arbitration Agreement, a form contract, is an adhesion contract and that it was entered into between a company in the business of selling cars, Hendrick, and an individual consumer, Doe—all points which Hendrick does not dispute—the court's analysis here bears a strong resemblance to its "meeting of the minds" analysis, with the court again pointing out that Doe never could have expected the Arbitration Agreement to cover her present claims and concluding that it "is unconscionable to the extent it abrogates [Doe's] right to have a jury of her peers hear and decide the merits of [those] claims." (Formal Order pp. 14-17.)

But "adhesion contracts are not per se unconscionable," and this is so even in the case of consumer-goods transactions where the consumer "lacked any meaningful choice to arbitrate." *See One Belle Hall*, 418 S.C. at 63, 791 S.E.2d at 293. This is because a proper unconscionability analysis has *two* prongs. *Id.* "'In South Carolina, unconscionability is defined as [(1)] the absence of meaningful

choice on the part of one party due to one-sided contract provisions, *together with* [(2)] terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.'" *Id.* at 60, 791 S.E.2d at 291 (quoting *Simpson*, 373 S.C. at 24-25, 644 S.E.2d at 668) (emphasis added). So, the question of arbitrability here turns on the second prong, which is an *objective* standard, looking not to Doe's subjective, backward-looking assessment of the Arbitration Agreement, as was erroneously done by the circuit court, but to whether a reasonable person would make and accept its terms.

Moreover, "'[i]n analyzing claims of unconscionability of arbitration agreements, the [U.S. Court of Appeals for the] Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker.'" *Id.* (quoting *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668). Absolutely nothing about the Arbitration Agreement indicates that it is geared towards achieving anything else. It gives both parties the right to demand arbitration; it expressly provides that "[a]rbitrators shall be attorneys or retired judges and shall be selected pursuant to the applicable rules" and that "[t]he arbitrator shall apply governing substantive law in making an award;" it even provides that Hendrick will advance arbitration-related fees up to a $2,500 maximum; and, at the same time, it still preserves Doe's right to seek remedies in small claims court where there is a claim within its jurisdictional limit.

(Arbitration Agreement.) As was the case in *One Belle Hall*—where this Court reversed a finding of unconscionability below—the Arbitration Agreement "facilitates an unbiased decision by a neutral decisionmaker in the event of a dispute" and it "does not unduly limit [Doe's] right to a meaningful legal proceeding." 418 S.C. at 64-65, 791 S.E.2d 294. The circuit court did not base its unconscionability determination on the actual terms of the Arbitration Agreement and whether an objectively reasonable person would make or accept them, but rather on the outrageousness of Smith's alleged actions—erroneously premised, of course, as explained above, on a fundamentally *un*favorable view of arbitration to begin with.

(c) The court erred in concluding that Doe's claims are not arbitrable on the basis of its finding that the 2011 transaction and Doe's dealings with Smith in late 2015/early 2016 are wholly separate and distinct events, such that the Arbitration Agreement does not cover the allegedly tortious acts underlying Doe's claims.

Whether the Arbitration Agreement covers the instant claims is a matter of contract interpretation, and—though nowhere in its order did the court do so—proper analysis of the matter requires consideration of the document's plain language. *See Maybank v. BB&T Corp.*, 416 S.C. 541, 576, 787 S.E.2d 498, 516 (2016) ("The cardinal rule of contract interpretation is to ascertain and give legal

effect to the parties' intentions *as determined by the contract language.*") (emphasis added). In pertinent part, that language is as follows:

> Any claim or dispute, whether in contract, tort, statute, or otherwise (including the interpretation and scope of this Arbitration Agreement, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, *which arise 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 (including any such relationship with third parties who do not sign your purchase, lease agreement, or financing contract)* shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action.

(Arbitration Agreement (emphasis added).) The entire relationship between Doe and Smith was initiated when Doe requested that her 2011 car be appraised so she could consider trading it in on another car. Without question, Doe's dealings with Smith in late 2015/early 2016 in furtherance of a potential "transaction" wherein Doe would trade-in her 2011 car toward the purchase of a new car (financing the balance owed on the new vehicle after the trade allowance) were a "relationship" that "result[ed]" from and "relate[d]" to the "condition of the[e] [2011] vehicle," a situation comfortably embraced by the plain language of the Arbitration Agreement.

CONCLUSION

For the foregoing reasons, Hendrick asks this Honorable Court to reverse the court and stay this lawsuit in favor of litigation, or remand the case to the circuit court with instructions for it to do so.

Respectfully submitted,
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Dated: 10/27/17

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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OCT 30 2017
SC Court of Appeals

Appeal from Charleston County
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2016-CP-10-4112

Jane Doe, an adult woman over the age of 18, Respondent,

v.

TCSC, LLC, d/b/a Hendrick Toyota of North Charleston, Appellant.

PROOF OF SERVICE

YOUNG CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
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Counsel for Appellant
TCSC, LLC, d/b/a Hendrick Toyota of North Charleston

I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Appellant, hereby certify that the foregoing **INITIAL BRIEF OF APPELLANT** and the **APPELLANT'S DESIGNATION OF MATTER** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on October 27, 2017, properly posted for delivery to the following addressees:

THE MASON LAW FIRM, P.A.
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Counsel for Respondent
Jane Doe, an adult woman over the age of 18

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: _____
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Counsel for Appellant
TCSC, LLC, d/b/a Hendrick Toyota of North Charleston

Charleston, South Carolina

Dated: 10/27/17

YCRLAW

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October 27, 2017

Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Jane Doe vs. TCSC, LLC d/b/a Hendrick Toyota of North Charleston
Appellate Case No. 2017-001216
Case No.: 2016-CP-10-4112
Claim No.: 30166435427-0001
Date of Loss: 1/19/2016
YCR File: 11176-20160726

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter, please find the original and one copy of the Initial Brief of Appellant, Appellant's Designation of Matter, and Proof of Service regarding the same.

Kindly return one court-stamped copy in the pre-stamped envelope provided. With best wishes and kindest regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP

Russell G. Hines
Partner

RGH/amj
cc: Mark A. Mason, Esquire, The Mason Law Firm, P.A.
Anthony E. Forsberg, Esquire, The Mason Law Firm, P.A.

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