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

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SC Court of Appeals

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.

INITIAL BRIEF OF RESPONDENT

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INTRODUCTION

Hendrick[1] has appealed from the Circuit Court's denial of its Motion to Compel Arbitration. Following oral argument and upon review of all briefs submitted to the lower court, The Honorable R. Markley Dennis, Jr., Circuit Court Judge, determined that based upon caselaw and general state law contract principles, no contractual agreement to arbitrate was formed as there was no meeting of the minds between the parties to the alleged agreement, that the agreement itself is an unconscionable adhesion contract and that no true agreement to arbitrate Doe's[2] claims ever existed, that the 2011 car sale which produced the Arbitration Agreement was a wholly separate and distinct event compared to the 2015 meeting between Hendrick's employee and Doe which led to the subsequent 2016 actions alleged to have been taken by Hendrick's employee with regard to Doe's personal and private information and, as such, that the 2011 Arbitration Agreement does not relate to or cover the alleged 2016 outrageous and unforeseeable torts because those acts allegedly committed by Hendrick's employee were not reasonably contemplated by or within the expectations of the parties at the time the 2011 Arbitration Agreement was signed.

Despite Hendrick's insistence that there was error below, the Circuit Court properly determined that there was no contract between the parties, therefore it is axiomatic that there was no necessity for arbitrability to be determined by an arbitrator as argued by Hendrick.

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[1] As used herein, "Hendrick" refers to the Appellant, Defendant TCSC, LLC d/b/a Hendrick Toyota of North Charleston.

[2] "Doe" refers to Doe on appeal, Plaintiff Jane Doe, an adult woman over the age of 18.

Moreover, the Circuit Court properly applied general principles of contract law in reaching its conclusions, including the "outrageous and unforeseen torts exception" to compelling arbitration which exception is based not upon any arbitration-specific legal foundation, but which rather is merely a label for the judicial application of a longstanding contract principle equally applicable to all contracts - effectuating the parties' contractual expectations. Respectfully, for the reasons stated in the court below, and again herein, the Circuit Court's decision should be affirmed and this matter remanded with instructions that the parties proceed with litigation.

STATEMENT OF ISSUES ON APPEAL

I. The Circuit Court did not err in denying Hendrick's Motion to Stay this lawsuit and compel Doe's claims to arbitration.

A. The Arbitration Agreement was properly found to be void *ab initio* and no contract to arbitrate existed.

B. The circuit court's decision on the arbitrability of the Plaintiff/Doe's claims was not erroneous on the merits.

(1) In concluding that Doe's claims are not subject to the Arbitration Agreement, the Circuit Court properly applied South Carolina contract caselaw which is not arbitration-specific and which constitutes a ground which exists at law or in equity for the revocation of any contract as contemplated by the Savings Clause of the FAA, 9 U.S.C.A. §2 (West).

(2) The Circuit Court properly applied general contract principles of South Carolina State law.

(a) The Circuit Court did not err in concluding that Doe's claims are not subject to arbitration in determining that there was no "meeting of the minds."

(b) The Circuit Court did not err in concluding that Doe's claims are not subject to arbitration in determining that the Arbitration Agreement constituted an unconscionable adhesion contract.

(c) The Circuit Court did not err in concluding that Doe's claims are not subject to arbitration by determining that the 2011 sales transaction and Doe's dealings with Smith in late 2015/early 2016 were wholly separate and distinct events such that the Arbitration Agreement does not cover the allegedly tortious acts underlying Doe's claims

STATEMENT OF THE CASE[3]

On or about June 11, 2011, Doe purchased a 2011 Toyota RAV 4 from Rick Hendrick Toyota of North Charleston, the Appellant in this matter. (*See*, Aff. of Jane Doe, ¶ 6). As part of the 2011 vehicle purchase sales documentation, Doe was presented with and signed a standalone document entitled "Arbitration Agreement". (*Id.* ¶ 7) 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.

(*See,* Arbitration Agreement, in record as Exhibit A to Def. Mot. to Compel Arb. and as an attachment to Aff. of Jane Doe)

Some four years and seven months later, on December 16, 2015, Doe found herself at Hendrick's dealership to receive service on her previously purchased 2011 Toyota RAV 4. (Compl. ¶ 7) During that visit, Doe spoke with Richard Wm. Smith, Jr. an employee and salesman for Hendrick. (Compl. ¶ 9) Doe was curious to see if she could potentially afford to purchase a new car, so Smith had Doe complete a credit application, and in doing so the Hendrick dealership collected personal and private identifying data from Doe including her name, address, telephone number and birth date, among other information. (Compl. ¶¶ 9-12)

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[3] Doe herewith provides her own Statement of the Case as allowed by SCACR 208(b)(2) to ensure that a full picture of the underlying matter is presented to this Court. In order to avoid including "contested matters" Doe has gleaned these statements from her Complaint, Affidavit and the transcripts of proceedings before the lower court.

After discussing some potential vehicles for purchase and the cost of the same with Smith and another employee, Doe chose not to purchase a new vehicle from Hendrick's dealership that day and communicated this to Smith. (Compl. ¶¶ 13-18) Smith thereafter persisted in contacting Doe by telephone over the following weeks in an attempt to convince her to buy another car from Hendrick's dealership. (Compl. ¶¶ 19-21)

Ultimately Doe purchased a vehicle from a different dealership. (Compl. ¶ 22) On January 19, 2016 at 10:20 am, Smith called from Hendrick's dealership to follow up on his previous calls to Doe as a prospective sale at which time Doe informed Smith that she had already purchased a vehicle elsewhere. (Compl. ¶ 22) Within ten minutes of learning that the sales lead he had been working since December 15, 2015 was now a dead end, on January 19, 2016 at 10:30 am, Richard Wm. Smith, Jr., posted the following ad in the "Charleston/Domination & Fetish" section of Backpage.com, a sexually oriented website used to offer and solicit random 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]
>
> Poster's age: 35
>
> Location: Charleston, Mt. Pleasant
> Post ID: 12XXXX81 charleston

(Compl. ¶ 23)

Within hours of this ad being posted, Doe 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 (sometimes in sexually explicit terms) that they sought to meet with her for sexual encounters in response to the Backpage.com advertisement posted by the employee of Hendrick. (Compl. ¶¶ 26-31). At some point, the initial advertisement was picked up and displayed by another sexually explicit website. (Compl. ¶¶ 41). Eventually, with the help of private investigators and the Mount Pleasant Police Department, Doe figured out what had occurred and steps were undertaken to remove the offensive advertisement. (Compl. ¶¶ 37-46)

Doe initiated litigation against Hendrick on August 9, 2016 alleging several causes of action sounding in tort, specifically the torts of Outrage, Intentional Infliction of Emotional Distress, Invasion of Privacy, Defamation/Libel Per Se, General Negligence, Gross Negligence, Negligent Hiring, Negligent Training and Negligent Supervision. (*See generally*, Summons and Compl.) Hendrick filed an Answer on October 11, 2016 (*See*, Answer) and thereafter moved to compel arbitration on December 9, 2016. (*See*, Def. Mot. to Compel Arb.) Doe filed her Memorandum in Opposition to Defense Motion to Compel Arbitration on February 17, 2017 (*See,* Pl.'s Memo In Opp.) Hendrick filed its Memorandum in Support of Motion to Compel Arbitration on February 21, 2017, the afternoon prior to the scheduled hearing. (*See,* Def.'s Memo In Supp. of Mtn. Cmpl. Arb.) Doe thereafter filed a Supplemental Memorandum in Opposition to Defense Motion to Compel Arbitration on February 22, 2017 the morning of the scheduled heraing. (*See,* Pl.'s Supp. Memo In Opp.)

Oral argument was first heard by the Circuit Court on February 22, 2017. At the conclusion of argument, the Circuit Court generally indicated its intention to grant Hendrick's motion but took the matter under advisement to review Doe's Supplemental Memo in Opposition and to allow Hendrick an opportunity to draft and file any additional briefs it deemed necessary to address arguments raised in Doe's Supplemental Memo. (*See generally*, Hr'g Tr. [Feb. 22, 2017].) No further filings were made. Upon further consideration of the oral arguments, a review of all the written submissions of the parties and the record before the Circuit Court, additional oral argument was requested by the court. In advance of that hearing date, Doe 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. (*See,* Aff. of Jane Doe) At the request of the Circuit Court, the parties reconvened on April 4, 2017. At that hearing, Judge Dennis explained his initial confusion and misunderstanding of the fact that Hendrick was attempting to assert that the 2011 Arbitration Agreement applied to the 2016 unforeseeable and outrageous torts alleged to have been committed in connection with a wholly separate and distinct potential car deal. The court orally announced its decision to deny Hendrick's Motion to Compel Arbitration and indicated it would file a Form 4 Order with a formal order to follow. (*See generally,* Hr'g Tr. [Apr. 4 2017]; Form 4 Order filed April 5, 2017; Formal Order filed April 27, 2017.)

In the Formal Order, the Circuit Court determined that the Arbitration Agreement at issue was void *ab initio* by applying general contract principles of state law to reach the

conclusion that there was no meeting of the minds as to the Arbitration Agreement, that it was an unconscionable adhesion contract and that in any event no reasonable person would contemplate that the Arbitration Agreement signed in 2011 would extend to cover the outrageous torts allegedly committed nearly five years later in the context of a wholly separate and distinct event involving the parties to the 2011 document. (*See generally*, Formal Order)

This appeal followed and was noticed on May 17, 2017.

ARGUMENT AND CITATION OF AUTHORITY

I. The Circuit Court did not err in denying Hendrick's Motion to Stay this lawsuit and compel Doe's claims to arbitration.

The determination whether a claim is subject to arbitration is reviewed *de novo*. *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 6, 791 S.E.2d 128, 130 (2016) (*citing, Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009)). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Id.* (citing, *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007); *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003)).

A. The Arbitration Agreement was properly found to be void *ab initio* and no contract to arbitrate existed.

"The policy of the United States and of South Carolina is to favor arbitration of disputes." *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C.

1, 6, 791 S.E.2d 128, 131 (2016). "Arbitration is a matter of contract law and general contract principles of state law apply to a court's evaluation of the enforceability of an arbitration clause." *Id.* "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." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001).

Initially, Hendrick argues that the Arbitration Agreement itself requires that questions of arbitrabilty be resolved by an arbitrator and not the courts and therefore the lower court should have ordered the question of arbitrability be decided by an arbitrator. The inherent flaw with this argument is that if there is no contract between the parties under general principles governing the formation of contracts, then the Arbitration Agreement cannot control the parties. Doe argued in her Supplemental Memo in Opposition that the 2011 Arbitration Agreement itself should be voided, and therefore deemed unenforceable, pursuant to the Savings Clause of the Federal Arbitration Act, 9 U.S.C.A. §2 (West) which specifically states:

> 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.** (emphasis added).

Doe's successful argument before the Circuit Court was premised upon the fact that arbitration is a matter of contract law and, as such, arbitration 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 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.")

Hendrick posits that the fact the Arbitration Agreement was signed constitutes "clear and unmistakable" evidence that the parties agreed to submit the threshold question of arbitrability to an arbitrator. But the Circuit Court was asked by Doe to determine if the Arbitration Agreement was an enforceable contract between the parties. State and Federal law recognizes that "[i]n certain limited circumstances, courts assume that the parties intended courts, not arbitrators, to decide a particular arbitration-related matter (in the absence of "clea[r] and unmistakabl[e]" evidence to the contrary)". *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452, 123 S. Ct. 2402, 2407, 156 L. Ed. 2d 414 (2003). "[This includes] certain gateway matters, such as whether the parties have a valid arbitration agreement at all..." *Id.* Therefore, "[t]he initial inquiry to be made by the trial court is

whether an arbitration agreement exists between the parties." *The Hous. Auth. of City of Columbia v. Cornerstone Hous.*, LLC, 356 S.C. 328, 334–35, 588 S.E.2d 617, 620 (Ct. App. 2003). *See also*, *Hooters of America v. Phillips*, 39 F.Supp.2d 582, 609 (D.S.C.1998) (holding that issues of "substantive arbitrability" are properly before the trial court and these issues include whether "a valid arbitration agreement exists between the parties...". (quoting *Glass v. Kidder Peabody & Co.*, 114 F.3d 446, 453 (4th Cir.1997))).

Hendrick argues that the Arbitration Agreement itself provides clear and unmistakable evidence that the parties agreed that the "interpretation and scope of the Arbitration Agreement and the arbitrability of the claim or dispute" between them were to "be resolved by neutral, binding arbitration and not by a court action". (App. Init. Brf., p. 10). Although the Arbitration Agreement does state that it applies to "the interpretation and scope" of itself, it does not follow from that phrase that it also applies to the more basic question of whether an enforceable contract even existed. At the trial court, Doe challenged the validity of the entire Arbitration Agreement and pursuant to the Savings Clause of the FAA, 9 U.S.C.A. §2, sought revocation of the contract on the state law grounds that there was no meeting of the minds, on grounds that it constituted an unconscionable adhesion contract, and on the grounds that the 2011 Arbitration Agreement did not reflect the expectations of the parties in light of its inapplicability to the 2016 outrageous and unforeseeable tortious actions alleged to have been committed by Hendrick's employee, all general principles of contract law equally applicable to any contract. Because Doe challenged the very existence of the

contract, thereby bringing into question whether an arbitration agreement even existed in the first place, there can be no "clear and unmistakable" evidence that the parties agreed to arbitrate the gateway matter of the agreement's ***validity***. The question before the trial court was not "interpretation and scope" of a contract. It was a question of formation and existence of a contract. In this instance, as properly found by the trial court applying general principles of contract law, there existed "grounds at law or in equity" - as contemplated by the FAA - for the revocation of the 2011 contract. As such, there was no error and the trial court properly ruled upon the issue of validity of the Arbitration Agreement rather than submitting that existential issue to arbitration. (*Cf., Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23, 644 S.E.2d 663, 668 (2007))[4].

B. The circuit court's decision on the arbitrability of the Plaintiff/Doe's claims was not erroneous on the merits.

(1) In concluding that Doe's claims are not subject to the Arbitration

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[4] In reviewing a similar question in the matter of *Simpson v. MSA of Myrtle Beach, Inc.*, the SC Supreme Court held:

> Although the clause specifically stated that arbitration applied to issues involving "the validity and scope of this contract," Simpson challenged the validity of the arbitration provision on grounds of unconscionability, bringing into question whether an arbitration agreement even existed in the first place.
>
> Furthermore, because Simpson has challenged the validity of the entire arbitration clause on grounds of unconscionability, there can be no "clear and unmistakable" evidence that the parties actually agreed to arbitrate the gateway matter of the arbitration clause's validity. ***Accordingly, the trial court did not err in ruling on the issue of validity instead of submitting the issue itself to arbitration***. (emphasis added).

Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 23, 644 S.E.2d 663, 668 (2007)

Agreement, the Circuit Court properly applied South Carolina contract caselaw which is not arbitration-specific and which constitutes a ground which exists at law or in equity for the revocation of any contract as contemplated by the Savings Clause of the FAA, 9 U.S.C.A. §2 (West).

Hendrick additionally argues that by way of the Supremacy Clause, the *Concepcion*[5] 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, in reaching its decision, the trial court did not rely upon any State statute, rule or caselaw that "outright prohibits" arbitration. Rather, in keeping with the Savings Clause embodied in the FAA[6], since the 2011 Arbitration Agreement at issue in this matter is a contract, and since both South Carolina and US Supreme Court case law requires courts to honor the expectations of the parties[7] embodied in their contracts, the Circuit Court relied in part upon the applicability of

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[5] The phrase "*Concepcion* line of cases" refers to 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).

[6] 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)

[7] "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)

what has been termed the "outrageous and unforeseeable tort exception" - a concept which the South Carolina Supreme Court has explained is firmly grounded in the longstanding general contract principle of effectuating the parties' contractual expectations.[8] This principle, while applicable in this *particular* instance to a contract to arbitrate, can apply equally to any contract. As such, the exception is another "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.A. § 2 (West) and its application to this arbitration contract does not conflict with Federal substantive law of arbitrability.

Hendrick takes issue with the trial court's application of the outrageous torts exception and argues that it should be preempted by *Concepcion*[9] and the FAA. In the matter of *Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 791 S.E.2d 128, (2016), the South Carolina Supreme Court directly addressed the Supremacy Clause/Preemption argument now championed by Hendrick and through a series of opinions, the high court reaffirmed the continued viability of the "outrageous and unforeseeable torts exception" to the policy of the United States and South Carolina courts favoring arbitration

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[8] In the matter of *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2007) the Supreme Court stated:

> 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.*** (emphasis supplied).

[9] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)

of disputes. In *Parsons*, three of the five Supreme Court justices agreed that the "outrageous and unforeseeable torts exception" remains a viable principle of law in South Carolina even in light of *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. Moreover, the *Concepcion* Court agrees 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).

In the concurring and dissenting opinion of Justice Hearn in *Parsons*, it was stated that abolishing the exception (as urged by Justices Pleicones and Kittredge) 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. *See, Parsons* 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.); *See also, e.g., Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008) (explaining a contract "interpretation which 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 Hendrick wants this Court to adopt. While the outrageous torts exception has been most often applied in the context of arbitration

contracts, the concept of giving effect to contracting parties' intentions is nothing new, nor is it only applicable to arbitration contracts. The issue Hendrick has with the exception, it would appear, is the fact that the Supreme Court gave a name to its application of this longstanding contract principle when applied in the context of an arbitration contract.

In her dissent in *Parsons,* Acting Justice Jean Toal proclaimed, "[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). Again, the first time our Supreme Court applied this well founded concept to the context of analyzing an arbitration contract it clearly stated:

> 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).

Giving effect to the parties' contractual expectations places arbitration contracts on equal footing with all other contracts as required by the *Concepcion* line of cases and as contemplated by the Savings Clause of the FAA. Hendrick argues that this "exception" is disproportionately applied to arbitration agreements, but for courts to ignore a glaring

disconnect between the parties' expectations simply because the contract addressed the potential for arbitration of disputes between the parties would lead to an absurd result if the parties' contractual *expectations* were not met by doing so. Explaining this, Acting Justice Toal provided the following rationale in her *Parsons* dissent:

> [a]bolishing the outrageous and unforeseeable tort exception [as Justices Pleicones and Kittredge hoped to do] effectively places arbitration agreements in a position of vast superiority to all other contracts. In essence, [if the exception were abolished] arbitration agreements [would] now become "super contracts," in which the parties' intentions in outlining the scope of their agreement are irrelevant, and [if the exception were abolished] courts must [then] indiscriminately send parties to arbitration regardless of their intentions. As stated previously, this blind imposition of judicial might on the parties not only lacks a legal foundation, but takes the Supreme Court's directives to enforce arbitration agreements to irrational lengths. *See*, *Stolt–Nielsen*, 559 U.S. at 684, 130 S.Ct. 1758 ("It falls to courts and arbitrators to give effect to the [ ] contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: *to give effect to the intent of the parties.*" (emphasis in original)

Parsons v. John Wieland Homes & Neighborhoods of the Carolinas, Inc., 418 S.C. 1, 19–20, 791 S.E.2d 128, 137–38 (2016). Surely Hendrick does not urge this Court to place its Arbitration Agreement on a pedestal above all other contracts, nor does it ever claim that the Arbitration Agreement should be afforded "super contract" status. "Arbitration under the Act ***is a matter of consent, not coercion***..." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S. Ct. 1248, 1256, 103 L. Ed. 2d 488 (1989) (emphasis added). As contemplated by both State and Federal caselaw, the courts can define the scope of the agreement to effectuate the intentions of the parties, whether it be a contract to arbitrate or a contract to paint a house. This Arbitration Agreement did not mirror the

intentions of the parties.

Because the legal principle of effectuating the parties' expectations relative to a contract applies equally to arbitration agreements and other contracts alike, this court should agree with the Circuit Court and find that doing so is contemplated by the FAA's Savings Clause and therefore was a proper ground upon which the lower court could determine whether the Arbitration Agreement at issue was enforceable. In a nutshell, since the parties to the 2011 Arbitration Agreement could not reasonably have expected the alleged torts to have occurred they quite plainly could not have agreed to arbitrate them. As such, the Circuit Court did not err in applying the outrageous torts exception to its analysis of this matter and its decision should be affirmed.

(2) The Circuit Court properly applied general contract principles of South Carolina State law.[10]

(a) The Circuit Court did not err in concluding that Doe's claims are not subject to arbitration in determining that there was no "meeting of the minds."

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[10] Doe raised arguments regarding "meeting of the minds" and "unconscionable adhesion contract" and also distinguished the U.S. Supreme Court cases cited by Hendrick in its Memorandum in Support of Motion to Compel Arbitration, which was filed at 4:26 pm on the afternoon before the hearing on February 21, 2017 and delivered to Doe's counsel at approximately 5:00 pm that same day, by way of her Supplemental Memo in Opposition to Defense Motion to Compel Arbitration, filed on February 22, 2017 prior to the hearing held that day. During oral argument, counsel for Hendrick announced his belief that the Circuit Court could not hear argument on those issues raised in Doe's supplemental briefing, but the Court disagreed and afforded Hendrick multiple opportunities to address those supplemental arguments by way of filing a supplemental brief or by additional oral argument. (See, Hr'g. Tr. [Feb. 22, 2017] p. 15, ln. 8 - p. 17, ln. 9 and Hr'g Tr. [Apr. 4, 2017] p. 5, ln. 16-20.) No additional briefing or oral argument addressing these issues raised by Doe was submitted to the trial court by Hendrick.

"[A] party challenging an FAA compliant arbitration[11] provision may still argue no meeting of the minds to arbitrate existed." *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 80, 749 S.E.2d 139, 145 (Ct. App. 2013). *See also, Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001) ("General contract principles of state law apply to arbitration clauses governed by the FAA." (citing *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 685, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996))); See, *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23-2, 644 S.E.2d 663, 668 (2007), (finding a "gateway matter" to arbitrability is whether a valid agreement to arbitrate existed).

"South Carolina common law requires 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." *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989). "Words cannot be read into a contract which impart intent wholly unexpressed when the contract was executed." *Gilstrap v. Culpepper*, 283 S.C. 83, 86, 320 S.E.2d 445, 447 (1984), citing *Blakeley v. Rabon*, 266 S.C. 68, 72, 221 S.E.2d 767 (1976); *McPherson v. J.E. Sirrine & Co., et al*, 206 S.C. 183, 204, 33 S.E.2d 501 (1945). Here Hendrick seeks to enforce an Arbitration Agreement in response to Doe's allegations that outrageous and unforeseeable torts were allegedly committed against her by one of its employees. The argument set forth in Hendrick's brief is that "neither law nor equity

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[11] The parties agree and the Circuit Court noted that the Federal Arbitration Act governs the Arbitration Agreement at issue in this case. (Def's Mem. in Sup. Mot. Compel Arb. pp. 5-6; Pl. Supp. Mem. in Opp., p.1-2; Formal Order, p. 4, n.1)

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." (App. Init. Brf., p. 17). Apparently, Hendrick wants this court to supply the term that outrageous and unforeseen tortious behavior is arbitrable under its Arbitration Agreement.

Again, in examining the Arbitration Agreement, the trial court sought to enforce the expectation of the parties. Of course, "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). Here, Hendrick wants this Court to accept that, at the time the Arbitration Agreement was signed, both parties to the document had a meeting of the minds as to the scope of issues the agreement was expected and intended to cover, and that the scope included the possibility that Hendrick's employee might one day place Doe's personal and private identifying information on a sexually explicit prostitution and "hook up" website. Such a reading of the Arbitration Agreement is preposterous as is any attempt by Hendrick to convince this Court that the parties reasonably expected or intended the allegations made in this litigation to be covered by that agreement. Presumably, Hendrick believes that because this material and essential term regarding the scope of the Arbitration Agreement was not spelled out for Doe, it should nevertheless have been implied by Doe, or supplied by the trial court, or now by this reviewing Court. Of course, the agreement itself states, in pertinent part, the following:

> 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***...shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. (emphasis supplied)

As Hendrick points out, Doe expressly admits in her Affidavit that she "did have the opportunity to read the document" (Aff. of Jane Doe, ¶ 10) and that she "reviewed" it (Aff. of Jane Doe, ¶12). It has never been suggested that Doe did not do so prior to signing. The question is whether, in forming their contract, both parties had a meeting of the minds as to the scope of the agreement. Doe has stated under oath by Affidavit that at the time the document was presented to her, after review, she was wholly unaware of the possibility that she might one day have to arbitrate claims such as those alleged and the document is glaringly ambiguous on that point. Importantly, Doe states in her Affidavit:

> 11. That at no time was it explained to me that by signing the document I was agreeing to relinquish my right to a jury trial if the dealership, its agents or employees ever committed outrageous tortious acts against me personally.
>
> 12. It was my understanding from a review of the document when presented to me that it related to issues surrounding my purchase of the car, not my personal interactions with the dealership, its servants, agents and employees.
>
> 16. I understood the purpose of the Arbitration Agreement to be limited to matters relating specifically to the vehicle I was purchasing, including any injuries I may have suffered in tort due to negligent repair or other similar tortious acts or omissions by the dealership relative to that vehicle.
>
> 17. That I would not have signed this Arbitration Agreement if it were clear on its face that the dealership or its employees, servants and agents could commit personal torts against me wholly unrelated to the vehicle itself and then claim those must be arbitrated.
>
> 21. When I signed the Arbitration Agreement, my understanding was that any injuries or disputes subject to arbitration had to be related to the vehicle

itself, work negligently performed on the vehicle at the dealership or related my payment or financing of the vehicle.

23. My purpose and intention in signing the Arbitration Agreement was to consummate the purchase of the car, and to arbitrate matters relating to the car, not to give up might [sic] right to a jury trial if the dealership, its servants, agents or employees injured me directly and personally through outrageous acts or negligence not involving my vehicle.

24. From the circumstances of the sales transaction, I did not, and could not, have known that at the time I signed the Arbitration Agreement in 2011, the dealership intended to arbitrate all tort claims including the instant outrageous tort claim arising from its employee posting my personal and private information on a sexually oriented prostitution website four and a half years after I bought the car from the dealership.

25. The December 2015 meeting at the dealership between myself and Richard Smith which led to this lawsuit was a wholly separate and distinct transaction from the June 2011 car purchase; it did not relate to my previous credit application for the 2011 purchase, it did not relate my actual purchase of the car in 2011, it did not relate to any lease of a car in 2011, it did not relate the condition of the vehicle I bought in 2011 nor did the December 2015 meeting relate to the terms of the 2011 purchase agreement or my 2011 financing contract.

(Aff. of Jane Doe, ¶¶ 11, 12, 16, 17, 21, 23, 24, 25)

Certainly Hendrick cannot argue in good conscience that the potential the parties may one day have to arbitrate such acts as have been alleged were in its mind at the time the Arbitration Agreement was presented to Doe in 2011 as part of closing her car deal. Clearly, as shown by her Affidavit, that possibility was decidedly **<u>not</u>** in the mind of Doe in 2011. Therefore, by definition, neither party ***expected*** that when forming the contract. Assuming *arguendo* that Hendrick would now claim to this tribunal that the Arbitration Agreement was in fact specifically and meticulously designed to ensure the arbitration of these very manner

of outrageous tort claims, or even any potential claim, no matter how remote, it must be remembered that "the 'meeting of minds' required to make a contract is not based on secret purpose or intention on the 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)(emphasis supplied). There is no possible way that any reasonable person, when the "circumstances" at play are the signing of an Arbitration Agreement with a car dealer as part of a vehicle purchase which states on its face that the agreement relates to "[a]ny 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***", could ever conceive that they would have to arbitrate claims such as arose here. Unless Hendrick was holding this in its mind and purposely keeping it secret from Doe, there is no doubt Hendrick did not conceive it either. Therefore, given that neither party would have ever contemplated the occurrence of, or expected to be arbitrating, such matters in the future, there was simply no meeting of the minds as to the scope of the contract that Hendrick now seeks to enforce. The original scope Hendrick now hopes to stretch far enough to cover Doe's allegations did not clearly and unambiguously encompass such acts, and while every single potential claim need not be specifically enumerated, the scope of the agreement, as an essential and material term of an agreement to arbitrate, cannot simply be later implied (or judicially supplied) when it suits

the drafter, in this case, Hendrick.

As a general rule, implied terms are not favored in the law. *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 147 S.E.2d 481 (1966). The unexpressed provision may be inferred from the language of the contract itself, or by looking to the external facts and circumstances surrounding the bargain, or by proving a general custom and usage of including certain terms as part of similar contracts. *Commercial Credit Corp. v. Nelson Motors, Inc., supra*; *Burden v. Woodside Cotton Mills*, 104 S.C. 435, 89 S.E. 474 (1916). Relying upon "general custom and usage" of certain terms in the context of a car purchase and sales arrangement, and looking at the "external facts and circumstances surrounding the bargain" that occurred here, it is clear that there is no way an agreement to arbitrate the claims alleged in this matter could have been "implied" or inferred by Doe as being part of the 2011 Arbitration Agreement which stated that it applied to "[a]ny 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***."

There was no meeting of the minds in 2011 as to the essential and material terms of the arbitration contract presented by Hendrick to Doe and as such, the trial court was correct in declaring the Arbitration Agreement void *ab initio*. This Court is urged to affirm that decision.

(b) The Circuit Court did not err in concluding that Doe's claims are not subject to arbitration in determining that the Arbitration Agreement constituted an unconscionable 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 contemplated by the FAA's Savings Clause, this is another 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). As Hendrick points out, unconscionability is characterized by (1) the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with (2) 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, 472 S.E.2d 242 (1996) (citing *Jones Leasing v. Gene Phillips and Assocs.*, 282 S.C. 327, 318 S.E.2d 31 (Ct. App.1984)), *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998).

Claiming that the Arbitration Agreement on its face was not objectively unconscionable, Hendrick argues that the trial court erred in finding the same to be unconscionable because Judge Dennis failed to analyze the terms of the Arbitration Agreement in a vacuum. "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), 17A Am.Jur.2d *Contracts* § 279 (2004); *see also* 17 C.J.S. *Contracts* § 4 (1999) ("The determination of unconscionability is fact specific, and the totality of the circumstances must be assessed.") Citing to a New Jersey court opinion, our Supreme Court adopted the language that "[a]s to the finding of unconscionability...'[t]here is no hard and fast definition of unconscionability' and that it is 'an amorphous concept.'" *Gladden v. Boykin*, 402 S.C. 140, 150, 739 S.E.2d 882, 887 (2013).

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" is also relevant to this determination. *Id.* at 27, 644 S.E.2d at 670. And while adhesion contracts are not "per se unconscionable", the Supreme Court has held that 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, 542 S.E.2d 360 (2001). As explained in *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 749 S.E.2d 139 (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 this case Doe 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. (See, Aff. of Jane Doe, ¶ 9) Also stated in her Affidavit, the closing documents were hastily presented and they were apparently represented as necessary to close the deal on the vehicle. (See, Aff. of Jane Doe,¶¶ 9-10)

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.*** " *citing, 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, the 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 Circuit Court determined that Doe's alleged injuries were not of the type normally considered in a commercial consumer setting such as a vehicle sale and that Doe was not a substantial business concern of Hendrick. The trial court also found that in the context of the 2011 sales transaction, Hendrick possessed substantially more bargaining power than Doe and used that power to its advantage in consummating the vehicle sale in 2011. The lower court also found that Doe, when compared to Hendrick, lacked the level of business sophistication relative to the dealership and its sales people in the context of making a car deal acknowledging that in the "take it or leave it" type of transaction that is a typical car deal, the buyer is normally at a disadvantage. Finally, in assessing whether there was any surprise in the inclusion of the Arbitration Agreement as part of the car purchase, the trial court determined that Doe could never have suspected that the type of injuries she allegedly suffered at the hands of Hendrick and its employee could be subject to binding arbitration. (*See generally*, Formal Order, pp.16-17).

The second prong of the unconscionability analysis which Hendrick claims was unexamined by the trial court is whether the Arbitration Agreement contained terms which are so oppressive that no reasonable person would make them and no fair and honest person

would accept them. Because its review must be done retrospectively, the court cannot determine whether the terms expressed in the arbitration contract are so oppressive as to render it unconscionable without examining the circumstances of the bargain overall. After finding the Arbitration Agreement to be an adhesion contract worthy of "considerable skepticism" (Formal Order, p.16) that additional analysis was undertaken by the trial court. Taken in context, the terms of the Arbitration Agreement that Hendrick now argues requires Doe to forego her right to a jury trial for redress of her outrageous and unforeseeable tort claims renders the agreement unconscionable at its inception. Because the trial court was not present to supervise its presentation at the time the Arbitration Agreement was given to Doe by Hendrick in 2011, the court must necessarily look back at the agreement as a whole in light of the all circumstances surrounding its making.[12] In doing so, it becomes evident that the 2011 Arbitration Agreement itself is unconscionable to the extent that, in practice, it abrogates Doe's right to have a jury of her peers hear and decide the merits of her present claims. The question is whether the document presents "terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *One Belle Hall Prop. Owners Ass'n, Inc. v. Trammell Crow Residential Co.*, 418 S.C. 51, 60, 791 S.E.2d 286, 291 (Ct. App. 2016). The trial court determined that, in light of the

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[12] "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), 17A Am.Jur.2d *Contracts* § 279 (2004); *see also* 17 C.J.S. *Contracts* § 4 (1999) ("The determination of unconscionability is fact specific, and the totality of the circumstances must be assessed.")

circumstances presented, no reasonable person would agree to subject themselves to those unforeseeable and outrageous torts Doe alleges were committed and knowingly agree to waive her Seventh Amendment right to a trial by jury on her claims. Doe stated as much in her Affidavit:

> 22. More to the point, I never would have signed the Arbitration Agreement if the intention of the dealership to arbitrate any disputes arising out of any source whatsoever was brought to my attention rather than stored away in the mind of the dealership and its employees, servants and agents.

(*See*, Aff. of Jane Doe ¶ 22)

And although it was not explicitly stated by the lower court, it is safe to assume that no other reasonable company in Hendrick's position would offer terms to a potential customer such as those Hendrick seeks to impose upon Doe now. In furtherance of its attempt to effectuate the intentions and expectations of the parties to the Arbitration Agreement, the trial court had the choice and authority to either refuse to enforce the Arbitration Agreement as a whole contract or to limit the application of the unconscionable clause to avoid an unconscionable result. It properly chose to avoid the agreement as a whole and that decision should be affirmed.

(c) The Circuit Court did not err in concluding that Doe's claims are not subject to arbitration by determining that the 2011 sales transaction and Doe's dealings with Smith in late 2015/early 2016 were wholly separate and distinct events such that the Arbitration Agreement does not cover the allegedly tortious acts underlying Doe's claims.

As Hendrick points out in its brief, a proper analysis of this matter requires the trial

court to consider the plain language of the Arbitration Agreement. *See, Maybank v. BB&T Corp.,* 416 S.C. 541, 576 787 S.E.2d 498, 516 (2106) ("The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language.") Contrary to the assertions of Hendrick, the common thread of giving effect to the parties' expectations and intentions runs through and overlaps the entire analysis undertaken by the trial court, whether in ascertaining if a meeting of the minds occurred, whether the contract in and of itself was unconscionable and whether the agreement even arguably applied to the matter which eventually, and unfortunately, arose between the parties. Hendrick asserts that the 2015/2016 interaction between the parties is "comfortably embraced" by the Arbitration Agreement. (App. Init. Brf., p. 22) Assuming for the sake of discussion that the contract at issue did form after a meeting of the minds, and assuming further that the contract was not voidable for unconscionability, there can be no question to the reasonable mind that the language of the document does not encompass the claims asserted by Doe in her lawsuit and forcing the parties to arbitrate the same would not further the court's goal of giving effect to the intentions of the parties.

Despite Hendrick's position that the trial court failed to analyze and consider the specific language of the Arbitration Agreement, it is clear from the Formal Order filed April 27, 2017 that such an analysis was indeed completed. To wit, in addition to its pronouncements at the April 4, 2017 hearing[13], the trial court engaged in the following

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[13] At the reconvened April 4, 2017 hearing, the Court stated:

examination in its Formal Order, beginning with the *Aiken* case and its applicability to the agreement at issue:

> 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)

The court stated that it found:

> ...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 relationship, much less a significant relationship,

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> And I did this after reading everything and told you if I needed further argument I would give you the opportunity.
>
> ***
>
> I am just saying my thought [at the February 22, 2017 hearing] was for some reason I was thinking the agreement dealt with a car that they were negotiating for, and it didn't. It was a car that had nothing to do at all with the interactions with this company in 2015.
>
> ***
>
> I can't jump from a car four years before and say this [Arbitration Agreement] covers everything that could possibly happen between these entities that doesn't specifically involve this car. And that is my concern. And so for that reason it...really I agree with you, Mr. Forsberg, I think it would go – it would be unconscionable to extend it that broadly.

See, Hr'g. Tr. [Apr. 4, 2017], p. 3, ln. 1-3 and ln. 10-14; p. 5, ln. 8-14.

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...

The court went on to point out that:

> 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.*** (emphasis added) 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).

(*See*, Formal Order, pp. 6-8)

As instructed by the *Aiken* Court, the trial court determined that the claims raised in a Complaint must have a significant relationship to the contract in order for the arbitration agreement to cover the lawsuit in question. Adopting the language of our Supreme Court, Judge Dennis found that the mere fact that Doe may have received a trade-in mailer from Hendrick's dealership or that she had returned to the dealership to service her car originally purchased in 2011, was insufficient to create a "significant relationship" between the asserted claims and the 2011 Arbitration Agreement. Moreover, Judge Dennis determined that Hendrick's position that the dispute would not have arisen but for the existence of the 2011 sale which included the Arbitration Agreement and the consequent relationship between the parties was insufficient by itself to transform the pending legal dispute into one "arising out of or relating to" the 2011 Arbitration Agreement. To avoid an illogical and unconscionable result, the court properly found the 2011 Arbitration Agreement had no application to the alleged 2016 torts.

The trial court likewise stated in the Formal Order that its decision was based upon the law in *Aiken*, where the South Carolina Supreme Court announced:

> ...[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.***
>
> 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).

Again, the concept of giving effect to the expectations and intentions of the parties is clearly stated as a basis for its decision in the trial court's lengthy analysis of the matter. After an exhaustive examination of the particular facts of the case in light of the language of the Arbitration Agreement, the lower court correctly determined that interpreting the agreement to apply to actions "completely outside the expectations of the parties" would be improper. It is evident from both the Formal Order and the discussion in open court that the trial court did carefully analyze the relationship between the parties in light of the Arbitration Agreement and thereafter determined that it was completely outside their expectations (or intentions) that the agreement would apply to the 2016 claims of Doe. It is disingenuous for Hendrick to suggest that the trial judge failed to analyze the language of the Arbitration Agreement in an attempt to ascertain and give legal effect to the parties' intentions, especially when the court's Formal Order quotes from the document itself and when the court expounds upon its reading and understanding of the document during oral argument.

As the trial court found, it would be absurd for this Court to determine that Doe, 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. As a party to the Arbitration Agreement, that was not her expectation or intention in signing it, nor was it anything the dealership would have ***expected*** in 2011 although now Hendrick, for its own purposes, ***intends*** for it to apply. No matter the reason she was at the dealership in 2015 and no matter why Hendrick employee Smith allegedly did what he did in 2016, what transpired was not expected by either party to the Arbitration Agreement and therefore, it was not covered by the document. As is evident from the Formal Order itself, the trial court did in fact properly conclude that the 2011 Arbitration Agreement and the 2015/2016 tortious conduct alleged in the Complaint were wholly separate and distinct events, that the alleged commission of those torts was not "comfortably embraced" within the expectations of the parties and therefore, in giving effect to the expectations of the parties, it was proper to find that the 2011 Arbitration Agreement did not apply to the 2016 torts. The Order of the trial court should be affirmed and this matter remanded with instructions that litigation proceed.

CONCLUSION

For the foregoing reasons, Doe respectfully requests that this Honorable Court affirm the Circuit Court's April 27, 2017 Order Denying Defendant's Motion to Compel Arbitration and Stay Litigation and remand this case to the lower court with instruction that this matter

proceed with litigation forthwith. Furthermore, pursuant to Rules 208(b)(2) and 220(c) of the South Carolina Appellate Court Rules, Doe would respectfully request that this Honorable Court affirm the Circuit Court upon any grounds appearing on the record.

Respectfully Submitted,

THE MASON LAW FIRM, P.A.

By:

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

Mount Pleasant, South Carolina
Dated: February 2, 2018

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

RECEIVED
FEB 09 2018
SC Court of Appeals

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

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I, Anthony E. Forsberg, of The Mason Law Firm, PA, counsel for Respondent, hereby certify that the foregoing **INITIAL BRIEF OF RESPONDENT** and the **RESPONDENT'S DESIGNATION OF MATTER** were served on all other parties to this matter by depositing a copy of the same in the U.S. mail on February 2, 2018, properly posted for delivery to the following addressees:

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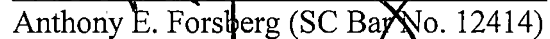
Counsel for TCSC, LLC d/b/a Hendrick Toyota of North Charleston

Respectfully submitted,

THE MASON LAW FIRM, P.A.



By: ______________________
Anthony E. Forsberg (SC Bar No. 12414)

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

Mount Pleasant, South Carolina
Dated: February 2, 2018

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February 2, 2018

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SC Court of Appeals

Jenny Abbott Kitchings, Clerk of Court
SOUTH CAROLINA COURT OF APPEALS
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RE: **Jane Doe v. TCSC, LLC d/b/a Rick Hendrick Toyota of North Charleston**
Civil Action Number: 2016-CP-10-4112
Appellate Case Number: 2017-001216
MLF File No.: 16-037

Dear Ms. Kitchings:

Enclosed for filing in the above referenced appeal please find the original and two (2) copies of the Initial Brief of Respondent, Respondent's Designation of Matter and Proof of Service relative to this matter.

Assuming you find the same in order, please file the same and return the file stamped copies to my office in the self addressed envelope provided. Of course, if there are any questions, please do not hesitate to call me. Thank you for your assistance in this regard.

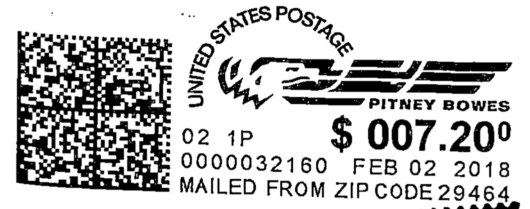
With kind professional regards, I am

Yours very truly,

THE MASON LAW FIRM, P.A.

Anthony E. Forsberg

AEF/
Enclosures as stated
CC: Stephen L. Brown, Esq.
Edward D. Buckley, Jr., Esq.
Nicholas J. Rivera, Esq.
Russell G. Hines, Esq.



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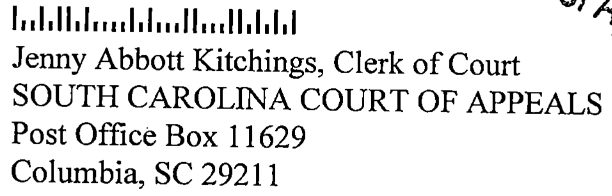

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