THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

APPELLATE CASE NO. 2017-001897

Marcus Kevin Grant, individually and in a representative capacity for all other similarly situated..... Respondent

vs.

Jud Kuhn Chevrolet.....Appellant

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN RULING THAT THE ARBITRATOR FOR THE AAA MAY TREAT THIS MATTER AS A CLASS ACTION?

STATEMENT OF THE CASE

Plaintiff Marcus Kevin Grant ("Buyer") filed this action individually and on behalf of similarly situated individuals against Jud Kuhn Chevrolet ("Seller"). The complaint sets forth a single cause of action which charges Seller with negligently violating the Dealers Act, S.C. Code Ann. §56-15-10 *et seq.,* in the manner in which it assessed automobile dealer closing fees. (Complaint at ¶¶ 15-20).

Buyer filed this case on December 28, 2015. *Id.* Seller timely answered on February 19, 2016 (Answer), and, among other defenses, asserted was that Buyer's claims were subject to mandatory arbitration under the Federal Arbitration Act (the "FAA"), 9 U.S.C. §1 *et seq.*, (Answer at ¶ 15).

After assembling evidence necessary to support a motion, and before discovery was undertaken, Seller filed a Motion to Compel *Bilateral* Arbitration. (Motion to Compel Arbitration filed December 6, 2016). A hearing on the matter was held before the Honorable Steven H. John. Judge John, however, did not rule on the motion.

Seller filed an Amended Motion to Compel to Bilateral Arbitration on February 13, 2017. (Amended Motion to Compel Arbitration fled February 9, 2017). A hearing on the Amended Motion was held before the Honorable Benjamin H. Culbertson on July 31, 2017. The trial court informed the parties that it would compel arbitration, but would take under further consideration the question of whether the arbitration agreement permitted class arbitration. (Tr. At 18:2-7). The parties were permitted to and did submit various supplemental briefs on this issue. (Tr. at 8:2-20); Plaintiff Supplemental Memorandum on Class Wide Arbitration; Defendant's Response

to Plaintiff's Supplemental Memorandum on Class Wide Arbitration; Plaintiff's Reply Memorandum filed August 11, 2017; Brief in Response to Plaintiff's Proposed Order, filed August 24, 2017).

The trial court subsequently issued an Order compelling arbitration, but denying Seller's request for *bilateral* arbitration, ruling that the arbitrator for the AAA may treat this matter as a class action. (Order of the Honorable Benjamin Culbertson dated August 25, 2017). The Order was filed on August 25, 2017. *Id.* Seller's counsel received electronic notice of the Order the same day. Seller timely filed its Notice of Appeal on September 15, 2017. (Notice of Appeal). Seller has asked this Court to reverse the trial court's Order and rule that class wide arbitration is not permissible.

STATEMENT OF THE FACTS

On July 6, 2013, Buyer purchased Chevrolet Camaro from Seller. (Retail Buyer's Order, Exhibit, Motion to Compel Arbitration).

The Retail Buyer's Order signed by Buyer charged a closing fee. It also contained an arbitration clause (the "Arbitration Clause"), which provides that:

> **ARBITRATION REQUIRED BY THIS AGREEMENT.** The Parties agree that instead of litigation in a court, any dispute, controversy or claim arising out of or relating to the sale of the motor vehicle or to this Purchase Order, including the validity or lack thereof of this contract, to any other document or agreement between the parties relating to sale of the motor vehicle, or to any other document or agreement between the parties relating to the motor vehicle, including the parties' retail installment contract, if any, shall be settled by binding arbitration administered by the American Arbitration Association, under its Commercial Arbitration Rules. Such arbitration shall be conducted in Columbia, SC. Each party will pay its own costs, and any filing fees charged by the American Arbitration Association shall be split evenly between the parties. Any judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction.

(Retail Buyers Order, Exhibit, Motion to Compel Arbitration).

ARGUMENT

I. THE TRIAL COURT WAS CORRECT IN RULING THAT THE ARBITRATOR FOR THE AAA MAY TREAT THIS MATTER AS A CLASS ACTION.

I. **Arbitration with the AAA**.

Arbitration clauses are favored in the State and Federal Courts. When interstate commerce is involved in a transaction, State arbitration law is preempted by the Federal Arbitration Act. Nevertheless, the Federal Arbitration Act provides that an arbitration clause may be unenforceable if it is held to be unconscionable under a State's contract law. Simpson v. M.S.A. of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007). The South Carolina Supreme Court has approached adhesion contracts between a consumer and automobile retailer with "considerable skepticism." Id. The lower court ruled that arbitration before the AAA is appropriate. The parties do not contest or appeal this ruling.

II. **Class vs. Bilateral Arbitration**. The lower court also ruled that the arbitrator for the AAA may treat this matter as a class action.

The present case has been styled as a Class Action under the Dealers Act. The Dealers Act specifically provides for class actions. S.C. Code Ann. §56-15-110(2) provides "When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the Court, one or more may sue for the benefit of the whole, including actions for injunctive relief."

The South Carolina Supreme Court addressed class actions under the Dealers Act in the case of Herron v. Century BMW, 387 S.C. 525, 693 S.E.2d 394 (2010) (Herron I). The Court found that an Arbitration Agreement which prohibited class actions in direct contravention of the Dealers Act is against public policy. THERE IS NO SUCH CLASS ACTION PROHIBITION IN THE ARBITRATION CLAUSE AT ISSUE IN THIS CASE. The Court noted that in

addition to specifically providing for class actions, the Dealers Act also provides that "Any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable." S.C. Code §56-15-130. The Court went on to hold, "Stated succinctly, the Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act and that any contract prohibiting a class action suit violates our State's public policy and is void and unenforceable." (Emphasis added.) The Court affirmed the Trial Court's Order in result, denying the Motion to Compel Arbitration.

Shortly after the opinion in Herron I was issued, The United States Supreme Court published its opinion in the case of AT&T Mobility, LLC v. Concepcion, 563 U.S. 333 (2011). In Concepcion, The United States Supreme Court overturned a decision of the California Courts which invalidated a class action waiver in an arbitration provision based upon the preemption of the FAA. The United States Supreme Court then accepted certiorari on the Herron I case and remanded the Herron I case with instructions for the South Carolina Supreme Court to reconsider its opinion in Herron I in light of the Concepcion case. The South Carolina Supreme Court affirmed Herron I because the issue of preemption had not been preserved for review in the South Carolina proceedings. Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011). (Herron II).

The arbitration agreement in Herron I contained a class action waiver. The Court struck the waiver on public policy grounds but implied that the waiver was severable and the arbitration clause could be saved. The Court struck the entire arbitration clause at the Defendant's request. The Arbitration Agreement in the present case does not have a class action waiver. Therefore,

the present case is even stronger than Herron I, with even more reason to deny the Appellant's request to limit the proceedings to bilateral arbitration.

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

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

The facts of the present case, however, are very different from the facts of DirecTV. The first and foremost distinction is that DirecTV and prior cases concerned the States' attempts to defeat arbitration altogether, which would frustrate the liberal Federal Policy in favor of arbitration as set forth in the FAA. In the present case, however, the Court has already ruled in favor of arbitration. The parties do not contest or appeal this ruling. Therefore, the issue of class treatment is not tied to the enforceability of the arbitration clause.

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

The Third distinction is that the class action provision of the Dealers Act applies to all situations which arise under the Act. It does not target arbitration as the California law did in DirecTV. The class action provision of The Dealers Act allows for a class action in any contract to purchase a vehicle, with or without an arbitration clause. The Dealers Act was adopted in 1962, long before arbitration became popular. In 1962, the South Carolina legislature could not possibly have intended to target arbitration clauses. There is no evidence in the record to suggest that arbitration clauses were used in automobile purchase agreements in 1962. The purpose of providing for class actions under the Dealers Act was most certainly to provide a practical economical remedy for a large group of car buyers who have suffered the same type harm. The purpose was not to defeat arbitration clauses, or to frustrate the purposes of the FAA.

In Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662 (2010), the U.S. Supreme Court held that imposing class arbitration on parties who have not agreed to authorize class arbitration was inconsistent with the Federal Arbitration Act. The Court held that the

arbitration clause in Stolt-Nielsen was "silent" as to class action treatment in arbitration. In the present case, however, the arbitration clause cannot be said to be silent as to class action treatment.

In the case of Oxford Health Plans, LLC v. Sutter, 569 U.S. _____ (2013), the United States Supreme Court, in a unanimous decision, affirmed an arbitrator's decision to allow a class action to proceed in arbitration based upon the arbitrator's interpretation of the contract. The arbitration clause at issue stated as follows:

> No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one Arbitrator. [Id.]

Obviously, this particular arbitration clause says nothing about class actions. Therefore, the agreement between the parties was arguably "silent" as to class actions. Nonetheless, the arbitrator found that the intent of the arbitration clause was "to vest in the arbitration process everything that is prohibited from the Court process." Id. The U.S. Supreme Court went on to state the Arbiter's reasoning as follows: "And a class action, the arbitrator continued, 'is plainly one of the possible forms of civil action that could be brought in a Court' absent the agreement." Id. Accordingly, he concluded that 'on its face, the arbitration clause... expresses the parties' intent that class arbitration can be maintained'" Id.

The United States Supreme Court ruled that the arbitrator's decision to allow this interpretation of the contract would not be overturned under the appellate standard of review of the Federal Arbitration Act. The Court went on to distinguish its Stolt-Nielsen decision by noting as follows: "The parties in Stolt-Nielsen had entered into an unusual stipulation that they had never reached an agreement on Class Arbitration." Id. (emphasis added).

In the present case there is no such unusual stipulation. On the contrary, the arbitration clause in the present case anticipates that all matters which could be brought forth in a Court system could also be brought forth in arbitration, which would include class actions.

There are at least three ways in which the present arbitration clause speaks to class wide arbitration. First, the arbitration clause states that "The parties agree that instead of litigation in a court, any dispute, controversy or claim... shall be settled by binding arbitration..." (Emphasis added.) Just as the arbitrator found in Sutter, the lower court found that the present arbitration clause "vests" in the arbitrator everything that is prohibited from the Court process.

Second, in the present case there is the added indicator that class actions are specifically provided for under the Dealers Act which has been declared to be the public policy of this state by our Courts in Heron I and Heron II. The entire agreement between the dealer and the purchaser is subject to the provisions of the Dealers Act. The Dealers Act is very specific in terms of the rights of consumers to band together in a class action. S.C. Code Ann. §56-15-110(2) provides, "When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the Court, one or more may sue for the benefit of the whole, including actions for injunctive relief." This is a specific consumer remedy recognizing that some losses suffered by consumers may be so small that the loss would not warrant the filing of a single action. The Dealers Act recognizes that consumers are particularly vulnerable to abusive fees charged by dealers and therefore specifically provides for consumers to band together to seek justice against these unscrupulous charges and activities.

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

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

Third, the agreement specifically calls for arbitration in the AAA. The AAA specifically provides Supplementary Rules for Class Arbitrations. (See Affidavits.) The AAA is set up to handle class arbitrations. The AAA has handled numerous class arbitrations in the past and is well equipped to handle this relatively simple class action. (See AAA website.)

Stolt-Nielsen indicates that there must be a contractual basis for concluding that a party agreed to class action treatment. By designating the AAA as the arbitration forum, the Defendant dealer is charged with knowledge of the AAA rules. The AAA has provided for class action treatment in arbitrations since its rules became effective on October 8, 2003. The dealer is charged with knowledge of this provision for class treatment and it has specifically designated the AAA as the forum to handle arbitrations. Therefore, there is in fact a contractual basis for class treatment.

Conclusion

The ruling of the lower court holding that the arbitrator for the AAA may treat this matter as a class action should be upheld.

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February 13, 2018

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PROOF OF SERVICE

PERSONALLY appeared before me, Lynn C. Benton, who being duly sworn, deposes and says that she is an employee of KELAHER, CONNELL & CONNOR, P.C., Attorneys at Law, and that she has served the **Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal** on the Appellant, through its attorney of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

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Robert L. Reibold. Esquire
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Post Office Box 11889
Columbia, SC 29211-1889

Date of Mailing: February 14th, 2018

Lynn C. Benton

SWORN to before me this
14th day of February, 2018

Notary Public for South Carolina
My Commission Expires: 6/17/24

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February 14, 2018

Ms. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street, Suite 201
Columbia, SC 29201

Re: Marcus Kevin Grant v. Jud Kuhn Chevrolet
Appellate Case No.: 2017-001897

Dear Ms. Kitchings:

Enclosed please find the following:

1. The original and a copy of Initial Brief of Respondent Marcus Kevin Grant;
2. The original and a copy of Respondent's Designation of Matter to Be Included on the Record On Appeal;
3. The original and a copy of Proof of Service of same.

Please file the originals and return a clocked copy of each of these documents in the envelope provided for your convenience.

I am, by copy of this letter, serving the same upon counsel of record.

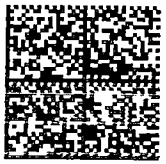
With best wishes, I remain

Sincerely yours,

L. Sidney Connor, IV

LSCIV:lb
Enclosures

cc w/encl.: H. Clayton Walker, Jr., Esquire
Robert Lawrence Reibold, Esquire



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