THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Resident Circuit Judge

CASE NO. 2016-CP-26-00937
Unpublished Opinion No. 2018-UP-083
Filed February 14, 2018

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

vs.

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

PETITION FOR WRIT OF CERTIORARI

L. Sidney Connor, IV
KELAHER, CONNELL & CONNOR, P.C.
Post Office Drawer 14547
Surfside Beach, SC 29587-4547
(843) 238-5648
sconnor@classactlaw.net
Attorney for Petitioner

Other Counsel of Record:
Sarah P. Spruill, Esquire
Haynsworth Sinkler Boyd, P.A.
Post Office Box 2048
Greenville, SC 29602
(864) 240-3200
Attorneys for Respondent

James Y. Becker, Esquire
Mary M. Caskey, Esquire
Haynsworth Sinkler Boyd, P.A.
Post Office Box 11889
Columbia, SC 29211-1889
(803)779-3080
Attorney for Respondent

INDEX

CERTIFICATION OF COUNSEL

The undersigned certifies that Petitioner's Petition for Rehearing was denied by the Court of Appeals on March 22, 2018.

QUESTIONS PRESENTED

Did the Appeals Court err in affirming the Trial Court Order requiring the case to proceed as bilateral arbitration as opposed to class wide arbitration?

STATEMENT OF THE CASE

I. Procedural History

On February 12, 2016, the Appellant Cali Alyson Emory filed this action individually and in a representative capacity for all others similarly situated. Appellant initially demanded a Jury Trial. The Respondent filed an Answer on or about June 10, 2016. The Appellant filed an Amended Complaint on June 23, 2016 demanding arbitration rather than a Jury Trial. The Respondent answered that Complaint on or about October 5, 2016.

On June 23, 2016, the Appellant filed a Motion to Compel Arbitration pursuant to the South Carolina Uniform Arbitration Act. On August 17, 2016, the Respondent filed a Motion to Stay Proceedings and Compel Bilateral Arbitration. The Court heard oral arguments on these motions on September 7, 2016. On September 15, 2016, the Court issued a written Order denying both the Appellant's Motion and the Respondent's Motion and requiring that the case proceed in Circuit Court. On September 23, 2016, the Respondent filed a Motion to Alter or Amend the Court's September 15, 2016 Order.

The Court then amended its original Order and on January 12, 2017 filed its Order granting Motion to Alter or Amend, holding, "(1) That the S.C. Act does not apply, (2) That the

FAA applies, and (3) The Court will appoint Karl Folkens as the Arbitrator pursuant to §5 of the FAA." None of these three specific holdings is at issue on this appeal. The Court further held that the arbitration shall proceed as a bilateral case involving only the individual Appellant Cali Alyson Emory as opposed to allowing Cali Alyson Emory to represent a class of persons. This holding concerning Bilateral versus Class Wide Arbitration is the subject of this appeal.

Emory appealed this ruling to the Court of Appeals, which affirmed the ruling and denied a rehearing.

STATEMENT OF THE FACTS

On or about May 28, 2014, the Appellant purchased a new vehicle from the Respondent Myrtle Beach Mitsubishi. The Respondent Myrtle Beach Mitsubishi had the Appellant sign a Purchase Agreement with a pre-printed "closing fee" of $499.00.

The Contract of Sale contains two arbitration clauses. The arbitration clause on the front page of the contract states as follows:

> All claims, disputes, and other matters of any kind or nature in question arising out of, in connection with, or relating to, the purchase of the above described vehicle, shall be decided by arbitration in accordance with the Commercial Arbitration Association. The award by the arbitrator(s) shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction therein.

The second arbitration clause on the reverse side of the Contract of Sale states as follows:

> 10. Any controversy or claim arising out of or relating to this contract, or breach thereof, shall be settled in the County Seat where the dealership is located by arbitration pursuant to the Uniform Arbitration Act of South Carolina (S.C. Code §15-48-10) in accordance with the Rules of the American Arbitration Association, and judgment of the award rendered by the arbitrator(s) may be entered in any Court having jurisdiction thereof.

REASON FOR GRANTING CERTIORARI

This Court should grant Certiorari because the issue presented before the Court has not yet been addressed. The South Carolina Supreme Court has previously held that the consumer's right to a class action under the Dealers Act is non-waivable. See Herron v. Century BMW, 387 S.C. 525, 693 S.E.2d 394 (2010) (Herron I) and Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011). (Herron II). In Herron II, the South Carolina Supreme Court did not address the issue of Federal preemption on remand from the United States Supreme Court because the issue of Federal preemption had not been raised in the arguments below. The Appellant in this case contends that the issue of Federal preemption is irrelevant to whether a class action can be brought in arbitration under the South Carolina Dealers Act. The South Carolina Dealers Act is particularly unique because it provides a specific consumer remedy in the form of a class action. It is furthermore unique because the remedy of class action was enacted prior to arbitration agreements becoming popular in dealer contracts. The consumer's nonwaivable right to class action treatment under the Dealers Act is not an attempt to defeat the liberal Federal policy of arbitration. The non-waivable right to a class action would apply whether the case were brought in Circuit Court or in arbitration. The United States Supreme Court cases dealing with this issue draw a distinction between those state statutes and state policies which seem to be aimed at arbitration agreements. Since this non-waivable right to class action treatment applies in any forum, it is enforceable in any forum, including arbitration.

While the Appeals Court has addressed the issue superficially in York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 749 S.E.2d 139, 153 (Ct. App. 2013), the issue has not been directly addressed by the South Carolina Supreme Court. The Appellant urges the Court to take this case

to get finality to this issue. The Court below did not mention either Herron I or Herron II and did not deal directly with the issues stated in DirecTV v. Imburgia, 577 U.S. ____ (2015) and Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662 (2010), and Oxford Health Plans, LLC v. Sutter, 569 U.S. _____ (2013). The Appellant would contend that when these cases are viewed together, the only conclusion is that South Carolina's non-waivable policy of class treatment under the Dealers Act is neutral toward arbitration and is, therefore, enforceable.

ARGUMENT

I. The Appeals Court erred in affirming the Trial Court's Order requiring the case to proceed as a bilateral arbitration as opposed to class wide arbitration.

While both the Appellant and the Respondent agree that the arbitration clauses are valid, the parties disagree on whether the matter can proceed in arbitration on behalf of a class. The lower court ordered "bilateral" (non-class) arbitration. Appellant maintains that the arbitrator may consider the Class allegations and may certify this case 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. 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 and this Court has even more reason to deny the Respondent's request for 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 Appellant has specifically requested arbitration. The Appellant agrees that the Contract of Sale drafted by the Respondent specifically provides for arbitration. The Appellant is not trying to avoid arbitration.

The second distinction is that the arbitration clauses in the present case contain no class action waivers. 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 arbitration clause in Stolt-Nielsen was "silent" as to class action treatment in arbitration. In the present case, however, the arbitration clauses 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 five ways in which the present arbitration clauses speak to class wide arbitration. The first arbitration clause states that "All claims, disputes, and other matters of any kind or nature in question arising out, in connection with, or relating to, the purchase of the above described vehicle, shall be decided by arbitration..." (Emphasis added.) Just as the arbitrator found in Sutter, the present arbitration clause "vests" in the arbitrator everything that is prohibited from the Court process. All class members' contracts have the same or similar language. Therefore, the phrase "the purchase of the above described vehicle" is not a limiting phrase, but would include all contracts with this language.

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 South Carolina Manufacturers, Distributors and Dealers Act (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 clauses 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 clauses are 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 contains no class action waiver. Such a waiver of course would be invalid because the statutory right to a class action is non-waivable, but the absence of an attempted waiver is clear evidence that class action treatment is available in arbitration.

Fourth, the second arbitration clause calls for arbitration "in accordance with the Rules of the American Arbitration Association." The AAA specifically provides Supplementary Rules for Class Arbitrations. (See AAA website) Even though the lower court order does not call for the application of the rules of the AAA, the fact that the second arbitration clause references these class action friendly rules is evidence of class action treatment.

Fifth, the parties anticipate the application of South Carolina law. The contract was entered in Horry County, South Carolina. Both parties are residents of South Carolina. The Respondent has a South Carolina Dealer's license. The Respondent is subject to the Dealers Act and is charged with knowledge of the Class Action provisions of the Act. All parties to the transaction are aware of the application of the Dealers Act. Therefore, the Contract of Sale is NOT SILENT as to class actions. The Second Arbitration Clause makes specific reference to the

application of South Carolina law (the Uniform Arbitration Act). The contract acknowledges the application of South Carolina law, which would include the Dealers Act and the provision for Class Actions.

CONCLUSION

The Appellant requests the Court to reverse the lower court order for bilateral arbitration and require the arbitrator to follow the Dealers Act provision for class action treatment.

KELAHER, CONNELL & CONNOR, P.C.

L. Sidney Connor, IV, S.C. Bar No. 1363
Post Office Drawer 14547
Surfside Beach, SC 29587
(843) 238-5648
sconnor@classactlaw.net
Attorney for Appellant

April 5, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Resident Circuit Judge

CASE NO. 2016-CP-26-00937

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

vs.

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

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 a **Petition for Writ of Certiorari** on the Respondent, through its attorney of record, by depositing a copy of same in the United States Mail, postage prepaid, to:

Sarah P. Spruill, Esquire
Haynsworth Sinkler Boyd, P.A.
Post Office Box 2048
Greenville, SC 29602

John H. Tiller, Esquire
Amy F. Bower, Esquire
Haynsworth Sinkler Boyd, P.A.
134 Meeting Street, 4th Floor
Charleston, SC 29401

Date of Mailing: April 5, 2018

Lynn C. Benton

SWORN to before me this
5th day of April, 2018

Notary Public for South Carolina
My Commission Expires: 6/11/24