

6

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

RECEIVED

APR 02 2018

SC Court of Appeals

Marcus Kevin Grant, individually
and in a representative capacity for
all others similarly situated,

Respondent,

v.

Jud Kuhn Chevrolet,

Appellant.

BRIEF OF APPELLANT

H. Clayton Walker, Jr.
Robert L. Reibold
Haynsworth Sinkler Boyd, P.A.
Post Office Box 11889
Columbia, SC 29211-1889
(803) 779-3080

COUNSEL FOR APPELLANT JUD KUHN
CHEVROLET

TABLE OF CONTENTS

Table of Authoritiesii

Statement of Issues on Appeal 1

Statement of the Case1

Statement of Facts2

Argument3

I. The Arbitration Clause Unambiguously Selects Bilateral Arbitration6

II. Because the Arbitration Clause Is Unambiguous, It Was Improper for the Trial Court to Refer to External Sources as Aids in Construction of the Clause9

III. At Worst, the Arbitration Clause Is Silent with Respect to Class Arbitration, and Class Arbitration Is Therefore Improper10

A. The Dealers Act Cannot Overcome the FAA and Controlling United States Supreme Court Precedent11

B. Even if the Dealers Act Is Not Preempted, It Sheds No Light on Whether the Parties Agreed to Class Arbitration12

C. The Parties Did Not Incorporate the AAA Supplementary Rules for Class Actions by Reference15

D. Even if the AAA Supplemental Rules for Class Arbitration Were Incorporated by Reference, the Rules Themselves Indicate That They May Not Be Used to Determine Whether an Arbitration Clause Permits Class Arbitration18

Conclusion19

TABLE OF AUTHORITIES

Cases

South Carolina Cases

Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519,
642 S.E.2d 751 (2007)13

Henderson v. Summerville Ford-Mercury, Inc., 405 S.C. 440,
748 S.E.2d 221 (2013)3,4

Herron v. Century BMW, 387 S.C. 525, 693 S.E.2d 392 (2010)11,
12

Herron v Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011)12

Silver v. Aabstract Pools & Spas, Inc., 376 S.C. 585,
658 S.E.2d 539 (Ct.App. 2008)9

Stevens Aviation, Inc. v. DynCorp, LLC, 349 S.C. 300,
715 S.E.2d 655 (Ct.App. 2011); *aff'd in part and rev'd in part on
other grounds*, 407 S.C. 407, 756 S.E.2d 148 (2014)16

Tritech Elect., Inc. v. Frank M. Hall & Co., 343 S.C. 396,
540 S.E.2d 864 (Ct.App. 2000)3

York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 749 S.E.2d 139 (Ct.App. 2013)12

Federal Cases

United States Supreme Court

AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011)4

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 57 (1995)4

Oxford Health Plans LLC v. Sutter, 569 U.S. 564 (2013)7-9

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010)4, 14

United States Court of Appeals

| | |
|---|----------|
| <i>Chesapeake Appalachia, Ltd. v. Scout Petroleum</i> , 809 F.3d 746 (3 rd Cir. 2016) | 17 |
| <i>Dell Webb Communities, Inc. v. Carlson</i> , 817 F.3d 867 (4 th Cir. 2016) | 10 |
| <i>Opalinski v. Robert Half Int'l Inc.</i> , 677 Fed.Appx. 738 (3 rd Cir. 2017) | 6-7 |
| <i>Reed Elsevier Inc. ex rel. LexisNexis Div. v. Crockett</i> , 734 F.3d 594 (6 th Cir. 2013) | 6,10, 18 |

United States District Court

| | |
|---|---------|
| <i>Bird v. Turner</i> , 2015 WL 5168575 (N.D.W.Va. September 1, 2015) | 7-9 |
| <i>Chesapeake Appalachia, LLC v. Ostroski</i> , 199 F.Supp.3d 912 (M.D.Pa. 2016) | 10 |
| <i>Del Webb Communities, Inc. v. Carlson</i> , 2017 WL 1050139 (D.S.C. Feb. 1, 2017) | 6 |
| <i>Henderson v. U.S. Patent Commission, Ltd.</i> , 188 F.Supp.3d 798 (N.D.Ill. 2016) | 19 |
| <i>Herzfeld v. 1416 Chancellor, Inc.</i> , 2015 WL 4480829 (E.D.Pa. July 22, 2015) | 17 |
| <i>JPAY, Inc. v. Kobel</i> , 2017 WL 3218218 (S.D.Fla. July 28, 2017) | 7 |
| <i>NCR Corp. v. Jones</i> , 157 F.Supp.3d 460 (W.D.N.C. 2016) | 6-7 |
| <i>Smith v. BT Conferencing, Inc.</i> , 2013 WL 5937313 (S.D.Ohio Nov. 5, 2013) | 6, 7, 9 |

Statutes

South Carolina Statutes

| | |
|--|------|
| S.C. Code Ann. § 37-5-202(1) | 14 |
| S.C. Code Ann. § 39-5-140 (a) (1976) | 14 |
| S.C. Code Ann. § 56-15-10 | 1 |
| S.C. Code Ann. § 56-15-110(1) | 13 |
| S.C. Code Ann. § 56-15-110(2) | 5,13 |

Federal Statutes

9 U.S.C. § 1 et seq.2

Other Authorities

Rule 3, AAA Supplementary Rules for Class Arbitration18-19

11 Williston on Contracts § 30:21 (4th ed.) (Updated May 2017)13

11 Williston on Contracts § 30:25 (4th ed. 1999)16

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN ORDERING CLASS ARBITRATION UNDER THE FEDERAL ARBITRATION ACT WHEN THE ARBITRATION CLAUSE UNAMBIGUOUSLY INDICATES THAT ARBITRATION SHOULD BE BILATERAL?
2. DID THE TRIAL COURT ERR IN CONCLUDING THAT THERE WAS A CONTRACTUAL BASIS FOR CLASS ARBITRATION WHEN THE AGREEMENT DOES NOT EXPRESSLY AUTHORIZE CLASS ARBITRATION?
3. DID THE TRIAL COURT ERR IN RELYING ON PROVISIONS OF THE DEALERS ACT, S.C. CODE ANN. § 56-15-10 et seq. WHEN THE DEALERS ACT WAS PREEMPTED BY THE FEDERAL ARBITRATION ACT?
4. DID THE TRIAL COURT ERR IN CONCLUDING THAT THE DEALERS ACT SHEDS LIGHT ON THE PARTIES' INTENT WITH RESPECT TO CLASS ARBITRATION?
5. DID THE TRIAL COURT ERR IN CONCLUDING THAT THE ARBITRATION CLAUSE INCORPORATED THE AAA SUPPLEMENTARY RULES FOR CLASS ARBITRATION WHEN THE ARBITRATION CLAUSE NOWHERE MENTIONS THIS SET OF RULES?
6. DID THE TRIAL COURT ERR IN CONCLUDING THAT THE AAA SUPPLEMENTARY RULES FOR CLASS ACTIONS SHED LIGHT ON THE PARTIES' INTENT WITH RESPECT TO CLASS ARBITRATION WHEN THE RULES THEMSELVES SAY OTHERWISE?

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. (R. p. 17-18).

Buyer filed this case on December 28, 2015. *Id.* Seller timely answered on February

19, 2016 (R. p. 19), 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.*, (R. p. 20).

After assembling evidence necessary to support a motion, and before discovery was undertaken, Seller filed a Motion to Compel *Bilateral* Arbitration. (R. pp. 24-34). 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. (R. pp. 70-78). 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. (R. p. 153, lines 18-27). The parties were permitted to and did submit various supplemental briefs on this issue. (R. p. 153, lines 2-20; R. pp. 100-105; R. pp. 106-111; R. pp. 112-129; R. pp. 130-135).

The trial court subsequently issued an Order compelling arbitration, but denying Seller's request for bilateral arbitration. (R. pp. 2-12). 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. Seller asks this Court to correct the trial court's order and refer this case to *bilateral* arbitration.

STATEMENT OF FACTS

On July 6, 2013, Buyer purchased a jewel red two door Chevrolet Camaro Limited

from Seller.¹ (R. at pp. 30-31). The purchased was financed by GM Financial in Arlington, Texas. Buyer also enrolled in an on-star program (R. at p. 32) and a U.S. Key Replacement Plan administered by Brickell Financial Services-Motor Club in Miami, Florida (R. at p. 33).

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 fee 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.

(R. at p. 30). Seller heard nothing from Buyer for years and assumed Buyer was satisfied with the transaction.

ARGUMENT

Because the Arbitration Clause is governed by the FAA, questions of substantive law will be guided by federal law. *Henderson v. Summerville Ford-Mercury, Inc.*, 405 S.C. 440, 449, 748 S.E.2d 221, 226 (2013). Conflicting state law is preempted. *Tritech Elect., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 400, 540 S.E.2d 864, 866 (Ct.App. 2000). The core question here is therefore whether the FAA permits class arbitration. Given the terms of the Arbitration Clause, it does not.

¹ The Complaint's reference to a July 31, 2015 sale is believed to be a typographical error.

The purpose of the FAA is to make sure that agreements to arbitrate are enforced according to their terms. *Henderson*, 405 S.C. at 449, 748 S.E.2d at 226. Parties to arbitration agreements are generally free to select whatever terms they like. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995). They “may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit *with whom* [they] will arbitrate its disputes.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011) (emphasis in original).

Accordingly, “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 682 (2010) (emphasis in original). The United States Supreme Court ruled that an implicit agreement to authorize class-action arbitration is not a term that can be inferred from the fact that the parties agreed to arbitrate. *Id.* at 685. Mere silence on the issue of class arbitration does not constitute consent to resolve disputes in class proceedings. *Id.* at 687.

Contractual consent is the key. *Id.* at 681 (while the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules, including the basic precept that arbitration is a matter of consent, not coercion). Consent to class arbitration is vital because class arbitration fundamentally changes the nature of arbitration. The benefits of arbitration are much less assured in a class setting. *Id.* at 685. The efficiency of arbitration between individuals is sacrificed when an arbitrator must adjudicate hundreds or thousands of claims. *Id.* The presumption of privacy which attaches in individual arbitration is lost. *Id.* Class-wide arbitration also necessarily includes absent parties, additional procedures, and higher stakes. *AT&T Mobility*, 563 U.S. at 347-48.

Here, the Arbitration Clause does not expressly authorize class arbitration and is cast in individual terms which limit its applicability to disputes involving the specific vehicle purchased by the Buyer. It unambiguously selects bilateral arbitration. At worst, the Arbitration Clause is silent with respect to class arbitration because it makes no express reference to class arbitration.

The trial court nevertheless strained the language of the clause and looked to external sources in an attempt to find some basis for consent to class arbitration. It: (1) construed the phrase “any dispute, controversy, or claim,” as broad language which would permit class arbitration; (2) reasoned that the Arbitration Clause could not be read separately from S.C. Code Ann. § 56-15-110(2) (the “Dealers Act”) which contains a non-waivable right to class or representative actions; and (3) believed that reference to the Commercial Rules of the American Arbitration Association (the “AAA”) was also a reference to the separate AAA Supplementary Rules for Class Actions and necessarily implied consent to class arbitration. (R. at pp. 9-10).

These rulings are contrary to established principles of contract construction and limitations imposed by the FAA. The Arbitration Clause unambiguously specifies that arbitration should be bilateral. Because the arbitration clause is unambiguous, the trial court should not have resorted to external sources, such as the Dealers Act or AAA Rules, to assist in construction of the clause.

Reference to and reliance on the Dealers Act was improper for other reasons. The FAA preempts the Dealers Act in this case. Moreover, when examined, the Dealers Act sheds no light on the parties’ intentions with respect to class arbitration.

Reference to and reliance on the AAA Supplementary Rules for Class Actions was

also improper for other reasons. The parties did not incorporate the supplementary rules by reference, and those very rules also say that they should not be considered in determining whether class arbitration is appropriate. It was improper for the trial court to infer consent to class arbitration from the supplementary rules.

I. The Arbitration Clause Unambiguously Selects Bilateral Arbitration.

The Arbitration Clause is cast in individual terms. It refers to arbitration any claim arising out of the sale of “*the* motor vehicle,” and “*this* Purchase Order.” (Purchase Order) (emphasis added). The reference to claims arising of the sale the “the motor vehicle” means claims arising out of the Buyer’s purchase of the jewel red Camaro which is the subject of this suit. The phrase “this Purchase Order” refers specifically to the July 6, 2013 contract between Buyer and Seller. *Id.*

These textual references to individual arbitration are an unambiguous selection of bilateral arbitration. *See, e.g., Reed Elsevier Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013) (class arbitration not authorized because the clause referred to “this Order” as opposed to other customers’ orders); *NCR Corp. v. Jones*, 157 F.Supp.3d 460, 467 (W.D.N.C. 2016) (bilateral terms weigh in favor of finding that agreement only covers bilateral disputes) (collecting cases); *see also Opalinski v. Robert Half Int’l Inc.*, 677 Fed.Appx. 738, 739 and 742 (3rd Cir. 2017) (where arbitration clause referred to “Employee’s employment,” it did not authorize arbitration for any other employee); *Del Webb Communities, Inc. v. Carlson*, 2017 WL 1050139 at * 2 (D.S.C. Feb. 1, 2017) (Duffy, J.) (bilateral arbitration was required where agreement required arbitration of claims arising out of “this Agreement”); *Smith v. BT Conferencing, Inc.*, 2013 WL 5937313 at * 10 (S.D.Ohio Nov. 5, 2013) (arbitration agreement referred to disputes arising out “my”

employment, and not to dispute arising out of the employment of others).

They negate the trial court's suggestion that reference to arbitration of "any claim, controversy, or dispute" manifests consent to class arbitration. *NCR Corp.*, 157 F.Supp.3d at 469; *Opalinski*, 677 Fed.Appx. at 742 (3rd Cir. 2017); *JPAY, Inc. v. Kobel*, 2017 WL 3218218 at * 4 (S.D.Fla. July 28, 2017); *Bird v. Turner*, 2015 WL 5168575 at * 9 (N.D.W.Va. September 1, 2015).

As the Court in *NCR Corp.* stated:

[w]hile the terms of the Agreement do indeed state that it should be read as broadly as possible, Defendant cannot escape the fact that the Agreement is limited to disputes arising out of his, and only his, employment with Plaintiff. Given the court's duty to determine the intent of the parties from the document as a whole, it cannot find that the agreement is intended to cover claims arising out of other employees' relationships with the Plaintiff. Defendant's argument as to a broad reading of the Agreement fails to sway the court

NCR Corp., 157 F.Supp.3d at 469. Or, as the Third Circuit explained in *Opalinski*:

Plaintiffs argue that the clause "[a]ny dispute or claim arising out of or relating to Employee's employment" shall be submitted to binding arbitration" is intentionally broad and designed to encompass class or collective actions. But Plaintiffs' argument misses a critical point: the agreement specifies that the dispute or claim arise out of or relate to the *particular* employee's employment, not *any* employee's employment.

Opalinski, 677 Fed.Appx. at 742 (emphasis in original).

The trial court's apparent reliance on *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013) does not alter this conclusion. In *Oxford Health*, the United States Supreme Court affirmed the award of an arbitrator who concluded that because the agreement permitted arbitration of any dispute or civil action, and a class action was a type of civil action, the agreement permitted class arbitration.

While the Supreme Court affirmed the award under the applicable standard of review,

it did not endorse the arbitrator's decision. As the Supreme Court itself stated:

[n]othing we say in this opinion should be taken to reflect any agreement with the arbitrator's contract interpretation, or any quarrel with Oxford's contrary reading. All we say is that convincing a court of an arbitrator's error—even his grave error—is not enough. So long as the arbitrator was “arguably construing” the contract—which this one was—a court may not correct his mistakes under § 10(a)(4).

Id. at 572-73.

In fact, the Supreme Court appears to have rejected the arbitrator's conclusion. A concurrence by Justice Samuel Alito noted that, if the Court were reviewing the arbitrator's decision de novo, it “would have little trouble concluding that [the arbitrator] improperly inferred ‘[a]n implicit agreement to authorize class-action arbitration ... from the fact of the parties' agreement to arbitrate.’ ” *Oxford Health*, 569 U.S. at 574 (Alito, J., concurring) (alterations in original) (emphasis added).

Other courts have noted that *Oxford Health* does not support a conclusion that an agreement implicitly permits class arbitration. *E.g.*, *Bird v. Turner*, 2015 WL 5168575 (N.D.W.Va. Sept. 1, 2015). The court in *Bird* stated that:

[t]he plaintiffs argue that because the Supreme Court concluded that the arbitrator [in *Oxford*] did not exceed his powers in authorizing class arbitration, the Court established a rule of law that express reference to class arbitration is not necessary for the parties to consent to it. However, the key to the *Oxford Health Plans* decision is its procedural posture. The Court was facing a motion to vacate the arbitral award, and the parties did not contest that the availability of class arbitration was arbitrable.

The Court considered the narrow question of whether § 10(a)(4) of the FAA allows a court to vacate an arbitral award based on the arbitrator's determination that the parties consented to class arbitration. Section 10(a)(4) allows a court to vacate an arbitral award “where the arbitrator[] exceeded [his] powers,” but not when the arbitrator commits even serious error. The Court concluded that the arbitrator did not abuse his power in “(... arguably) interpreting the parties' contract.” Thus, *Oxford Health Plans* reinforces the high burden a party has in seeking to vacate an award, *but says nothing about how a court should interpret an*

arbitration clause.

Id. at * 9 (emphasis added) (internal citations omitted).

Also addressing *Oxford Health*, the United States District Court for the Southern District of Ohio stated:

[Plaintiff] argues that if *Stolt–Nielsen* held that silence alone prohibited class arbitration, the Supreme Court in *Oxford Health* would have been required to vacate the arbitrator's ruling in that case. However, Smith misreads and misapplies *Oxford Health*. In *Oxford Health*, the Supreme Court strongly implied that the arbitrator may have been incorrect in his analysis, but that the Court could not overturn the arbitrator's decision based upon a very limited scope of review.

Smith v. BT Conferencing, Inc., 2013 WL 5937313 at * 9 (S.D.Ohio Nov. 5, 2013).

The Arbitration Clause unambiguously selects bilateral arbitration, and the trial court's order should be reversed.

II. Because the Arbitration Clause Is Unambiguous, It Was Improper for the Trial Court to Refer to External Sources as Aids in Construction of the Clause.

It is well settled that in construing a written contract, the intention of the parties is gathered primarily from the contents of the writing itself. *Silver v. Abstract Pools & Spas, Inc.*, 376 S.C. 585, 591, 658 S.E.2d 539, 542 (Ct.App. 2008). Stated differently, the intent of the parties is gathered from the four corners of the document itself, and, if the intent is clear, it is determined from the four corners of the document alone. *Id.* An ambiguity cannot be created by pointing to a single sentence or clause. *Id.*

As discussed above, the Arbitration Clause unambiguously selects bilateral arbitration. It was therefore improper for the trial court to resort to external sources such as the Dealers Act or the AAA Supplementary Rules for Class Actions in construing the Arbitration Clause.

III. At Worst, the Arbitration Clause Is Silent with Respect to Class Arbitration, and Class Arbitration Is Therefore Improper.

A number of courts have taken a fairly straightforward approach to determining whether an arbitration clause permits class arbitration. They look to see whether an arbitration clause expressly permits or prohibits class arbitration. If it does, the court defers to the parties' expressed intent. Where an arbitration clause does not expressly mention class arbitration, these courts consider the arbitration agreement to be "silent" within the meaning of *Stolt-Nielson*, making class arbitration improper. *E.g., Dell Webb Communities, Inc., v. Carlson*, 817 F.3d 867, 877 (4th Cir. 2016) (agreement said "nothing at all" about class arbitration despite reference to the rules of the American Arbitration Association and class arbitration was improper); *Reed*, 734 F.3d at 599; *Chesapeake Appalachia, LLC v. Ostroski*, 199 F.Supp.3d 912, 916-17 (M.D.Pa. 2016) (arbitration clause which referred to rules of the American Arbitration Association but did not expressly mention class arbitration was silent on the issue). As the Sixth Circuit stated in *Reed*, "[t]he principal reason to conclude that the arbitration clause does not authorize class wide arbitration is that the clause nowhere mentions it." *Reed*, 734 F.3d at 599.

This analysis provides the benefit of predictability. It leads to a simple conclusion in this case. Although the Arbitration Clause refers to the AAA Commercial Rules, it is nevertheless silent on the issue of class arbitration because it does expressly refer to class arbitration one way or another. Because the Arbitration Clause is silent, consent to class arbitration cannot be inferred, and class arbitration is improper.

To escape the fact that the Arbitration Clause is, at worst silent, the trial court attempted to find consent to arbitration in external sources. These efforts were improper

because the Arbitration Clause is unambiguous, but, even if it were permissible for the trial court to look outside of the parties' contract, its reliance upon the Dealers Act and the AAA Supplementary Rules for Class Arbitration was misplaced.

A. The Dealers Act Cannot Overcome the FAA and Controlling United States Supreme Court Precedent.

The trial court adopted the Buyer's somewhat tortured argument regarding the Dealers Act. It reasoned that because the Dealers Act existed at the time the Buyer and Seller entered into the Arbitration Clause, and law existing at the time a contract is executed part of the contract, the Dealers Act's class action provision became part of the Arbitration Clause. According to the trial court, the Arbitration Clause was therefore not silent with respect to class arbitration. The trial court's conclusion rests on the fact that the South Carolina Supreme Court once stated that the Dealers Act's class action provision was "non-waivable." *Herron v. Century BMW*, 387 S.C. 525, 693 S.E.2d 392 (2010) ("*Herron I*").

However, the history of *Herron I* indicates that this holding is preempted where, as here, the FAA controls. *Herron I* stated that the Dealers Act creates a non-waivable right to class arbitration. It invalidated an arbitration clause because it contained a waiver of class action rights. The United States Supreme Court then vacated this holding in *Sonic Automotive, Inc. v. Watts*, 563 U.S. 971 (2011) because it conflicted directly with the United States Supreme Court's decision in *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011).

In *Concepcion*, the Court stated that "[r]equiring the availability of class wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344 (emphasis added). *Herron I*'s holding that the

Dealers Act, a state statute, created a non-waivable right to a class action procedure was forced to give way to the FAA. *Concepcion* is a barrier that state law cannot breach. The FAA preempts the holding on which the trial court based its decision.

The trial correctly notes that *Herron I* was reinstated, but reinstatement does not support the trial court's conclusion. The South Carolina Supreme Court reinstated its decision not because its holding somehow survived *Concepcion*, but on procedural grounds; namely that the issue of preemption had not been preserved for appellate review. *Herron v Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011) ("*Herron II*").

Herron II cannot be and should not be read as somehow overcoming controlling federal law. As this Court itself has recognized:

[a]lthough our supreme court technically "reinstated" its *Herron I* opinion, in light of (1) that case's profound preservation deficiencies; (2) the opinion of the Supreme Court of the United States vacating *Herron*; and (3) the applicable holdings within *Concepcion*, the *Herron I* reinstatement did not signify a post-*Concepcion* position that the Dealers Act provision is immune to FAA preemption.

York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 93, 749 S.E.2d 139, 152 (Ct.App. 2013) (emphasis added).

Here, *Herron I*'s holding that the Dealers Act requires class arbitration is preempted by the FAA. Because the Dealers Act is preempted, it cannot serve as a basis for finding the parties agreed to class arbitration.

B. Even if the Dealers Act Is Not Preempted, It Sheds No Light on Whether the Parties Agreed to Class Arbitration.

The trial court concluded that because existing law is considered part of a contract, the Dealers Act's class action provision should be considered part of the Arbitration Clause. The trial court is of course correct that, generally, the law existing at the time of the making

of a contract is considered part of the contract. *Catawba Indian Tribe of South Carolina v. State*, 372 S.C. 519, 591, 642 S.E.2d 751, 756 (2007). But, this general principle is not unlimited. As one commentator has noted:

[w]hile the statement that existing law is incorporated into the contract is generally valid, to say that the parties have contracted to be guided by existing rules is obviously artificial; and it seems unfortunate, as a matter of terminology, to put in the form of a fiction matters which may be stated accurately. To assume, first, that everybody knows the law, and second, that parties make their contracts with reference to the law and adopt its provisions as terms of their agreement, is to pile a fiction on top of fiction, and certainly without any necessity.

11 Williston on Contracts § 30:21 (4th ed.) (Updated May 2017). The better approach is that “[w]ith respect to the process of interpreting contractual language, statutes and common law principles are only part of the surrounding circumstances, and should be so considered.” *Id.*

The trial court did not consider the Dealers Act as a whole or as merely part of the surrounding circumstances. Instead, it focused on one specific provision, S.C. Code Ann. § 56-15-110(2),² which authorizes representative actions under certain circumstances. It ignored § 56-15-110(1)³ which authorizes individual actions. Because the Dealers Act permits both class and individual actions, it is not possible to infer from the Dealers Act as a whole what the parties may have intended with respect to class arbitration.

The Third Circuit reached a similar conclusion in *Opalinski*. There the plaintiffs

² This section provides that: (2) 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.

³ This section provides: (1) In addition to temporary or permanent injunctive relief as provided in Section 56-15-40(3)(c), any person who shall be injured in his business or property by reason of anything forbidden in this chapter may sue therefor in the court of common pleas and shall recover double the actual damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

argued that the arbitration agreement evidenced an intent to arbitrate class claims because the agreement referenced certain federal statutes which allow for class litigation. *Opalinski*, 677

Fed.Appx. at 742-43. The Third Circuit explained:

[P]laintiffs argue that because all of the specific statutes listed in [the arbitration agreement] allow for class litigation, and litigants often bring class claims under these statutes, the inclusion of [these statutes] suggests that the parties intended to permit class arbitration. We find this argument unavailing. The statutes listed – like many statutes and common law causes of action – allow for both class and individual claims, so the agreement’s reference to them sheds no more light on the parties’ intent to arbitrate class claims than the “any dispute” language [in the agreement].

Id. (emphasis in original).

Just as the trial court failed to consider the Dealers Act as a whole, it also failed to consider the impact of other statutes which are also presumably part of the parties’ agreement. For example, the Arbitration Clause is regulated by the FAA, and the FAA does not permit class arbitration where an agreement is silent on the matter. *Stolt-Nielsen*, 559 U.S. at 682 (2010). Other statutes such as South Carolina’s Unfair Trade Practices Act and Consumer Protection Code also apply to the parties’ transaction and prohibit class actions. *E.g.*, S.C. Code Ann. § 39-5-140(a) (an injured party may “bring an action individually, but not in a representative capacity”); S.C. Code Ann. § 37-5-202(1) (a consumer has a right “other than in a class action” to recover a penalty).

If external statutes are part of the contract and can be used to determine the parties intent, then:

- Was the FAA incorporated into the parties’ agreement? And if so, given the trial court’s logic, is the absence of an express provision allowing class arbitration evidence of an intent to forego class arbitration?

- Was the Unfair Trade Practices Act incorporated into the parties' agreement?

And if so, given the trial court's logic, is its prohibition on class actions evidence of an intent to forego class arbitration?

- Was the Consumer Protection Code incorporated into the parties' agreement?

And if so, given the trial court's logic, is its prohibition on class actions evidence of an intent to forego class arbitration?

While these questions are rhetorical, they illustrate the point that attempting to ascertain whether the parties intended to permit class arbitration by referring to external statutes is to open a virtual Pandora's box. It is not possible to glean any inference regarding the parties' intent with respect to class arbitration by reference to external statutes. The statutes themselves contain equivocal and/or contradictory references to class proceedings. The trial court mistakenly concluded that a specific provision of the Dealers Act not referenced in the contract supplies a contractual basis for consent to class arbitration.

C. The Parties Did Not Incorporate the AAA Supplementary Rules for Class Actions by Reference.

The trial court concluded that the Arbitration Clause's reference to the AAA Commercial Arbitration Rules somehow also incorporated by reference the AAA Supplementary Rules for Class Actions. The trial court next reasoned that, if the Supplementary Rules for Class Actions were part of the Arbitration Clause, then the Arbitration Clause did contain affirmative consent to class arbitration. This conclusion is incorrect. Under ordinary principles of contract construction, the parties did not incorporate the AAA Supplementary Rules for Class Actions by reference.

A contract may of course include a separate writing if properly incorporated by

reference. Magic words are not required. *Stevens Aviation, Inc. v. DynCorp, LLC*, 349 S.C. 300, 307, 715 S.E.2d 655, 659 (Ct.App. 2011); *aff'd in part and rev'd in part on other grounds*, 407 S.C. 407, 756 S.E.2d 148 (2014). However:

the contract 'must explicitly, or at least precisely, identify the written material being incorporated and must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract (rather than merely to acknowledge that the referenced material is relevant to the contract, e.g., as background law or negotiating history).'

Id. at 308; 715 S.E.2d at 659 (internal citations omitted). As Samuel L. Williston explains:

extrinsic material is properly incorporated when the underlying contract makes clear reference to the separate document, the identity of the second document may be ascertained beyond doubt, and the parties to the agreement had knowledge of and assented to the incorporation.

11 Williston on Contracts § 30:25 (4th ed. 1999).

These criteria are not met with respect to the AAA Supplementary Rules for Class Arbitration. The Arbitration Clause is reprinted below for convenience. It provides:

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 fee 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.

(R. p. 30). Not only does this clause not precisely or clearly identify the AAA Supplementary Rules for Class Arbitration – it does not mention them at all.

Furthermore, reference to the AAA Commercial Arbitration Rules is insufficient. As

the Third Circuit recently explained, the Commercial Rules “do not mention class arbitration.” *Chesapeake Appalachia, Ltd. V. Scout Petroleum*, 809 F.3d 746, 761 (3rd Cir. 2016). They are couched in terms of bilateral arbitration proceedings. *Id.* Importantly, none of the 58 rules set forth in the Commercial Arbitration Rules mentions or purports to incorporate the AAA Supplementary Rules for Class Arbitration.

In summary, the identity of the AAA Supplementary Rules for Class Arbitration cannot be found in the Arbitration Clause itself or the AAA Commercial Rules. The AAA Supplementary Rules for Class Arbitration were therefore not explicitly or precisely identified by the parties, and were not incorporated by reference. *See Herzfeld v. 1416 Chancellor, Inc.*, 2015 WL 4480829 (E.D.Pa. July 22, 2015).

The Court in *Herzfeld* was presented with an argument that a reference to AAA “rules and regulations” was sufficient to incorporate by reference the AAA Supplementary Rules for Class Arbitration. Rejecting this argument, the court stated:

[w]e cannot find the three-word reference to AAA “rules and regulations” incorporates a panoply of collective and class action rules applied by the AAA once the matter is properly before the arbitrators by consent or waiver. [The defendant’s] arbitration clause does not incorporate AAA rules on collective or class actions. This clause merely mentions AAA’s “rules and regulations” with no clear reference to any underlying document or even mention collective or class actions. ‘Incorporation by reference is proper where the underlying contract makes clear reference to a separate document, the identity of the separate document may be ascertained, and incorporation of the document will not result in surprise or hardship.’ The AAA rules on collective or class actions are never mentioned or described in any terms and we cannot find the identity of those rules may be ascertained beyond doubt.

Id. at * 6 (internal citations omitted).

The AAA Supplementary Rules for Class Actions were not incorporated by reference, and the trial court therefore improperly relied upon them in holding that class arbitration was

permissible.

D. Even if the AAA Supplemental Rules for Class Arbitration Were Incorporated by Reference, the Rules Themselves Indicate That They May Not Be Used to Determine Whether an Arbitration Clause Permits Class Arbitration.

The trial court concluded not only that the AAA Supplementary Rules for Class Arbitrations had been incorporated by reference, but that incorporation of the rules was evidence that the parties consented to class arbitration. Absent from the trial court's Order is any discussion of the actual content of the AAA Supplementary Rules for Class Arbitrations.

This omission is important, because when the rules are examined, they do not support the trial court's conclusion. The Supplementary Rules provide in pertinent part that:

[i]n construing the applicable arbitration clause, the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis.

Rule 3, AAA Supplementary Rules for Class Action. The Supplementary Rules themselves therefore dictate that they are not to be given weight in any determination concerning the propriety of class arbitration.

To the extent that the Supplementary Rules are incorporated into the Arbitration Clause, which Seller denies, the rules cannot be used to support or oppose class arbitration. They are by their own terms a non-factor, and the trial court's reliance on the Supplementary Rules for Class Arbitration to infer an agreement to class arbitration was misplaced. See *Reed Elsevier Inc.*, 734 F.3d at 599-600 (incorporation of the Supplementary Rules is unavailing because the rules "expressly state that one should 'not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor in favor of or against permitting arbitration to proceed on a class basis.'"); *Henderson v. U.S. Patent Commission*,

Ltd., 188 F.Supp.2d 798, 809-10 (N.D.Ill. 2016); *Levy v. Lytx, Inc.*, 2017 WL 2797113 at * 6 (S.D.Cal. June 28, 2017).

As the *Henderson* court stated:

[Plaintiff] again contends that the agreements incorporate by reference AAA rules addressing class arbitration. For the reasons set forth above, this argument misses the mark. *Further, as Defendants note, AAA Supplementary Rule 3 expressly forbids an arbitrator “to consider the existence of these Supplementary Rules . . . to be a factor in favor of or against permitting the arbitration to proceed on a class basis.” So, although the court need not and does reach the issue, it would appear that even if Step 1 and Step 2 Agreements incorporated the AAA rules, which they do not, those rules would not permit an inference that an otherwise silent arbitration clause permits class arbitration.*

Henderson, 188 F.Supp.3d at 809-810 (emphasis added). Or, as the *Levy* court explained:

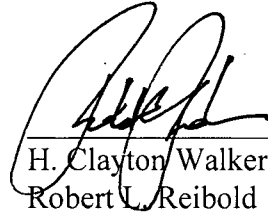
[d]efendant correctly asserts that an arbitration agreement’s mere reference to the AAA rules does not establish that the agreement permits class arbitration. The AAA Supplementary Rules for Class Arbitrations (“Supplementary Rules”) expressly dictate that when considering an arbitration clause, ‘the arbitrator shall not consider the existence of these Supplementary Rules, or any other AAA rules, to be a factor either in favor of or against permitting the arbitration to proceed on a class basis.’

Levy, 2017 WL 2797113 at * 6. The trial court improperly relied upon AAA Supplementary Rules to infer contractual consent to class arbitration.

CONCLUSION

The trial court’s ruling should be reversed, and this case should be referred to bilateral arbitration. The Arbitration Clause unambiguously selects bilateral arbitration, making resort to extrinsic aids improper. In any event, the Dealers Act is preempted. The AAA Supplementary Rules for Class Arbitrations were not incorporated by reference, and neither the Dealers Act nor the AAA Rules shed any light on the parties’ intentions regarding class arbitration.

Respectfully submitted,



H. Clayton Walker, Jr.

Robert L. Reibold

Haynsworth Sinkler Boyd, P.A.

Post Office Box 11889

Columbia, SC 29211-1889

(803) 779-3080

March 23, 2018

COUNSEL FOR APPELLANT
JUD KUHN CHEVROLET