THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Steven H. John, Circuit Court Judge

Case No. 2016-CP-26-00937

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

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This Petition arises from a unanimous, unpublished *per curiam* opinion of the Court of Appeals. (App. at 2-3). It does not present any novel question, does not raise a substantial constitutional issue, and is not in conflict with any prior decision of this Court or the Court of Appeals that has not been directly overruled.[1] Given the foregoing, this case does not warrant discretionary review by this Court pursuant to Rule 242, SCACR.

QUESTION PRESENTED

1. DID THE TRIAL COURT AND THE COURT OF APPEALS CORRECTLY REVIEW THE PARTIES' AGREEMENT TO ARBITRATE, WHICH BOTH SIDES CONCEDE IS VALID UNDER THE FEDERAL ARBITRATION ACT, AND DETERMINE THAT THERE WAS ONLY AN AGREEMENT TO PARTICIPATE IN BILATERAL, NOT CLASS, ARBITRATION?

COUNTER-STATEMENT OF THE CASE AND FACTS

I. The Contract for Sale.

This appeal arises from the trial court's threshold determination of arbitrability based on the language of a Contract for Sale ("Contract") entered between the parties, Cali Emory ("Buyer") and Myrtle Beach Mitsubishi ("Seller"), for the sale of an automobile. The Contract provides that it relates to "this contract" (R. at 67, ¶ 10), that it is between "DEALER, and the undersigned Buyer(s)" (R. at 66, BAILMENT AGREEMENT), and that it applies to disputes relating to "the above described vehicle." (*Id.*).

The Contract includes two provisions addressing arbitration. (R. at 66-67). On the front page in the second paragraph under a heading labeled BAILMENT AGREEMENT is the following language:

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[1] *Herron v. Century BMW*, 387 S.C. 525, 693 S.E.2d 394 (2010) ("Herron I") was overruled by the United States Supreme Court on the issue presented by this appeal. *Sonic Auto., Inc. v. Watts*, 563 U.S. 971 (2011). The opinion in Herron I was reinstated on remand for preservation reasons. 395 S.C. 461, 719 S.E.2d 640 (2011) ("Herron II").

> 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.

(emphasis added).

> Paragraph 10 on the reverse side of the Contract states as follows:
>
> 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.

(emphasis added). There are no other references to arbitration in the Contract and there are no other arbitration agreements contained in any other document.

II. The Trial Court's Order Addressing Arbitrability.

The trial court's order addressed two motions filed in conjunction with the Amended Complaint: (1) the Buyer's motion to compel class arbitration pursuant to the South Carolina Uniform Arbitration Act ("SC Act") (R. at 48), and (2) Seller's motion to stay proceedings and compel bilateral arbitration pursuant to the Federal Arbitration Act ("FAA") (R. at 55-71). The trial court initially denied both motions because it found there was no agreement to arbitrate pursuant to the SC Act because the notice provisions of S.C. Code Ann. § 15-48-10 were not met. (R. at 6-8).

In response to this ruling, Buyer filed a second amended complaint (R. at 21-25), and Seller filed a motion to alter or amend and to hold in abeyance, arguing that the trial court failed to recognize that the FAA preempts the SC Act and that there was a valid agreement to arbitrate under the FAA (R. at 72-74). Seller also renewed its arguments as to the forum for arbitration and its request that any arbitration be between the Buyer and Seller only, and not on behalf of a

class. Buyer conceded that there was a valid agreement to arbitrate under the FAA, but argued that the arbitration should proceed under the SC Act and that the arbitrator "may consider the Class allegations and may certify this as a class action." (R. at 75-80).

After receiving the parties' initial briefings, the trial court posed two questions by email, "(1) briefly clarify your position on the substantive law to apply to the arbitration, and (2) whether the issue of class-wide vs. bilateral arbitration is an issue of contract interpretation for the arbitrator or for the Court." (R. at 92). Both parties' responses to the second question indicated that the issue of whether the case could proceed as a class action was a question of arbitrability to be determined by the trial court. (R. at 93-101). The trial court considered all of these arguments and the language of the Contract and granted the motion to alter or amend by order dated January 11, 2017, compelling bilateral arbitration pursuant to the FAA. (R. at 1-5).

III. The Court of Appeals Affirmed the Trial Court in an Unpublished, *Per Curiam* Opinion Issued Pursuant to Rule 220, SCACR.

The Court of Appeals reviewed the briefs in this matter and affirmed the trial court without oral argument in a short opinion issued pursuant to Rule 220, SCACR. In that opinion, the Court of Appeals cited United States Supreme Court and South Carolina cases addressing contract construction generally, together with cases addressing whether an arbitration may proceed as a class action. (App. at 2-3).

Buyer's petition for rehearing was only one paragraph long and included one argument: that this Court's opinion in *Herron I* would not be decided differently today, even in light of the United States Supreme Court's decision directly overruling that opinion, *Sonic Auto., Inc. v. Watts*, 563 U.S. 971 (2011). (App. at 4-5). The Court of Appeals summarily denied the petition. (App. at 1)

ARGUMENT

The sole issue presented in Buyer's Petition has been addressed by both the United States Supreme Court and the South Carolina Court of Appeals. There is no question that *Herron I* is no longer good law. *Sonic Auto., Inc. v. Watts*, 563 U.S. 971 (2011); *see York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 91–94, 749 S.E.2d 139, 151–53 (Ct. App. 2013).

York holds that the case law interpreting the FAA regarding the availability of class arbitration applies to cases brought under the South Carolina Dealers Act, S.C. Code Ann. §§ 56-15-10 to -600 ("Dealers Act"). As set forth in *York*,

> Although 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 I*; 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. Consistently, numerous other jurisdictions now apply *Concepcion* to preempt similar state laws that, if not preempted, would invalidate class action waivers on public policy grounds. . . . Accordingly, the provisions banning class arbitration in the present case cannot be invalidated based upon public policy considerations embodied within state law. Rather, the arbitration clause[s] at issue here must be enforced according to [their] terms, which requires individual arbitration and forecloses class arbitration.

Id. (citations and quotations omitted); *see also Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (holding that that the goals of the FAA and its policy favoring arbitration are to control even where a statute confers a right to bring an action in a class capacity and stating "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA").

Buyer's argument in her Petition is the same as that presented to the Court of Appeals through page 8. Seller incorporates here the arguments made in its Respondent's brief.

The arguments made on pages 8-11 of the Petition are new and were not presented to the Court of Appeals either in Buyer's Appellant's brief or her petition for rehearing. Therefore,

these points are not preserved for this Court's review. *Mazloom v. Mazloom*, 392 S.C. 403, 403, 709 S.E.2d 661, 661 (2011) (holding "this portion of the question is not preserved for review because it was not raised in the petition for rehearing to the court of appeals"); *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993) ("The Court of Appeals did not address this issue nor did [Petitioner] petition for rehearing for the court to consider it. We therefore decline to address this issue.").

However, even if timely and properly presented, the new arguments fail on their merits. Nothing about the parties' agreement reflects an intent to provide for class arbitration.

The issue of bilateral or class-wide arbitration has been addressed by the United States Supreme Court and the Fourth Circuit. *See Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010); *Dell Webb Communities, Inc. v. Carlson*, 817 F.3d 867, 875-76 (4th Cir. 2016), *cert. denied* 137 S.Ct. 567 (2016). Under these cases, the question before the Court is "whether the parties *agreed to* authorize class arbitration." *Stolt-Nielsen S.A.* at 687 (emphasis in original). Thus, parties cannot be forced to arbitrate on a class-wide basis absent "a contractual basis for concluding that the party agreed to do so." *Id.* at 684. Further, "[a]n implicit agreement to authorize class-action arbitration, [] is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate." *Id.* at 685. As stated by the Supreme Court, "[w]e think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Id.* at 687.

Here, the parties' agreement does not include any reference to class-wide arbitration, class actions, or any other language that would suggest an agreement by either party to engage in

class-wide arbitration. Instead, the Contract of Sale provides that it relates to "this contract" (R. at 67, ¶ 10) and that is it between "DEALER, and the undersigned Buyer(s)" (BAILMENT AGREEMENT) and applies to disputes relating to "the above described vehicle" (*Id.*). Nothing about the plain language of this agreement suggests that it relates to any other claim, or parties, or vehicles, or transactions, much less a class-wide arbitration; therefore, there is no basis for inferring an agreement to arbitrate on a class basis.

The mere application of the Dealers Act to the underlying transaction does not change this result as it provides for both individual actions and class actions in the Circuit Court. S.C. Code Ann. § 56-15-110. Thus, the General Assembly obviously intended that rights under the Dealers Act could be addressed on an individual basis. S*ee Am. Exp. Co.* at 233 (finding that rule requiring rigorous enforcement of arbitration agreements "holds true for claims that allege a violation of a federal statute, unless the FAA's mandate has been overridden by a contrary congressional command" and that no such command was present in the federal antitrust statutes (citations and quotations omitted)). Statutory permission to bring a class action does "'not mean that individual attempts at conciliation were intended to be barred.'" *Id.* at 237 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)). Thus, nothing in the Dealers Act overrides the FAA, its underlying purpose, or the United States Supreme Court cases addressing whether there is an agreement between the parties that would allow class arbitration.

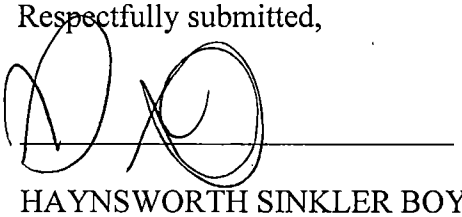
In addition, this result is not changed based on the reference to the Rules of the American Arbitration Association ("AAA"). Although the trial court's order does not compel AAA arbitration, Buyer's Petition references the AAA's "Supplementary Rules for Class Actions" and claims that the existence of these rules somehow indicates consent to class arbitration. These Supplementary Rules were not incorporated into the parties' agreement. Moreover, the

Supplementary Rules themselves provide, "[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 Actions. Thus, nothing about the existence of these rules evidences any intent on the part of the parties to allow this action to proceed on behalf of a class. *See Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594, 599–600 (6th Cir. 2013) (noting that 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.'"); *Chesapeake Appalachia, Ltd. v. Scout Petroleum*, 809 F.3d 746, 761 (3rd Cir. 2016) (ruling that AAA Commercial Rules do not mention class arbitration and contemplate only bi-lateral arbitration).

CONCLUSION

Buyer has failed to present any argument in her Petition that implicates the considerations listed in Rule 242(b), SCACR. Nothing about the opinion of the Court of Appeals is inconsistent with binding precedent, nor does the Petition present any question of exceptional importance. Simply, the parties agreed to arbitrate disputes between them, and only between them. The trial court and the Court of Appeals enforced that agreement according to its plain language. Therefore, the Petition must be denied.

Respectfully submitted,



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May 3, 2018

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PROOF OF SERVICE

I, the undersigned employee of Haynsworth Sinkler Boyd, P.A., do hereby certify that I have this 3rd day of May, 2018, caused the foregoing *Respondent, Thag, LLC d/b/a Myrtle Beach Mitsubishi's Return to Petition for Writ of Certiorari* to be served via U.S. mail, postage prepaid on counsel of record at the address shown below:

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