

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

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JUL 20 2018

The Honorable R. Scott Sprouse, Circuit Court Judge

SC Court of Appeals

Case No. 2017-CP-23-03402
Appellate Case No. 2017-002259

Casey MastersRespondent,

v.

KOL, Inc. d/b/a Kia of Greenville.....Appellant.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page(s)
Table of Authorities.....	iii
Counter Statement of Issue on Appeal.....	3
Counter Statement of the Case.....	3
Statement of the Facts.....	4
Facts occurring prior to the filing of the Complaint.....	4
Facts occurring after the filing of the Complaint.....	5
Standard of Review.....	6
Argument.....	7
Introduction.....	7
Did the trial court correctly deny the Appellant's Motion to Stay and Compel Arbitration by finding the arbitration clause in question was moot and unenforceable?.....	8
The June 2, 2017 contract was properly before the trial court and part of a single transaction.....	8
The Seller executed the arbitration agreement under duress.....	10
Is there sufficient evidence in the record for the trial court to conclude the arbitration clause in question is unconscionable?.....	10
The test for unconscionability in arbitration agreements.....	10
Absence of meaningful choice.....	13
Oppressive and one-sided terms.....	13
Conclusion.....	13
Certificate of Service.....	14

Table of Authorities

Cases	Page(s)
<i>Café Assocs. V. Gerngross</i> 305 S.C. 6, 406 S.E.2d 162 (1991).....	9
<i>Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.</i> 361 S.C. 544, 606 S.E.2d 752 (2004).....	11
<i>Doctor's Assoc., Inc. v. Casarotto</i> 517 U.S. 681, 116 S.Ct. 1652 (1996).....	7, 8
<i>General Drivers, Warehousemen and Helpers Local Union No. 509 v. Ethyl Corp.</i> 68 F.3d 80 (4th Cir.1995).....	7
<i>Holler v. Holler</i> 364 S.C. 256, 612 S.E.2d 469 (Ct.App.2005).....	10
<i>Hooters of Am., Inc. v. Phillips</i> 173 F.3rd. 933 (4th Cir. 1999).....	11
<i>I'ON, LLC v. Town of Mt. Pleasant</i> 338 S.C. 406, 526 S.E.2d 716 (2000).....	6
<i>Klutts Resort Realty, Inc. v. Down'round Development Corp.</i> 268 S.C. 80, 2332 S.E.2d 20 (1977).....	9
<i>Munoz v. Green Tree Fin. Corp.</i> 343 S.C. 531, 542 S.E.2d 360 (2001).....	7
<i>Perry v. Thomas</i> 482 U.S. 483, 107 S.Ct. 2520 (1981).....	7
<i>Simpson v. MSA of Myrtle Beach, Inc.</i> 373 S.C. 14, 644 S.E.2d 663 (2007).....	6, 10, 11, 12, 13
<i>Soil Remediation Co. v. Nu-Way Environmental, Inc.</i> 323 S.C. 454, S.E.2d 149 (1996).....	8
<i>Thornton v. Trident Med. Ctr., L.L.C.</i> 357 S.C. 91, 592 S.E.2d 50 (Ct.App.2003).....	7
<i>Towles v. United Healthcare Corp.</i> 338 S.C. 29, 524 S.E.2d 839 (Ct.App.1999).....	7
<i>Wellman, Inc. v. Square D Co.</i> 366 S.C. 61, 620 S.E.2d 86 (Ct.App.2005).....	6
Other Authorities	
9 U.S.C. § 2.....	7
15 U.S.C. § 2301 <i>et seq</i>	12
16 C.F.R. § 703.5(j).....	12
17A C.J.S. <i>Contracts</i> § 175 (1999).....	10
15 U.S.C.A. § 2301 <i>et seq</i>	13

COUNTER STATEMENT OF THE ISSUE ON APPEAL

1. Did the trial court correctly deny the Appellant's Motion to Stay and Compel Arbitration by finding the arbitration clause in question was moot and unenforceable?
2. Is there sufficient evidence in the record for the trial court to conclude the arbitration clause in question is unconscionable?

COUNTER STATEMENT OF THE CASE

The Plaintiff/Respondent, Casey Masters ("Purchaser") filed a Complaint in Greenville County on May 25, 2017. (R. pp. 6-17) The Purchaser alleged several legal and equitable causes of actions arising out of an April 10, 2017 transaction for the purchase of a vehicle from the Defendant/Appellant, KOL, Inc. d/b/a Kia of Greenville ("Dealer") (R. pp. 6-17) Purchaser's counsel provided Dealer's counsel with a copy of the Complaint and a request to accept service on behalf of the Dealer (R. p. 17, lines 18-22) Purchaser's counsel did not receive a response and service was effected against the Dealer on June 1, 2017. (R. p. 73, lines 23-25)

The Dealer filed a Motion to Stay and to Compel Arbitration on July 26, 2017, seeking to enforce an alleged arbitration agreement. (R. pp. 18-20) The Dealer submitted a Memorandum in Support of its Motion to Stay on August 18, 2017. (R. pp. 23-29) The Dealer submitted a Supplemental Memorandum in Support of its Motion to Stay on August 22, 2017. (R. pp. 36-41) The Purchaser submitted an affidavit in opposition to the Motion to Stay on August 23, 2017, and the trial court heard the Dealer's Motion to Stay that same day. (R. pp. 92-94) No discovery was served or exchanged between the parties other than the documents the Dealer chose to attach to its Memorandum in Support.

The trial court issued an order denying the Dealer's Motion to Stay on October 12, 2017. (R. pp. 1-3) On October 17, 2017, the Dealer filed a Motion to Alter or Amend the trial court's order. (R. pp. 56-59) The trial court denied the Dealer's subsequent motion

on October 25, 2017 and notice of this appeal was filed on October 26, 2017. (R. pp. 4-5)

STATEMENT OF THE FACTS

1. Facts occurring prior to the filing of the Complaint.

On April 10, 2017, the Purchaser entered into an agreement with the Dealer to purchase a 2017 Kia Forte. (R. pp. 95-97) The agreement required the Purchaser to “trade-in” her 2002 Chevrolet Cavalier, make a down payment in the amount of Five Hundred and no/100’s dollars (\$500.00), and finance the remaining Sixteen Thousand Three Hundred Thirty-three and no/100’s dollars (\$16,333.00) of the balance owed.¹ (R. p. 96)

Three separate documents comprised the purported agreement between the parties:

1. A purchase order agreement containing the total charges and credits to be applied to the purchase (R. pp. 42-43);
2. A retail sales installment contract containing the financing terms for the remaining balance owed (R. pp. 95-97); and
3. An arbitration agreement. (R. p. 30)

The Dealer attempted to assign the retail sales installment contract to Crescent Bank, who refused to accept same because the Dealer made misrepresentations in its application to Crescent Bank regarding the Purchaser’s income. (R. pp. 95-97) Shortly thereafter, an employee of the Dealer instructed the Purchaser to return the vehicle for a recall. (R. p. 63, lines 8-11) Purchaser submitted the vehicle’s VIN number to the National Highway Traffic Safety Administration recall registry and discovered that a recall had not

¹ Purchaser mistakenly alleged the amount financed was \$18,000.00 in her complaint. Purchaser was relying upon her recollection because her copies of the retail sales installment contract and purchase order agreement were taken by the Dealer when she returned the vehicle to have it serviced on June 2, 2017, and neither she nor her counsel had a copy of any of these documents at the time the litigation was filed.

been issued for her vehicle. (R. p. 7, ¶ 13)

Approximately one week later, the Purchaser returned to the Dealer's service department for regularly scheduled maintenance on the vehicle. (R. p. 7, ¶ 14) The Dealer took possession of the vehicle for service but refused to return it to the Purchaser or to allow her to retrieve her personal belongings. (R. p. 7, ¶14; p. 8, ¶¶ 15-17) The Dealer also refused to return the Purchaser's \$500.00 down payment or her 2002 Chevrolet Cavalier and admitted that it had failed to satisfy the outstanding loan on the 2002 Chevrolet Cavalier. (R. p. 8, ¶15) However, the Dealer provided the Purchaser with a "loaner" vehicle and made her execute a test drive agreement. (R. p. 8, ¶ 16) The Purchaser then filed the Complaint in this matter.

I. Facts occurring after the filing of the Complaint.

After Dealer was personally serviced with the Summons and Complaint, and after Purchaser's counsel had provided the Dealer's counsel with a courtesy copy, agents or employees of Dealer contacted the Purchaser and promised to again sell her the 2017 Kia Forte and refund her \$500.00 down payment. The agents or employees also promised her that her monthly payments under the new agreement would be lower than the April 10, 2017 agreement. (R. p. 92, ¶ 2) On June 2, 2017, Purchaser returned the "loaner" vehicle to the Dealer, after which the Dealer refused to refund her down payment and informed her that her monthly payments would actually increase. (R. p. 92, ¶ 3)

The Purchaser initially refused to sign the new agreement and she requested the return of her trade-in but the Dealer told the Purchaser that they would not return her vehicle and she had to sign the new agreement if she wished to leave with the 2017 Kia Forte. (R. p. 93, ¶ 4) The terms of the new agreement were considerably different than the

April 10, 2017 agreement.² The Purchaser's children were present with her and she had no other means of transportation. (R. p. 93, ¶ 4) She felt pressured to execute the agreement and she did execute the agreement, after which she was able to leave the dealership with her children. (R. p. 93, ¶ 4)

Over the next two weeks, the Dealer's agents and employees continued to contact and harass the Purchaser, falsely claiming that the documents executed on June 2, 2017 contained errors and needed to be re-executed. (R. p. 93, ¶ 5) The Dealer again promised to refund Purchaser's down payment if she would execute the new documents but she refused. (R. p. 93, ¶ 7) The Purchaser was hospitalized on June 15, 2017, and after being released from the hospital and under the influence of medication, she executed, upon information and belief, a general release and third purchase agreement (comprised of another purchase order, retail sales installment contract, and arbitration agreement). (R. p. 93, ¶ 8) After learning of this, Purchaser's counsel demanded that Dealer's counsel direct his clients to stop contacting Purchaser, and Dealer's counsel refused to do so. (R. p. 80, lines 17-21)

STANDARD OF REVIEW

"Arbitrability determinations are subject to *de novo* review. Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007) (citing *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89

² The purchase price was reduced by \$5,593.00 (27% of the total value of the vehicle); the trade-in value was reduced by \$3,449.00 (67% of the total value of the trade-in); the term of financing was reduced causing monthly payments to increase, and the vehicle mileage disclosed in the documents increased from 16 miles to 929 miles.

(Ct.App.2005) and *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct.App.2003)). However, a Respondent may raise additional arguments for affirming the trial court's decision even if the trial court failed to rule on the additional arguments, if those additional arguments appear in the Record on Appeal. *I'ON, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419-420, 526 S.E. 2d 716, 723 (2000).

ARGUMENT

I. Introduction

There is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes. *Towles v. United Healthcare Corp.*, 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct.App.1999). Appellant contends the Federal Arbitration Act ("FAA") is the controlling law in determining the applicability and enforceability of the alleged arbitration agreement. (R. p. 42; p. 72, lines 11-12). Written arbitration agreements "shall be valid irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "Arbitration is available only when the parties involved contractually agree to arbitrate." *Id.*, 338 S.C. at 37, 524 S.E.2d at 843-44 [citing *General Drivers, Warehousemen and Helpers Local Union No. 509 v. Ethyl Corp.*, 68 F.3d 80, 83 (4th Cir.1995)].

General contract principles of state law apply when courts evaluate the enforceability of arbitration clauses, including those governed by the FAA. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539; 542 S.E.2d 360 (2001) [citing *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 685, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996) and *Perry v. Thomas*, 482 U.S. 483, 492 n. 9, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1981). "[G]enerally

applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening . . .” the FAA. *Doctor’s Assoc.*, 517 U.S. 681 at 685 (1996); see also *Soil Remediation Co. v. Nu-Way Environmental, Inc.*, 323 S.C. 454, 476 S.E.2d 149 (1996).

II. Did the trial court correctly deny the Appellant’s Motion to Stay and Compel Arbitration by finding the arbitration clause in question was moot and unenforceable?

1. The June 2, 2017 contract was properly before the trial court and part of a single transaction.

The fact pattern and procedural history before the Court in this matter is convoluted, at best. The Purchaser filed the Complaint in this matter after the Dealer repossessed her 2017 Kia Forte without notice and under false pretenses (the Dealer also kept the Purchaser’s copy of the contract and her personal belongings). (R. p. 8, ¶ 17). Purchaser’s counsel provided Dealer’s counsel with a courtesy copy of the Summons and Complaint on May 30, 2017; Dealer was served with same on June 1, 2017. (R. p. 73, line 25). Immediately after service of the Complaint, the Dealer offered the Purchaser a new contract for the purchase of a 2017 Kia Forte (R. p. 65, lines 11-12; p. 92, ¶ 3). The Dealer’s new offer included a refund the Purchaser’s down-payment and reduction in her monthly payments. The Purchaser returned to the Dealer, who took possession of the “loaner” car, leaving the Purchaser and her children without transportation. (R. p. 93, ¶ 4) Then, and only then, did the Dealer provide the Purchaser with the actual written contract, which differed materially both from the original contract and from the Dealer’s new offer. (R. p. 98-101).

The Dealer contends that this second contract and the facts surrounding its execution were not properly before the Court. However, the Dealer placed this contract squarely before the Court in its pleadings and oral arguments. (R. p. 63, lines 11, 14-16; p. 64, lines 2-19; p. 66, lines 8, 16-23; p. 72, lines 19-24). The Dealer also argues that the April and June contracts constituted two transactions and two separate agreements. Yet the Dealer does not assert that it sold two 2017 Kia Fortes, or that the Purchaser has two loans, or that she traded in two separate 2002 Chevrolet Cavaliers. The Dealer argues this legal fiction in an effort to avoid this Court's and the trial court's review of the Dealer's acts surrounding the June 2, 2017 contract.

"The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, **and in the course of the same transaction**, the Court will consider and construe them together." [emphasis added] *Café Assocs. v. Gerngross*, 305 S.C. 6, 10, 406 S.E.2d 162, 164 (1991) [citing *Klutts Resort Realty, Inc. v. Down'round Development Corp.*, 268 S.C. 80, 232 S.E.2d 20 (1977)]. In *Café Assocs.*, the parties executed an asset purchase agreement that included a requirement that the seller enter into a covenant not to compete with the purchaser. The asset purchase agreement was executed by the purchaser and seller on December 30, 1986. The closing occurred on January 30, 1987, at which time the seller executed the covenant not to compete. The Court found that although the asset purchase agreement and covenant not to compete were executed more than thirty (30) days apart, they were still part of the same transaction. *Id.*

In the present case, the June 2, 2017 contract was clearly a part of the same transaction that began on April 10, 2017. The contract was for the sale of a single 2017

Kia Forte, it relied upon the same \$500.00 down payment and 2002 Chevrolet Cavalier trade-in, and the terms of April 10, 2017 retail sales installment contract were replaced by the terms of the June 2, 2017 retail sales installment contract. Thus, the trial court properly considered the terms of the agreement from the totality of the documents put before it. The trial court also properly considered the validity of the execution of the agreement. In so doing, the trial court had ample evidence before it to conclude the the Purchaser was subjected to duress in executing the June 2, 2017.

2. The Seller executed the arbitration agreement under duress.

Corpus Juris Secundum defines duress as “subjecting a person to a pressure which overcomes his or her will and coerces him or her to comply with demands to which he or she would not yield if acting as a free agent.” 17A C.J.S. *Contracts* § 175 (1999). “In order to establish that a contract was procured through duress, three things must be proved: (1) coercion; (2) putting a person in such fear that he is bereft of the quality of mind essential to the making of a contract; and (3) that the contract was thereby obtained as a result of this state of mind.” *Holler v. Holler*, 364 S.C. 256, 612 S.E.2d 469, 475 (Ct.App.2005). The Record on Appeal and the evidence before the trial court provide ample facts to conclude the Purchaser executed the June 2, 2017 contract under duress. The Dealer had repossessed both the 2017 Kia Forte and the “loaner” and refused to return her 2002 Chevrolet Cavalier trade-in, leaving her with no form of transportation for herself or her children. Additionally, the Dealer refused to satisfy the loan associated with her trade-in and would not refund her down-payment. (R. p. 8, ¶15). The Dealer’s actions were orchestrated and coercive leaving the Purchaser with little choice but to sign the June 2, 2017 contract and arbitration agreement.

III. Is there sufficient evidence in the record for the trial court to conclude the arbitration clause in question is unconscionable?

1. The test for unconscionability in arbitration agreements.

The trial court also had separate, valid grounds to dismiss the arbitration agreement for unconscionability. The enforceability of an arbitration agreement hinges on whether there was meaningful choice and, if not, whether the terms of the agreement were so oppressive that no fair-minded person would accept them. *Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.* 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004). “In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker.” *Simpson*, 373 S.C. 14, 644 S.E.2d 663, 669 (2007) [see *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir.1999)].

The South Carolina Supreme Court has previously considered the question of unconscionability for an arbitration agreement similar to the one in the present case and found it “unconscionable and unenforceable in its entirety.” *Simpson*, 644 S.E.2d at 675. In *Simpson*, a car buyer, Simpson, entered into an arbitration agreement with the car dealer, Addy, as part of a purchase agreement. The Court found the arbitration agreement to be a contract of adhesion that was “offered on a ‘take-it-or-leave-it’ basis with terms that are not negotiable.” *Id.* at 669. Having made such a finding, the Court used “considerable skepticism” when it examined Addy’s claims that the arbitration agreement was not one-sided. *Id.* at 670.

The Court observed that the purpose of the contract was for Simpson’s “primary transportation”, that there was no attorney for Simpson present at the execution of the

contract, and that the contract was presented “hastily” for Simpson’s signature. *Id.* The Court also noted the inconspicuous nature of the arbitration provision which was “embedded in paragraph ten (10) of the sixteen (16) total paragraphs included on the page.” *Id.* The Court concluded that Simpson lacked any meaningful choice in agreeing to arbitrate claims with Addy. *Id.*

The South Carolina Supreme Court then turned its attention to the oppressive and one-sided terms of the arbitration agreement. The arbitration agreement barred the arbitrator from ordering statutorily-required damages, which the Court found an unconscionable waiver of statutory rights. *Id.* at 671. The Court also found the requirement that Simpson submit warranty claims to arbitration was in violation of the Magnuson-Moss Warranty Act (“MMWA”) and Federal Trade Commission regulations promulgated for the enforcement of MMWA. *Id.* at 673; see also 15 U.S.C. § 2301 *et seq.* and 16 C.F.R. § 703.5(j).

The agreement also exempted Addy from arbitration for “any claims by Dealer against Customer for claim and delivery, repossession, injunctive relief, or monies owed by Consumer . . . **and any claims by Dealer for these remedies shall not be stayed pending the outcome of arbitration.**” *Id.* at 672 Addy argued that the car buyer had the option of filing procedural motions to “offset any potentially inconsistent effects of the provision.” *Id.* The Court found such arguments unpersuasive and in fact,

“show[ed] and informal acknowledgement on the part of Addy that such a provision on its face is indeed one-sided. These procedural mechanisms only act to place an additional burden on the consumer to ensure that the vehicle in controversy is not disposed of in a court proceeding initiated by the dealer before the adjudication of the consumer’s claims in arbitration.” *Id.*

The Court concluded,

“the arbitration clause in the adhesion contract between Simpson and Addy [is] wholly unconscionable and unenforceable based on the cumulative effect of a number of oppressive and one-sided provisions contained within the entire clause. While this Court does not ignore South Carolina’s policy favoring arbitration, we hold that the intent of the parties is best achieved by severing the arbitration clause in its entirety.” *Id.* at 674.

2. Absence of meaningful choice.

The arbitration agreement at issue in the present case also had an absence of meaningful choice. First, it is an adhesion contract. It does not have a single negotiable term and is comprised entirely of pre-printed, boiler-plate language except for the date, names of the parties and the Purchaser’s signature. (R. p. 21) Moreover, the Dealer’s employees instructed the Purchaser to sign the contract if she wanted the car. (R. p. 93, ¶ 4) There is no evidence in the record that the Dealer offered to negotiate the terms of the arbitration agreement and it is hard to imagine a scenario in which it would.

It is no small detail that the arbitration agreement was presented only after the Dealer had taken possession of the Purchaser’s car leaving her without transportation for her or her children. (R. p. 93, ¶ 4) Additionally, the Dealer did not even provide the entire arbitration agreement to the Purchaser but, rather, required her to request the “Arbitration Policies and Procedures.” (R. p. 21) The arbitration agreement was clearly a contract of adhesion and the Purchaser lacked any meaningful choice in agreeing to the arbitration provision. Accordingly, any claims that it was not one-sided or oppressive must be evaluated with “considerable skepticism.” *Id.* at 670.

3. The terms of the arbitration agreement are either oppressive, one-sided, or in violation of public policy.

The terms of the arbitration agreement in question were also oppressive and one-sided. The “Arbitration Policies and Procedures” require the Purchaser to be represented

either by a lawyer or *pro se*; however, the Dealer is allowed to designate a representative, including an employee who was not a licensed attorney, allowing the Dealer to avoid a significant expense. (R. p. 55, ¶ 20) The “Arbitration Policies and Procedures” also appointed Bob Hogan, who is the General Manager and/or owner of the Dealer, as the Arbitration Administrator. (R. p. 49, ¶ 5(a)(1)) The Arbitration Administrator serves as the gatekeeper to the administration process with sole possession and responsibility for providing and processing form requests for arbitration, sole responsibility for determining the validity of a request for arbitration, and sole responsibility for accepting and depositing filing fees. (R. 49, ¶ 5) The Arbitration Administrator also serves roles in appointing an administrator and determining whether a claimant is exempt from filing fees. (R. p. 49, ¶ 5(a)(3)) Appointing the Dealer’s representative as the arbitration administrator is nothing more than the fox guarding the henhouse, and no fair-minded person would accept those terms. It is equally difficult to imagine that such a provision would help achieve an unbiased decision by a neutral decision-maker.

The arbitration agreement also allows the Dealer to proceed with claims for the possession and sale of the vehicle while an arbitration is proceeding. (R. p. 45) Admittedly, this differs slightly from the arbitration provision in *Simpson* insofar as it does not bar the Purchaser from seeking an injunction to stop the sale of the vehicle. However, it still requires the Purchaser to engage in the same “procedural mechanisms” that the *Simpson* Court found to be an additional burden rendering the arbitration agreement unconscionable. *Id.* at 672.

Finally, the “Arbitration Policies and Procedures” allow for attorneys not licensed in the State of South Carolina to represent the parties in the arbitration hearing. It also

allows the Dealer to be represented by an unlicensed attorney. (R. p. 55, ¶ 20) Both provisions are clear violations of S.C. Code 40-5-310 and 320. Finally, the arbitration agreement requires the Purchaser to submit any claim related to the “condition of the vehicle” to arbitration in clear contravention of *Simpson* and the Magnuson-Moss Warranty Act. *Id.* at 672-673; 15 U.S.C.A § 2301 *et seq.* These provisions are all violations of federal and state law, contrary to public policy, and render the arbitration agreement void and unenforceable.

CONCLUSION

The arbitration agreement the Dealer seeks to enforce was executed as part of a single transaction, and the acts of the parties at all times during the transaction were properly considered by the trial court. The Dealer placed the Purchaser under extreme duress, and she would not have executed the arbitration agreement but for that duress. Moreover, the arbitration agreement was unconscionable. There was a total absence of meaningful choice and the agreement is oppressive, one-sided, and contrary to both federal and state laws as well as public policy. The order of the trial court should be upheld.

Respectfully submitted;



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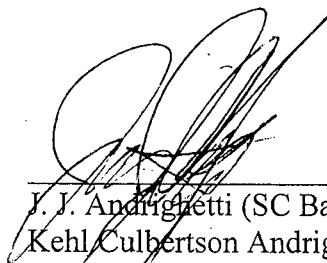
Attorney for Respondent Casey Masters

April 30, 2018

ATTORNEY CERTIFICATION

The undersigned, attorney for Respondent, hereby certifies that this Final Brief of Respondent complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Date: April 30, 2018



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