THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2010-CP-40-4244

Melissa Anne York and
Olga Joanne Cristy,

Appellants,

v.

Dodgeland of Columbia, Inc.
and Jim Hudson Automotive
Group, and Jim Hudson
Superstore, a/k/a Jim Hudson
Hyundai

Respondents.

FINAL REPLY BRIEF OF APPELLANTS

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ARGUMENT

1. APPELLANTS WAIVED NOTHING AT ORAL ARGUMENT

Respondents' first issue[1] is a truly bizarre claim: that Appellants "concede[d] that an enforceable arbitration agreement exists in this matter" and have "waived" other arguments. (Brief of Respondents at 7, 9). Appellants conceded nothing of the sort and waived nothing. Respondents quote Appellants' counsel at oral argument: "Like I said, <u>if there were</u>, in fact, enforceable arbitration agreements, then an arbitrator would be able to make those decisions, Your Honor." (Brief of Respondents at 9) (emphasis added). How this quote could possibly be interpreted as any kind of waiver escapes the undersigned. It is plainly contemplating a hypothetical: a hypothetical ("if there were") enforceable arbitration agreement. Appellants <u>never</u> conceded the existence of an enforceable arbitration agreement.

Respondents' first issue then moves in an even stranger direction, asserting "Appellants do not contend that they did not sign or enter into an arbitration agreement." (Brief of Respondents at 9). This action was dismissed on a motion without even an answer being filed. Plaintiffs-Appellants' only pleading is their complaint. All a complaint must contain with regard to allegations are "a short and plain statement of the facts showing the pleader is entitled to relief." Rule 8(a)(2), SCRCP. A "contention" regarding the purported signatures on the documents would have required Plaintiffs, in advance, to anticipate that Respondents would raise arbitration, and then pre-emptively

---

[1] One of the many ways in which Respondents' Brief is confusing is that the "Counter Statement of Issues on Appeal" at page x lists four issues, while the Table of Contents and the text of the Brief list six. Appellants have decided to address the six issues set forth in the text, and they are numbered in that order, and to disregard the "Counter Statement of Issues on Appeal."

allege the signatures were not theirs. Such a procedure is absurd. The proper method for testing factual contentions such as whether or not the signatures on the purported agreements are those of Appellants is discovery: depositions, interrogatories, and examination of the original signed documents. None of this occurred, as the Court below rejected Appellants' request for discovery. As Appellants set forth in their Opening Brief, the refusal to permit discovery is grounds for reversal.

2. RESPONDENTS' SECOND ISSUE RAISES NO INTELLIGIBLE ARGUMENT AND IS IRRELEVANT

Respondents' second issue is "The Federal Arbitration Act preempts state arbitration law and governs the arbitration agreements entered into by the parties." (Brief of Respondent at 10). This statement presents a legal truism that has no bearing on this appeal. As to the legal truism, it is of course true that any Federal law, including the F.A.A., preempts contradictory state law. *See* U.S. Const., Art. VI, Cl. 2 ("This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."). This matters not here. Appellants' issues on appeal are basically: 1) discovery was improperly denied; 2) there was no "meeting of the minds" and the purported arbitration agreements are therefore invalid under South Carolina contract law; and 3) the purported arbitration agreements are unconscionable under South Carolina contract law and therefore unenforceable. The first is a state-law procedural argument (discovery must be granted before ruling on the facts), and the other two are contract formation arguments. The Supreme Court of the United States has explicitly stated "generally applicable contract defenses, such as fraud, duress, or unconscionability," "may be applied to invalidate arbitration agreements without

contravening § 2 [of the FAA]," Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 682 (1996). None of the issues presented on appeal by Appellants claim that state law is superior to the FAA.

The remainder of this "issue" in Respondents' Brief is irrelevant. Issue II.B addresses whether, if the arbitration agreements are valid and enforceable, Appellants' claims would fall within their scope-an "issue" which is not presented by this appeal and which has never been raised by Appellants or ruled on by the Trial Court. Issue II.C consists of two paragraphs, entirely devoid of legal citation, asserting the purported arbitration agreements are "unremarkable and of a type countless courts have upheld." Issue II.D claims Appellants cannot avoid arbitration by naming additional defendants-again, an argument that Appellants plainly did not make in our Brief and which is not at issue on appeal. Finally, Issue II.E presents a string of citations to support an argument that when claims "fall within" valid arbitration agreements, dismissal or stay is appropriate. None of this has any bearing whatsoever on the issues presented on Appeal by Appellants.

3. THE TRIAL COURT DID NOT "PROPERLY COMPEL[]ARBITRATION" BECAUSE THERE WAS NO RECORD TO ACT UPON, THERE WAS NO MEETING OF THE MINDS, AND THE PURPORTED AGREEMENTS ARE UNCONSCIONABLE

Respondents begin their third issue by mischaracterizing Appellants: "the Appellants are claiming that the trial court failed to address the requirements of Simpson v. MSA of Myrtle Beach . . . by not determining whether an arbitration agreement existed in the first place." (Brief of Respondents at 15). That is not Appellants' argument at all.

Rather, Appellants argue that the consideration of the factors set forth in Simpson require a factual record not present in this case because Appellants were denied discovery.

The Simpson unconscionability factors include: (1) disparity in bargaining power between the parties; (2) parties' relative sophistication; (3) whether the party seeking to avoid the contract is a "substantial business concern;" (4) whether there is an element of surprise in the offending provision's inclusion; and (5) conspicuousness of the offending provision. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 23-24, 644 S.E.2d 663, 668 (2007). These factors are fact specific. The South Carolina Supreme Court's decision in Simpson hinged on these key facts, in the words of the Court: the "vehicle [was] intended for use as Simpson's primary transportation"; "Simpson . . . did not possess the business judgment necessary to make her aware of the implications of the arbitration agreement, and . . . she did not have a lawyer present;" "the contract was 'hastily' presented for her signature." Simpson, 373 S.C. at 27, 644 S.E.2d at 670.

Respondents concede "[t]he trial court determined that an arbitration agreement existed between the parties following its review of documents and the oral arguments of counsel." (Brief of Respondents at 15). The purported arbitration agreements were not attached to Plaintiffs-Appellants' complaints, which were the only pleadings in this matter. (R. pp. 3-21). The Court's consideration of the purported arbitration agreements (outside the pleadings) had the effect of converting Respondents' motions to dismiss into motions for summary judgment: "If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment." See Rule 12, SCRCP. What the trial court did in this matter is breathtaking: Plaintiffs filed their complaint, Defendants moved for a ruling

on the pleadings with new purported documents attached, Plaintiffs were denied discovery and the Court ruled. The entire litigation process was reduced to one motion, and turned on the interpretation of a document whose original copy Appellants were not even allowed to examine to determine if their signatures were genuine. This "procedure" mandates reversal. "Discovery is the quintessence of preparation for trial and, when discovery rights are trampled, prejudice must be presumed." Scott v. Greenville Hous. Auth., 353 S.C. 639, 652, 579 S.E.2d 151, 158 (Ct. App. 2003).

On page 17 of this same issue, Respondents transition to discussing whether a party may "contract away their rights." The next four pages are spent arguing that it is legally permissible for Appellants to waive their rights under the Dealer's Act, S.C. Code Ann. § 56-15-10, et seq. Remarkably, there is not one reference in these pages to our Supreme Court's absolutely plain and direct holding that the rights under the Dealers Act are not waivable:

> The Dealers Act further provides: '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.' . . . Stated succinctly, the Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right . . .

Herron v. Century BMW, 387 S.C. 525, 535-36, 693 S.E.2d 394, 399 (2010), judgment vacated sub nom. Sonic Auto., Inc. v. Watts, 131 S. Ct. 2872, (2011) and opinion reinstated, 395 S.C. 461, 719 S.E.2d 640 (2011). This is a direct holding of the South Carolina Supreme Court and therefore both arbitration agreements are unenforceable as against the public policy of our state.[2]

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[2] Appellants anticipated Respondents would argue this holding of Herron has been abrogated by AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011). Appellants

4. THE TRIAL COURT HAD SUBJECT MATTER JURISDICTION TO HEAR APPELLANTS' COMPLAINT

Issue four claims the trial court lacked subject matter jurisdiction. This is merely the arbitration argument repackaged as subject matter jurisdiction: that since there is a purported arbitration agreement, only an arbitrator has subject matter jurisdiction. This argument is without merit. "The question of arbitrability of a claim is an issue for the courts." Herron v. Century BMW, 387 S.C. at 530, 693 S.E.2d at 397. See also Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. at 22, 644 S.E.2d at 667 (citing S.C. Code Ann. § 15-48-20(a) ("The South Carolina Uniform Arbitration Act (UAA) generally provides that where one party denies the existence of an arbitration agreement raised by an opposing party, a court must immediately determine whether the agreement exists in the first place.").

5. THE TRIAL COURT MADE NO RULING AS TO WHETHER APPELLANTS, IF FORCED TO ARBITRATE, COULD PROCEED AS A CLASS

Issue five of Respondents' brief continues the pattern of spending pages on irrelevant and immaterial issues. In the case of issue five, Respondents spend five pages arguing "[t]he Stolt-Nielsen[3] decision mandates that the trial court's Order Compelling Arbitration be upheld as it directed Ms. York and Ms. Cristy each to arbitrate her claim on an individual basis . . . ." (Brief of Respondents at 25). The only problem is the Trial Court's Order held no such thing, and the issue of whether, if Plaintiffs-Appellants were

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disagree, as the scope of the Dealers Act far exceeds the issues of arbitration or class actions, and Appellants do not believe it is abrogated. Nevertheless, Respondents have waived any such argument as the AT&T case is not mentioned in Respondents' Brief, nor is there any argument that Herron is abrogated or limited by Federal law.

[3] 130 S.Ct. 1758 (2010).

forced to arbitrate, they could proceed as a class arbitration, was neither briefed, argued, nor ruled upon by the Trial Court. In fact, the Trial Court's Order was explicitly limited to the issue of "whether an arbitration agreement existed." (R. p. 17). The Trial Court even went further and stated "the Court declines to rule on other issues."[4] Id.

6. THIS APPEAL IS NOT INTERLOCUTORY UNDER WIDENER v. FORT MILL FORD

Respondents' final issue is an attempt to relitigate their claim that Appellants' appeal is interlocutory. This issue has already been ruled on by this Court on May 4, 2012. Although appeals of orders staying actions for arbitration are interlocutory, dismissal of the circuit court case is a final judgment which may be immediately appealed. Widener v. Fort Mill Ford, 381 S.C. 522, 674 S.E.2d 172 (Ct. App. 2009). Appellants cited Widener in our return to Respondents' motion to dismiss our appeal. This Court cited Widener in its Order denying Respondents' motion. Nevertheless, Respondents have again made the same argument, and again not mentioned Widener, which is the controlling authority on this issue.

Appellants set forth three issues warranting reversal in our Opening Brief: 1) discovery was improperly denied; 2) there was no "meeting of the minds" and the purported arbitration agreements are therefore invalid under South Carolina contract law; and 3) the purported arbitration agreements are unconscionable under South Carolina contract law and therefore unenforceable (paraphrased). Respondents offer not one case or statute supporting the Trial Court's rejection of Appellants' factual unconscionability

[4] The Trial Court did, at one point in the Order, refer to compelling "individual Arbitration." Id. However, the issue of whether arbitration would be classwide or individual was not raised by any Defendant in their motions, was not briefed or argued, and any holding by the Court on "other issues" like this was expressly disclaimed.

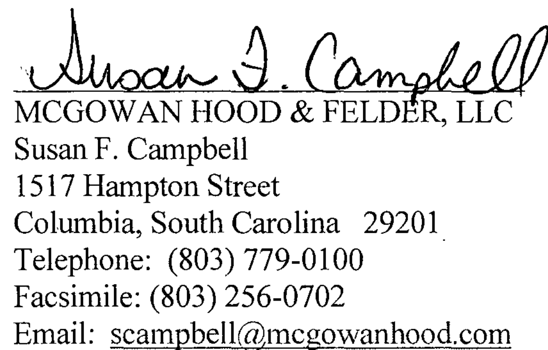
claims without discovery. Appellants' contention that there was no meeting of the minds with regard to the purported contracts is not even mentioned, much less addressed, in Respondents' Brief. And finally, Appellants' arguments that Simpson, Herron and other cases mandate a holding that the contracts were unconscionable is barely addressed. The Trial Court erred in compelling arbitration, and at the very least, should have granted discovery.

CONCLUSION

For the stated reasons, this Court should reverse the judgment of the Trial Court.

Respectfully submitted,

December 27, 2012



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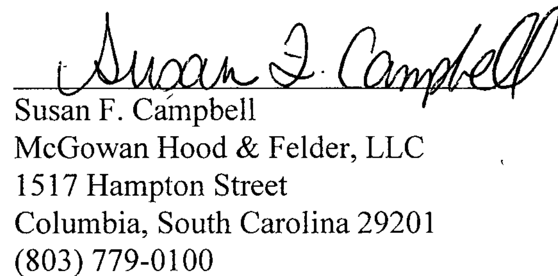
CERTIFICATE OF COUNSEL

The undersigned certified that this **Appellants' Final Reply Brief** complies with Rule 211 (b), SCACR.

December 27, 2012



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I, the undersigned paralegal, of the law offices of McGowan Hood & Felder, LLC, attorneys for Appellants Melissa Anne York and Olga Joanne Cristy, do hereby certify that I have served all counsel in this action with a copy of the **Appellants' Final Reply Brief** by hand delivering a copy of same to counsel at the following addresses:

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December 27, 2012