89405

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

The Honorable Maité Murphy
Circuit Court Judge

Opinion No. 2019-UP-103
Appellate Case No. 2017-000120
Circuit Court Case No. 2016-CP-27-269

Annalee Walsh..... Respondent,

v.

Boat-N-RV Megastore and Ridgeland Recreational Vehicles, Inc., ... Defendants.

of whom

Ridgeland Recreational Vehicles, Inc., d/b/a Boat-N-RV Megastore is the..... Appellant.

PETITION FOR REHEARING

WOMBLE BOND DICKINSON (US) LLP

M. Todd Carroll
South Carolina Bar 74000
todd.carroll@wcsr.com
1221 Main Street, Suite 1600
Columbia, South Carolina 29201
(803) 454-6504

Attorneys for Appellant

Columbia, South Carolina
March 28, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

INTRODUCTION

This case is controlled by the Federal Arbitration Act. Under that federal statute, there can be no room for disagreement: the parties' dispute must be compelled to arbitration pursuant to their unambiguous, comprehensive, and undisputed arbitration agreement.

Unfortunately, this Court's summary decision does not acknowledge or address this threshold, dispositive issue. Respectfully, the Court's order is contrary to an unbroken line of Supreme Court precedent that requires enforcing arbitration agreements when, as here, the party opposing arbitration challenges the enforceability of the whole contract in which the arbitration agreement appears. Though the summary decision does not address this threshold issue, it actually cites a prior opinion of this Court—*New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008), cited in Paragraph 1 of the summary decision with respect to the standard of review—that unequivocally stands for the proposition that arbitration is required under facts that are virtually identical to those presented here.

Accordingly, Boat-N-RV respectfully petitions for rehearing of this matter pursuant to Rule 221(a), SCACR, so that the Court can reconsider its ruling in light of controlling case law, including authorities cited in the summary opinion itself.

ARGUMENT

I. The Court's summary order overlooked the threshold issue of this appeal: enforcement of the parties' arbitration agreement under the Federal Arbitration Act, which is required by well-established Supreme Court precedent.

The Court's per curiam opinion only identifies three issues in this appeal: the standard of review, whether a parol-evidence objection was preserved, and a general statement of the law regarding conditions precedent. (Summary Order ¶¶ 1–3.) While Boat-N-RV respectfully disagrees with the Court's summary disposition of those issues and addresses them below in

turn, the chief error in the Court's order was the failure to address the threshold issue that governs this case: whether the Federal Arbitration Act requires arbitration here despite Ms. Walsh's argument that the parties' sales contract was conditioned on her securing third-party financing. Indisputably, it does.

There is no dispute that the parties' transaction involved interstate commerce, as Ms. Walsh is a New Jersey resident purchasing a recreational vehicle from Boat-N-RV, a South Carolina corporation. (R. p. 11, Sales Contract at 1.) Accordingly, the Federal Arbitration Act governs this appeal. *Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 87 (4th Cir. 2005).

There is also no dispute that the parties entered into an ***arbitration agreement***; Ms. Walsh even concedes in the complaint that she signed the sales contract containing that agreement. (R. p. 5; Compl. ¶ 7; R. pp. 11–12; Sales Contract.) The arbitration agreement reads as follows:

> **Binding Arbitration.** The Parties agree that the purchase and sale of the Vehicle(s) described on Page 1 of this Agreement is an act of interstate commerce implicating the Federal Arbitration Act to the exclusion of any and all State arbitration acts. Except and only as limited by the final sentence of this numbered Paragraph, **THE PARTIES FURTHER AGREE THAT ANY CLAIM OR CONTROVERSY ARISING OUT OF OR OTHERWISE RELATING TO THIS AGREEMENT, INCLUDING THE MAKING THEREOF, SHALL BE RESOLVED THROUGH BINDING ARBITRATION, WITH THE SEAT OF SUCH ARBITRATION TO BE LOCATED IN KNOX COUNTY, TENNESSEE, TO THE EXCLUSION OF ALL OTHER LOCALES.** The discovery rules contained in the Fed. Rules of Civil Procedure, as well as the Fed. Rules of Evidence, shall apply in any proceeding brought pursuant to this Paragraph. In the event the dispute resolution terms of any retail installment contract entered into the by the Parties shall differ from this Paragraph, as between Buyer and Seller the terms of this Agreement shall control. Notwithstanding the foregoing, either Party may bring an action within the jurisdictional limit of the small claims (or equivalent) court serving the territory where this Agreement was executed.

(R. p. 12; Sales Contract at 2, ¶ 10 (all capital letters, bold, and underlined in original).)

The presence of interstate commerce and the parties' arbitration agreement are the only two facts that matter regarding the sole issue on appeal, and any argument regarding a so-called "condition precedent" for the sales contract as a whole is irrelevant as a matter of law.

Beginning with *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 404 (1967); carrying through *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006), and *Preston v. Ferrer*, 552 U.S. 346, 354 (2008); and recently reiterated again in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 69–70 (2010), the United States Supreme Court has been clear that the presence of an arbitration agreement must be enforced regardless of challenges, such as the one that Ms. Walsh has made here, to the whole contract in which the arbitration agreement is contained. As the *Buckeye Check Cashing* Court stated: "We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." 546 U.S. at 449. And as the *Rent-A-Center* Court summarized this line of cases: "Thus, a party's challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate." 561 U.S. at 70.

The South Carolina Supreme Court has recognized this exact same distinction between attacks on a contract as a whole and attacks on an arbitration provision specifically. Like the United States Supreme Court, it has repeatedly held that an attack on the whole contract, such as Ms. Walsh's argument here, cannot avoid an arbitration agreement. *See, e.g.*, *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001) ("Under the [Federal Arbitration Act], an arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole."); *Jackson Mills v. BT Capital Corp.*, 312 S.C. 400, 403–04, 440 S.E.2d 877, 879 (1994) ("However, it is only when

a party has valid grounds upon which to challenge the arbitration clause itself that arbitration may be avoided."); *S.C. Pub. Serv. Auth. v. Great W. Coal, Inc.*, 312 S.C. 559, 562–63, 437 S.E.2d 22, 24 (1993) (adopting the *Prima Paint* analysis and holding that a party must make an "independent challenge to the arbitration clause," rather than dispute the contract as a whole, in order to avoid arbitration).

The trial court's holding reflects exactly the opposite of what *Rent-A-Center* and other controlling Supreme Court decisions require. In the order on appeal, Judge Murphy declined to enforce the parties' arbitration agreement "because the parties never formed a contract for the purchase of an RV." (R. p. 3; Trial Order at 3.) However, because a challenge to the contract as a whole cannot "prevent a court from enforcing a specific agreement to arbitrate," *Rent-A-Center*, 561 U.S. at 69–70, the trial court's decision was incorrect as a matter of law under the Federal Arbitration Act.

The ***only*** way that Ms. Walsh can bypass this unbroken line of Supreme Court precedent is to argue that the arbitration agreement itself somehow contains a "condition precedent." She has made no such argument here, nor would one make sense in any event. The plain language of the arbitration agreement forecloses such an argument, as it requires issues regarding "the making" of the parties' contract to be arbitrated. *See, e.g., id.* at 68–69 ("We have recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.").

Moreover, this Court has previously acknowledged this exact line of authority when enforcing an arbitration agreement within a contract that one party claimed was never entered. In *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008), this Court held that arbitration was required in a dispute regarding the return of a deposit

(just like in this case) where the plaintiff alleged that it never entered into the contract containing the arbitration agreement (also just like in this case). As the Court recited: "[T]he Church argues it has numerous grounds on which ***the Contract*** is invalid and that 'the Contract simply does not exist as a Contract' in part because of Rose's inability to bind the Church." *Id.* at 629, 667 S.E.2d at 5 (emphasis supplied by the Court). The Court rejected those arguments against enforcing the arbitration agreement and recognized that "precedent forces a distinction to be drawn between disputes in which a party challenges the arbitration agreement itself and disputes in which only the overall contract is challenged." *Id.* at 631, 667 S.E.2d at 6. Because the plaintiff in that case did not challenge the arbitration agreement specifically, arbitration was required. *Id.* at 629–31, 667 S.E.2d at 5–6.

In its summary order, this Court actually cited *New Hope Missionary Baptist Church* for the proposition that "a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." (Summary Order ¶ 1.) But the Court's failure to compel arbitration here is squarely opposite of the outcome required by *New Hope Missionary Baptist Church*, *Rent-A-Center,* and the myriad other authorities cited above.

The summary order does not acknowledge or address the fundamental issue that is dispositive of the entire appeal, making it proper for rehearing under Rule 221(a), SCACR. Respectfully, Boat-N-RV requests that the Court grant this petition, reconsider its earlier order, reverse the trial court's decision, and compel this matter to arbitration consistent with the parties' unambiguous arbitration agreement and controlling case law.

II. Respectfully, the Court's analyses of the issues addressed its summary order are either incomplete or incorrect.

The Court should grant this Petition because the summary order overlooked the dispositive issue of this appeal. Moreover, of the issues that were addressed in the order, Boat-N-RV respectfully submits that the Court's analyses were incomplete or inconsistent with the record, as explained below.

A. The trial court's ruling is not entitled to any deference.

In Paragraph 1 of the summary order, the Court recited cases regarding the standard for reviewing the denial of a motion to compel arbitration. Among those is a citation—notably, to *New Hope Missionary Baptist Church*, which reaches the opposite conclusion than the Court's summary order—that reversal of a factual finding is not warranted if there is any evidence to support the finding. (Summary Order ¶ 1.) This deference is not warranted here because there is no factual finding that could support the denial of arbitration in this case.

As discussed above, the only issue relevant to the question of arbitrability is whether the parties entered into an arbitration agreement. The trial court did not make any "factual findings" on this point. Instead, Judge Murphy only stated (without a trial or any testimony) that the parties' sales contract ***as a whole*** was conditioned on financing. (R. pp. 2–3; Trial Order at 2–3.) But such a statement regarding the contract ***as a whole*** does not inform the issue of arbitrability; this is the very holding of *New Hope Missionary Baptist Church*, the case cited by the Court in support of this paragraph in is summary order.

Accordingly, the trial court's statement of fact regarding the parties' contract as a whole is not entitled to any deference at all. Boat-N-RV respectfully requests that the Court reconsider Paragraph 1 of its summary order to make the outcome of this case consistent with *New Hope*

Missionary Baptist Church, as well as *Rent-A-Center* and all of the other authorities cited in Section I of this Petition regarding enforcement of the Federal Arbitration Act.

B. Boat-N-RV preserved its argument to the Regulation Z disclosure form by objecting to the trial court's consideration of it, but the trial court rejected the objection and considered that document when making its ruling.

In Paragraph 2 of the summary order, the Court recited cases regarding issue preservation principles with respect to the question of whether a Regulation Z disclosure form amounted to inadmissible parol evidence. (Summary Order ¶ 2.) Respectfully, Boat-N-RV believes that issue was properly preserved for appellate review.

Boat-N-RV specifically objected to the trial court's consideration of that disclosure form. (R. pp. 15–16; Boat-N-RV's Memorandum in Support of Motion to Compel Arbitration at 3–4.) The trial court overruled that objection and considered the objected-to document when making its ruling. (R. p. 2; Trial Order at 2.) There is nothing more required to preserve the issue for this Court's review, and the Court should reconsider Paragraph 2 of its summary order accordingly.

C. The authorities cited regarding the final appellate issue expressly support Boat-N-RV's position, not affirmance of the trial court's ruling.

In the summary order's final paragraph, the Court cited two cases regarding Boat-N-RV's argument that the Regulation Z disclosure form did not create a condition precedent to contract ***formation***, as Ms. Walsh argues and the trial court found, but at most created a condition precedent to contract ***performance***.

Both of the cases cited in the Court's summary order squarely support Boat-N-RV's argument, as demonstrated by the Court's own parentheticals cited in the summary order. The Court's parentheticals are reproduced below with emphasis added:

- *Worley v. Yarborough Ford, Inc.*, 317 S.C. 206, 210, 452 S.E.2d 622, 624 (Ct. App. 1994) (stating a condition precedent is "any fact other than the lapse of time, which, unless excused, must exist or occur before a duty of immediate ***performance*** arises") (emphasis added); and

- *McGill v. Moore*, 381 S.C. 179, 187, 672 S.E.2d 571, 575 (2009) ("If a contract contains a condition precedent, that condition must either occur or it must be excused before a party's duty to ***perform*** arises.") (emphasis added).

This is exactly Boat-N-RV's point. To the extent that a Regulation Z disclosure form could ever create a so-called condition precedent, it could only create a condition precedent to ultimate ***performance*** of the parties' sales agreement: if Ms. Walsh did not get third-party financing to fully pay for her vehicle, then Boat-N-RV's performance of delivering the vehicle to her with good title is excused. But that has nothing to do with a condition precedent to contract ***formation***, and the authorities cited in the Court's summary order confirm Boat-N-RV's argument on this issue and make clear that reversal, rather than affirmance, is required.[1] As such, Boat-N-RV respectfully requests that the Court reconsider Paragraph 3 of its summary order.

CONCLUSION

The outcome of this case should be dictated by clear, well-established law regarding enforcement of the Federal Arbitration Act. Respectfully, because the Court overlooked or misapprehended those authorities—including the very authorities that the Court cited in its summary order—Boat-N-RV requests that it rehear and reconsider its decision in this case, enforce the parties' arbitration agreement according to its plain language, and reverse the trial court's order denying Boat-N-RV's motion to compel arbitration.

---

[1] Again, this issue is a secondary one, as there has never been an argument that the Regulation Z disclosure form created any kind of condition precedent with respect to the parties' arbitration agreement. In the absence of an attack on the specific arbitration agreement, any discussion of conditions precedent regarding the sales contract as a whole is irrelevant, as Boat-N-RV noted on Pages 7 and 8 of its reply appellate brief.

Respectfully submitted,

WOMBLE BOND DICKINSON (US) LLP

By: _____

M. Todd Carroll
S.C. Bar No. 74000
todd.carroll@wcsr.com
1221 Main Street, Suite 1600
Columbia, South Carolina 29201
(803) 454-6504

Attorneys for Appellant

Columbia, South Carolina
March 28, 2019

PROOF OF SERVICE

I, the undersigned Office Manager of the law offices of Womble Bond Dickinson (US) LLP, Attorneys for Appellant, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) specified below by mailing a copy of the same, postage prepaid, to the following address(es):

Pleading: Petition for Rehearing

Parties Served:

Joshua R. Fester
Law Office of Darrell Thomas Johnson, Jr.
Post Office Box 1125
Hardeeville, SC 29927

Attorneys for Respondent

Deborah L. Johnson

March 28, 2019

womblebonddickinson.com

WOMBLE BOND DICKINSON

Womble Bond Dickinson (US) LLP

1221 Main Street
Suite 1600
Columbia, SC 29201

t: 803.454.6504

M. Todd Carroll
Direct Dial: (803) 454.7730
E-mail: Todd.Carroll@wbd-us.com

March 28, 2019

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Annalee Walsh v. Boat-N-RV Megastore and Ridgeland Recreational Vehicles, Inc.
Appellate Case No. 2017-000120

Dear Ms. Kitchings:

Enclosed please find an original and seven copies of Appellant's Petition for Rehearing, along with our check for the $50 filing fee. Please return a clocked copy via our courier. If we can provide the Court with any additional materials or information, please do not hesitate to call on us.

With kind regards, I remain

Very truly yours,

M. Todd Carroll

Enclosures
MTC/dj
cc: Joshua R. Fester