

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM JASPER COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Maité Murphy,
Circuit Court Judge

Appellate Case No. 2019-001080
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

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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July 31, 2019

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QUESTIONS PRESENTED FOR REVIEW

- I. IN LIGHT OF THE WELL-SETTLED LAW ON ISSUE PRESERVATION, DID THE COURT OF APPEALS PROPERLY HOLD THAT THE PETITIONERS FAILED TO PRESERVE ANY ISSUES AND ARGUMENTS NOT ADDRESSED BY THE CIRCUIT COURT'S ORDER, INCLUDING WHETHER A REGULATION Z FINANCING FORM WAS IMPROPER PAROL EVIDENCE?

- II. DID THE COURT OF APPEALS CORRECTLY REFUSE TO DISTURB THE HOLDINGS AND FACTUAL FINDINGS OF THE CIRCUIT COURT THAT THERE WAS NO CONTRACT BETWEEN THE PARTIES AND NO AGREEMENT TO ARBITRATE, DUE TO AN UNSATISFIED CONDITION PRECEDENT TO FORMATION?

- III. IN AFFIRMING THE HOLDINGS AND FINDINGS OF FACT OF THE CIRCUIT COURT, DID THE COURT OF APPEALS CORRECTLY APPLY THE LAW REGARDING THE ENFORCEMENT OF ARBITRATION AGREEMENTS?

STATEMENT OF THE CASE

The Petition for Writ of Certiorari comes after the South Carolina Court of Appeals affirmed the findings and conclusions of the trial court in denying Petitioner's motion to compel arbitration. Boat-N-RV Megastore and Ridgeland Recreational Vehicles, Inc. (hereinafter, "Petitioners") would ask this Court to disturb the factual findings of the circuit court and require that Ms. Annalee Walsh (hereinafter, "Respondent" or "Ms. Walsh") involuntarily submit to arbitration in a state several hundreds of miles from her home, when she never agreed or contracted to do so, stripping her of her right to have her case heard by a jury of her peers.

This case arises out of Petitioners' wrongful retention of money that Ms. Walsh placed in trust with Petitioners in anticipation of entering a contract for purchase of a recreational vehicle from Petitioners. Ms. Walsh's Complaint contains causes of action for conversion, South Carolina Unfair Trade Practices Act (SCUTPA), and fraud. The Petitioners moved to compel arbitration pursuant to an arbitration clause found in a document referred to as a "purchase agreement." The circuit court correctly found that there was no agreement to arbitrate pursuant to that document

because there was no contract, due to a failure of a condition precedent. The circuit court issued its Order Denying Defendants' Motion to Compel Arbitration, dated January 12, 2017, which was filed on January 18, 2017. (Appx. 70 – 72). Defendants filed a Notice of Appeal on January 18, 2017. The Court of Appeals affirmed the circuit court and denied Petitioners' Petition for Rehearing by Order filed on June 5, 2019. Petitioners seek now seek further review.

On September 13, 2015, Ms. Walsh visited Petitioners' retail location in Ridgeland, South Carolina. Ms. Walsh entered negotiations with agents or employees of Petitioners for the purchase of a recreational vehicle and on that date also signed a document referred to as a "purchase agreement." (Appx. 74, Compl., ¶ 7). The "purchase agreement" contained terms of a prospective contract for the purchase of a 2013 Mirada recreational vehicle for \$95,000.00, paid partially through a trade-in. (Appx. 80 – 81). The "purchase agreement" also contained an arbitration clause and a liquidated damages clause, providing for damages to the extent of Eleven Thousand Two Hundred Fifty Dollars (\$11,250.00) or in the alternative submit to arbitration, in the event that Ms. Walsh canceled a contract with Petitioners. *Id.* In anticipation of forming a contract for the purchase of the vehicle, Ms. Walsh provided a One Thousand Dollar (\$1000.00) deposit (paid by credit card), and a check for Twenty-Four Thousand Dollars (\$24,000.00). (Appx. 74, Compl., ¶ 8). Included and incorporated into the written "purchase agreement" was an understanding that the formation of any contract for purchase of the vehicle would be conditioned upon securing third-party financing. A document identified as the "Agreement Pending Financing/Regulation Z Disclosure," provides as follows: "By signing below, I acknowledge that I have entered into a written agreement to purchase a boat or recreational vehicle conditioned only upon the willingness of third-party lender to finance the purchase on terms not less favorable than those set forth immediately below." (Appx. 107).

Ultimately, although Petitioners applied for credit with Petitioners' "partner lenders," no third-party financing was secured on terms no less favorable than those listed in the Agreement Pending Financing/Regulation Z Disclosure. (Appx. 107). In fact, Ms. Walsh received notices from several creditors denying the credit applications submitted by Petitioners. (Appx. 108 – 112). It is undisputed fact that the vehicle subject to negotiations for purchase was never tendered or delivered to Ms. Walsh, and the trade-in vehicle was never tendered, delivered, or demanded. Ms. Walsh subsequently demanded that Petitioners return her deposit and down payment. Petitioners refunded One Thousand Dollars (\$1,000.00) to her credit card and sent a check for Twelve Thousand Seven Hundred Fifty Dollars (\$12,750.00), after several months, several demands by Ms. Walsh, and only after Ms. Walsh sought the assistance of an attorney. Petitioners refused to return the remaining \$11,250.00 of the money that Petitioners held in trust, pending the formation of the sales contract.

On the date of the hearing on Petitioners' Motion to Compel Arbitration, Petitioners submitted a memorandum in support of their motion, and at the hearing, argued that Ms. Walsh's causes of action arose out of a transaction between the parties, which was governed by the Federal Arbitration Act, and that the parties had agreed to submit to arbitration, pursuant to the arbitration clause found in the "purchase agreement." At the hearing, attorney for Ms. Walsh presented the Agreement Pending Financing/Regulation Z Disclosure which contained terms that are required by the Truth in Lending Act, which as discussed above, provided that the parties had entered an agreement for purchase of a recreational vehicle "conditioned only upon the willingness of a third party lender to finance the purchase on terms not less favorable than those set forth immediately below." (Appx. 107). Ms. Walsh argued that there was no contract for purchase and no agreement to arbitrate because the contract had never been formed, due to failure of a condition precedent to

formation of that contract, specifically, the multiple refusals of Petitioners third-party “partner lenders” listed in the Agreement Pending Financing/Regulation Z Disclosure to finance the purchase and the failure to secure any third-party financing for the purchase.

After the hearing on September 20, 2016, Ms. Walsh also submitted a Memorandum in Opposition to Motion to Compel Arbitration in which she argued, that in addition to there being no contract, that enforcement of the liquidated damages clause and arbitration clause would be unconscionable, as Petitioners were essentially asking the circuit court to allow them to keep \$11,250.00 to shop Ms. Walsh’s credit, or in the alternative, significantly burden Ms. Walsh’s access to justice by compelling her to arbitration in a forum far from her home and hundreds of miles from Petitioners store in Ridgeland, South Carolina. (Appx. 104 – 106). Petitioners submitted a Reply in Support of Motion to Compel Arbitration, in which Petitioners claimed that counsel for Ms. Walsh did not provide a copy of the Agreement Pending Financing/Regulation Z (a document created by Petitioners) before the September 20, 2016 hearing, and that after reviewing the document, made the argument that the document supported a factual finding that the parties had entered into a contract. (Appx. 113 – 114).

As discussed, by Order dated January 18, 2017, the circuit court denied Petitioners’ Motion to Compel Arbitration. In denying Petitioners’ motion, the circuit court found that due to failure of the condition precedent of securing third party financing for the purchase of Petitioners’ recreational vehicle, the parties had not formed a contract and there was no agreement between the parties to arbitrate. (Appx. 70 – 73). Prior to the issuance of that Order, Petitioners emailed the circuit court on November 10, 2016, objecting to the proposed order. In this email, counsel for Petitioners argued that the “supposed ‘condition precedent’” was not one that Defendants could have met, alleging that it was Ms. Walsh’s responsibility to secure third-party financing. (Appx.

118 - 121). Attached to this email was a pdf file which included documents with hand-written notes (the author of which is unknown), which could only be characterized as hearsay, and which Petitioners claimed to demonstrate that Petitioners attempted to secure third-party financing, but that these attempts failed by some fault of Ms. Walsh. *Id.* In this email, and in another email sent on November 14, 2016, counsel for Petitioners additionally argued that “[w]hen there is a disagreement as to the facts that speak to the arbitrability of a case, the proper procedure under the Federal Arbitration Act is for the Court to permit discovery on those facts and then hold an evidentiary hearing.” (Appx. 123). These emails were later re-styled by Petitioners as “Objections to Proposed Order Regarding Motion to Compel Arbitration.” (Appx. 115 – 124).

Despite making new arguments subsequent to the hearing, and after reviewing the proposed order submitted by Ms. Walsh, Petitioners filed a notice of appeal the same day the Order Denying Motion to Compel Arbitration was filed by the circuit court and did not make any Motion to Alter or Amend Judgment pursuant to SCRCP Rule 59. While Petitioners attempted to make the argument in emails to the circuit court that the court had misunderstood the significance of the Agreement Pending Financing/Regulation Z Disclosure, and that the condition precedent was not the responsibility of Petitioners, the Petitioners argued, for the first time in their brief to the Court of Appeals, that the Agreement Pending Financing/Regulation Z Disclosure was improper parol evidence. In its Order, the Court of Appeals affirmed the finding of the circuit court that the parties had not agreed to submit to arbitration, affirmed the finding that the purchase agreement was conditioned upon the willingness of a third party to finance the purchase, and held that the Petitioners’ argument that the circuit court erred in considering the Agreement Pending Financing/Regulation Z Disclosure, because it was improper parol evidence, was not preserved for appellate review.

STANDARD OF REVIEW

The circuit court denied Petitioners' Motion to Dismiss or Compel Arbitration, holding that there was no contract and no agreement to arbitrate. Because the existence of a contract is a question of law, the determination of whether a claim is subject to arbitration is subject to *de novo* review. *Aiken v. World Fin. Corp.*, 373 S.C. 144, 148, 644 S.E.2d 705 (2007) (citing *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E. 2d 86, 89 (Ct. App. 2005)). 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, 644 S.E.2d 663 (2007); *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003).

A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion, or power to grant review in general, indicate the character of reasons which will be considered: 1) where there are novel questions of law; 2) where there is a dissent in the decision of the Court of Appeals; 3) where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; 4) where substantial constitutional issues are directly involved; 5) where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. SCACR Rule 242(b).

ARGUMENTS

- I. THE COURT OF APPEALS CORRECTLY HELD THAT THE SCOPE OF REVIEW OF PETITIONERS' APPEAL WAS LIMITED ONLY TO THOSE ISSUES ADDRESSED IN THE CIRCUIT COURT'S ORDER AND THAT PETITIONERS FAILED TO PRESERVE ARGUMENTS FOR APPEAL.

The Court of Appeals correctly held that Petitioners did not preserve its arguments that the circuit court erred by considering the Agreement Pending Financing/Regulation Z Disclosure as

part of the proposed purchase agreement, because it was improper parol evidence. Petitioners failed to move to alter or amend the circuit court's Order, pursuant to SCRCP Rule 59(e). Accordingly, it would have been inappropriate for the Court of Appeals to consider any argument not properly preserved for appeal, including the argument that the Agreement Pending Financing/Regulation Z Disclosure was improper parol evidence.

South Carolina appellate practice rules provide that an appellate court "may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal." SCACR Rule 220(c). A respondent's brief may also "contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)." SCACR Rule 208(b)(2). In contrast, different preservation rules apply to an appellant. The appellant, by way of a motion to alter or amend judgment pursuant to Rule 59, "must first try to convince the lower court it . . . has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." *l'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 724 (2000). This principle is based upon the "long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." *Id.* (citing *Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 427 (1995)). Moreover, if the appellant raised an issue and the court failed to rule upon it, the appellant must file a motion to alter or amend the decision in order to preserve the issue for appellate review. *Id.*

In the present case, Petitioners simply failed to preserve any argument that the circuit court erred in considering the Agreement Pending Financing/Regulation Z Disclosure in its ruling and the argument that this was improper parol evidence. Because the Petitioners failed to move to alter or amend the decision of the circuit court, the review of the Court of Appeals is limited only to the

issues found in the circuit court's Order. In the Order, the circuit court found, based upon the language found in the Agreement Pending Financing/ Regulation Z Disclosure, that a third-party lender's willingness to finance the purchase of the RV was a condition precedent to the formation of a contract, that condition precedent was unsatisfied, and because the condition precedent to formation of the contract was unsatisfied, there was no contract and no agreement to arbitrate. The circuit court's Order did not address whether the document was improper parol evidence, and prior to their brief to the Court of Appeals, Petitioners never raised that issue.

As discussed above, the first time the argument that the Agreement Pending Financing/Regulation Z disclosure was improper parol evidence was in their brief to the Court of Appeals. In fact, in their Reply in Support of Motion to Compel Arbitration, and in their emails to the Judge's chambers, memorialized as "Objections to Proposed Order Regarding Motion to Compel Arbitration," Petitioners argued not that the document was parol evidence, but alleged that the document reinforced that there was a contract and that the responsibility of meeting the condition precedent found in this document was the responsibility of Ms. Walsh. Thus, the issue was not raised or ruled upon, because Petitioners made a different argument, and took a starkly different stance, prior to issuance of the circuit court's Order.

Moreover, Petitioners argue in their Petition that the issue was raised in their Memorandum in Support of Motion to Compel Arbitration, but this is not accurate, and takes a revisionist view of the facts, as clearly demonstrated in the record. In their memorandum handed to counsel for Respondent and the circuit court on the date of the hearing, the Petitioners argued in a vague and general manner that the contract contains a merger clause and that the parol evidence rule prevented her from attempting to "add unwritten 'conditions' to the parties' contract" while conveniently leaving out the Agreement Pending Financing/Regulation Z Disclosure, which

contained terms that were key to the formation of any contract. (Appx. p. 84 - 85). It was not until after counsel for Ms. Walsh submitted the document that there was any argument by Petitioners concerning the document, and none of those arguments by Petitioners concerned the Agreement Pending Financing/Regulation Z Disclosure being improper parol evidence. Petitioners are essentially asking this Court to find that the Court of Appeals erred in holding that Petitioners did not properly preserve its argument, because Petitioners mentioned parol evidence generally in a memorandum, prior to the submission, and any discussion of the Agreement Pending Financing/Regulation Z Disclosure, and when Petitioners never argued that the document was parol evidence prior to their appeal.

Though they did not, even if Petitioners had raised the argument in their emails to the circuit court, restyled as “Objections to Proposed Order Regarding Motion to Compel Arbitration,” the appellate preservation rules do not extend to informal communications with the court after a court’s ruling, and Petitioners’ emails to the court’s chambers are no substitute for a motion to alter or amend, pursuant to Rule 59. Therefore, the arguments and additional information found in those emails sent to the circuit court’s chambers, and later memorialized by Petitioners’ “Objections to Proposed Order Regarding Motion to Compel Arbitration” would have been improper for the review of the Court of Appeals. Consideration of these “objections,” and Petitioners’ argument that the Agreement Pending Financing/Regulation Z Disclosure was parol evidence, would be contrary to long-established rules of issue preservation and would also be manifestly unfair to Ms. Walsh, who did not have the opportunity to address these issues.

In their Petition to this Court, Petitioners concede that the Agreement Pending Financing/Regulation Z Disclosure “was the sole basis of the circuit court’s ruling.” (Petition for Writ of Certiorari, p. 11, ln 1-2). Petitioners, thus, failed to preserve for appellate review any

argument that the “sole basis” of the circuit court’s factual findings and ruling was improper parol evidence that should not have been considered. Accordingly, this Court’s review should go no further than whether the issue was properly preserved.

While not addressed by the Court of Appeals, Ms. Walsh would add, as an additional sustaining ground, that in failing to move to amend or set aside judgment pursuant to Rule 59(e), Petitioners also failed to preserve their arguments concerning the application of the Federal Arbitration Act in the present case. The bulk of Petitioners’ argument is that the decision of the Court of Appeals is inconsistent with decisions of the United States and South Carolina Supreme Courts regarding enforcement of the Federal Arbitration Act. Petitioners also boldly presume that there is no dispute that the Federal Arbitration Act governs the negotiations between the parties, underlying Ms. Walsh’s causes of action. Perhaps illustrative of the purpose of the Rule 59(e) motion to amend or set aside judgment, Petitioners’ presumption is unfounded by the record. Petitioners argued in their memorandum that the Federal Arbitration Act applied to the negotiations for the purchase of Petitioners’ recreational vehicle, and later in their “Objections to Proposed Order Regarding Motion to Compel Arbitration,” argued that if the court was not inclined to compel Ms. Walsh’s claims to arbitration, that the Court should permit discovery on the issues related to arbitrability of the dispute. While Petitioners may have raised these issues in their memoranda, the issue of whether the Federal Arbitration Act applies, at all, was not ruled upon by the circuit court. In fact, not once in the circuit court’s Order is the Federal Arbitration Act mentioned, and the issue was not addressed or discussed in the Order. Accordingly, Petitioners failed to preserve this issue for appellate review.

II. THE COURT OF APPEALS CORRECTLY APPLIED THE STANDARD OF REVIEW IN THE PRESENT CASE IN REFUSING TO DISTURB THE HOLDINGS AND FINDINGS OF FACT OF THE CIRCUIT COURT THAT THERE WAS NO CONTRACT, DUE TO FAILURE OF CONDITION PRECEDENT TO FORMATION OF THE CONTRACT

The Court of Appeals correctly affirmed findings of facts and conclusions of law of the circuit court that no contract existed between the parties, due to failure of a condition precedent to formation of the contract. Though the standard of review in determining whether a case should be submitted to arbitration is subject to *de novo* review, the circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. See *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007). In the present case, the Court of Appeals appropriately refused to disturb the circuit court's findings that there was no contract and no agreement to arbitrate.

Ms. Walsh never entered a contract with Petitioners for the purchase of their recreational vehicle. While Petitioners conveniently left the Agreement Pending Financing/Regulation Z Disclosure out of their Memorandum in Support of Motion to Compel Arbitration and later argued to the circuit court that this document supported that a contract had been entered between the parties, the document contained terms key to the formation of any contract for purchase. As discussed above, the document provided that the parties had entered an agreement for purchase "conditioned only upon the willingness of a third party lender to finance the purchase on terms not less favorable than those set forth immediately below." (Appx. 107). The undisputed evidence before the circuit court, which was admitted by Petitioners, is that the condition precedent to the formation of the contract, the willingness of a third-party lender to finance the purchase of the vehicle, did not occur. While Petitioners attempted to characterize the failure of the condition precedent as being the fault of Ms. Walsh in their "Objections to Proposed Order Regarding

Motion to Compel Arbitration,” Petitioners arguments contained therein were not properly preserved for appellate review, as discussed above, and had no basis in the facts presented before the circuit court, as Petitioners “partner lenders” listed in the Regulation Z disclosure had declined to extend credit for any transaction.

A. The Court of Appeals correctly affirmed the findings of the circuit court that the Agreement Pending Financing/Regulation Z disclosure was integral to any purchase agreement as it contained terms essential to any contract for sale and any consumer credit transaction.

Assuming *arguendo* Petitioners had preserved for appellate review their argument that the Agreement Pending Financing/Regulation was “improper parol evidence,” this argument is without merit and has no basis in fact or law. As discussed at length in Ms. Walsh’s Brief to the Court of Appeals, Defendants are estopped from arguing that this document is parol evidence, because such disclosures are required by federal law and comprise essential terms to the formation of a contract.

Regulation Z “is issued by the Board of governors of the Federal Reserve System to implement the federal Truth in Lending Act, which is contained in title I of the Consumer Credit Protection Act, as amended.” 12.C.F.R. § 226.1(a). The regulation applies when (1) credit is offered or extended to consumers; (2) the offering or extension of credit is done regularly; (3) the credit is subject to a finance charge or is payable by a written agreement in more than four installments; and (4) the credit is for personal, family, or household purposes. 12 C.F.R. § 226.1(b). In a closed-end credit transaction, Regulation Z requires that the amount financed, an itemization of the amount financed, finance charges, the annual percentage rate, payment schedule, and the total of payments, among other terms, must be disclosed to the consumer. 12 C.F.R. § 226.18. Because the purchase of the recreational vehicle would be a closed-end consumer credit transaction and an installment sale contract, the terms found in the Agreement Pending Financing/Regulation

Z disclosure were required by Regulation Z as part of any contract for the sale of the vehicle, without which the transaction would have been illegal. That document, which is part of any prospective contract for an installment sale or consumer credit transaction, explicitly states that the entering of the written agreement is conditioned only upon the willingness of a third-party lender to finance the purchase. Thus, the Court of Appeals properly refused to disturb the findings of fact of the circuit court, which were based on significant evidence, and in fact the only evidence of record before it, in determining that the Agreement Pending Financing/Regulation Z Disclosure contained terms that were necessary to the formation of any agreement.

B. The Court of Appeals correctly affirmed the holding of the circuit court that the Agreement Pending Financing/Regulation Z created a condition precedent to the formation of a contract.

A condition precedent to formation is one that must occur for a contract to exist. See *Wahl v. Hutto*, 249 S.C. 500, 155 S.E.2d 1 (1967). In *Wahl*, the Supreme Court of South Carolina held that an executed bond for title was an agreement to make title in the future upon the performance of certain conditions, that it did not constitute a sale, and there was no binding contract for sale when the condition precedent of securing adequate financing was an express condition of purchase. A plain reading of the Agreement Pending Financing/Regulation Z Disclosure indicates that Ms. Walsh did not enter the written agreement if a third party-lender was not willing to finance what, at that time, was only a potential and contemplated purchase of a recreation vehicle. This document reads as follows: “By signing below, I acknowledge that I have entered into a written agreement to purchase a boat or recreational vehicle conditioned only upon the willingness of a third-party lender to finance the purchase on terms not less favorable than those set forth immediately below.” (Appx. 107). The phrase “immediately below” effectively incorporates by reference the Regulation Z disclosure, because the absence of such disclosure would be unlawful. The terms of

the Agreement Pending Financing/Regulation Z Disclosure made clear that the entire agreement, and thus, the formation of the contract, was conditioned upon securing financing from a third-party lender. This is further supported by language on page 2 of the purchase agreement which states that “seller shall retain the title(s) to the Vehicle(s) shown on Page 1 of this Agreement until the purchase price has been fully paid and **Buyer has executed all required documents of transfer**” (emphasis added). (Appx. 81, ¶ 1). Therefore, much like in *Wahl*, there was no transfer of title and there was no complete purchase agreement, for failure of the condition precedent to formation of securing financing. While Petitioners cherry-pick and emphasize certain language in the Agreement Pending Financing/Regulation Z Disclosure in their brief and Petition, the Court of Appeals properly affirmed the circuit court’s holding that there was no contract or agreement, based on a plain reading of this agreement.

Much like in their brief to the Court of Appeals, Petitioners cite *dicta* from other jurisdictions in support of their argument that the willingness of a third-party lender to extend credit to Ms. Walsh for her potential purchase was a condition precedent to performance and not a condition precedent to the formation of the contract. The holdings in the cases cited by Petitioners, in addition to being non-authoritative, are not persuasive or germane to the present case, as those cases involved arms-length business transactions between sophisticated parties, which did not trigger Regulation Z. Whereas, Petitioners in the present case were compelled under Regulation Z to provide the terms of credit under any installment sale agreement. Moreover, while they were not compelled by Regulation Z to state that the agreement was “pending¹,” in doing so, Petitioners verified that there was no contract until there was financing.

¹ The term Pending is defined as “Begun, but not yet completed; during; before the conclusion of; prior the completion of; unsettled; undetermined; in process of settlement or adjustment. *Pending*, Black’s Law Dictionary (4th Ed. 1968).

III. THE COURT OF APPEALS CORRECTLY AFFIRMED THE HOLDINGS AND FINDINGS OF FACT OF THE CIRCUIT COURT THAT THE PRESENT CASE SHOULD NOT BE COMPELLED TO ARBITRATION PURSUANT TO THE LAWS OF THIS STATE AND THE UNITED STATES.

Though the Petitioners did not preserve this issue for review, the Court of Appeals correctly affirmed the holding and findings of the circuit court that the Federal Arbitration Act does not apply such to compel her to arbitration because there was no contract between the parties and no agreement to arbitrate. Because there is no contract between the parties and the circuit court never made a finding that the Federal Arbitration Act applies to negotiations between Petitioners and Ms. Walsh, the arbitration clause found in the terms of the proposed contract is not an agreement to arbitrate enforceable by the Federal Arbitration Act.

While Petitioners argue that the authority cited by the Court of Appeals in support of its decision to affirm, *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008), actually supports reversal of the circuit court, that case is factually distinguishable from the present case. In that case, representatives of New Hope Missionary Baptist Church signed a contract with a Paragon Builders, without any conditions precedent to formation, to aid in the construction of a new church building. The church paid Paragon and the contract for Paragon's services contained an arbitration clause which provided that all disputes would be resolved by binding arbitration in accordance with the rules of the American Arbitration Association. *Id* at 624. The church filed a declaratory judgment action asking the court to determine the existence, validity, and enforceability of the contract, and among other things, argued that the contract was not valid because the representatives that signed the contract had no authority to bind the church.

Notably in that case, the Court of Appeals held that the trial court properly determined that the Federal Arbitration Act applied to the arbitration agreement in this matter. In the present case,

the circuit court made no such finding, and as this issue was never ruled upon by the circuit court, the Petitioners did not preserve for appellate review any argument concerning the application of the Federal Arbitration Act in the present case, as discussed above. Thus, the only law that clearly applies is the South Carolina Arbitration Act, which provides that “a written agreement to submit to any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.” S.C. Code Ann. § 15-48-10(a). The South Carolina Arbitration Act also states that if

“[on application of a party showing an agreement described in §15-48-10, and the opposing party’s refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found of the moving party, otherwise, the application shall be denied.”

S.C. Code Ann. § 15-48-20(a).

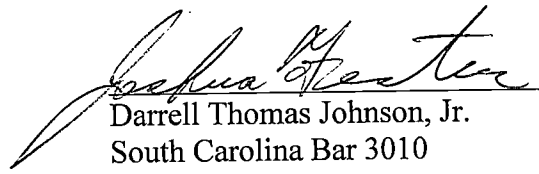
Moreover, this case is factually distinct from *New Hope Missionary Baptist Church* in that the terms of the proposed contract and the undisputed facts indicate that there was never a contract or agreement to arbitrate. The proposed contract for purchase, which was drafted by Petitioners, contained terms required by the federal Truth in Lending Act and created a condition precedent to formation of the contract that indisputably never occurred. Unlike in *New Hope Missionary Baptist Church*, where the church argued that the contract never existed or was invalid because the representatives of the church had no authority to bind the church, which were disputed factual questions regarding the validity of the contract, Ms. Walsh’s position is, and the only evidence of record before the circuit court supported that, a contract for purchase and agreement to arbitrate was never entered. Thus, the Court of Appeals correctly affirmed the decision of the circuit court, which in its authority and discretion to decide questions of law, including whether a contract

existed, and pursuant to the South Carolina Arbitration Act, found that there was no contract or agreement to arbitrate and appropriately declined to compel Ms. Walsh's claims to arbitration and burden her access to justice.

CONCLUSION

For the reasons stated above, the present case does not merit further review by this Court. Petitioners have failed to show that the decision of the Court of Appeals is inconsistent with the prior decisions of the South Carolina and United States Supreme Courts, as claimed in their Petition. Accordingly, this Court should deny the Petition for Writ of Certiorari.

Respectfully Submitted,



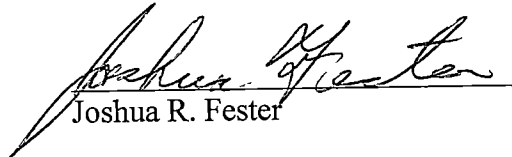
Darrell Thomas Johnson, Jr.
South Carolina Bar 3010
Joshua R. Fester
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Post Office Box 1125
Hardeeville, South Carolina 29927
(843) 784-2142
Tdjohnson1@hargray.com
Attorneys for Respondent

July 31, 2019

PROOF OF SERVICE

I hereby certify that I have this 31st day of July 2019, placed a copy of Respondent's Return to Petition for a Writ of Certiorari, in the US Mail, with sufficient postage attached, and addressed to the following:

M. Todd Carroll
WOMBLE BOND DICKINSON, LLP
1221 Main Street, Suite 1600
Columbia, South Carolina 29201


Joshua R. Fester

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**LAW OFFICES OF
DARRELL THOMAS JOHNSON, JR., LLC** S.C. SUPREME COURT
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** Also Licensed in Georgia

July 31, 2019

The Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

**RE: Annalee Walsh, Respondent v Boat-N-RV Megastore and Ridgeland
Recreational Vehicles, Inc., Defendants, of which Ridgeland Recreational
Vehicles, Inc., d/b/a Boat-N-RV Megastore is the Appellant
Appellant Case No.: 2019-001080**

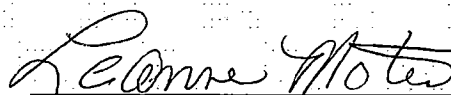
Ladies and Gentlemen:

Please find enclosed the original and seven (7) copies of Respondent's Return to Petition for Writ of Certiorari and Proof of Service. Please note that the original Proof of Service is within the original Return. Please stamp and return the extra copy in the return envelope provided. I am serving this on attorney for the Appellant/Petitioner, as evidenced by my Proof of Service.

Should you require anything further, please do not hesitate to contact this office.

With kind regards,

LAW OFFICE OF
DARRELL THOMAS JOHNSON, JR., LLC



Leanne Motes
Assistant to Joshua Fester

JRF/lmo
encs.

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