

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM JASPER COUNTY
Court of Common Pleas

The Honorable Maité Murphy
Circuit Court Judge

Appellate Case No. 2019-001080
Court of Appeals Opinion No. 2019-UP-103
Circuit Court Case No. 2016-CP-27-269

RECEIVED

AUG 12 2019

S.C. SUPREME COURT

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.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

WOMBLE BOND DICKINSON (US) LLP

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

Attorneys for Petitioner Boat-N-RV Megastore

Columbia, South Carolina
August 12, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT.....2

 I. The issue of arbitrability is preserved for appellate review, as it was squarely presented to and ruled upon by the circuit court and the Court of Appeals.....2

 II. Ms. Walsh provides no defense of the substance of the Court of Appeals’s ruling.....4

CONCLUSION8

TABLE OF AUTHORITIES

Cases

<i>Buckeye Check Cashing, Inc. v. Cardegna</i> , 546 U.S. 440 (2006).....	5
<i>Champion v. Whaley</i> , 280 S.C. 116, 311 S.E.2d 404 (Ct. App. 1984).....	6
<i>New Hope Missionary Baptist Church v. Paragon Builders</i> , 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008).....	1, 2, 6, 7
<i>Prima Paint Corp. v. Flood & Conklin Manufacturing Co.</i> , 388 U.S. 395 (1967).....	5
<i>Rent-A-Center, W., Inc. v. Jackson</i> , 561 U.S. 63 (2010).....	1, 5, 6
<i>S.C. Pub. Serv. Auth. v. Great W. Coal, Inc.</i> , 312 S.C. 559, 437 S.E.2d 22 (1993).....	5
<i>Wahl v. Hutto</i> , 249 S.C. 500, 155 S.E.2d 1 (1967).....	6
<i>Wilder Corp. v. Wilke</i> , 330 S.C. 71, 497 S.E.2d 731 (1998).....	3
<i>Zabinski v. Bright Acres Assocs.</i> , 346 S.C. 580, 553 S.E.2d 110 (2001).....	4

Rules

Rule 242(b)(3), SCACR	8
Rule 242(b)(5), SCACR	8

INTRODUCTION

The Court should not be misled by Ms. Walsh's repeated attempts to distract the Court regarding the sole issue in this appeal: whether the parties' dispute must be compelled to arbitration. She spends page, after page, after page opposing certiorari review by arguing about the ins-and-outs of the Regulation Z disclosure form that Boat-N-RV provided to Ms. Walsh when she entered into the parties' Sales Contract.

But that simply does not matter to the analysis that controls here. The law is straightforward: When the parties have agreed to an arbitration agreement—which is indisputable here, as the Sales Contract contains an arbitration agreement (Appx. 81; Sales Contract at 2, ¶ 10), and Ms. Walsh specifically concedes in the complaint that she signed the Sales Contract (Appx. 74; Compl. ¶ 7)—a challenge to the validity of the contract as a whole in which the arbitration agreement is contained is not relevant. *See, e.g., Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010) (“[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.”).

Even authority cited in the Court of Appeals’s decision confirms this basic proposition of law. *See New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 631, 667 S.E.2d 1, 6 (Ct. App. 2008) (“[P]recedent 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.”).

The lower courts’ rulings are squarely contrary to this well-established authority that has been reiterated time and again by this Court and by the United States Supreme Court. Nothing in Ms. Walsh’s opposition brief rehabilitates or insulates those incorrect rulings, as discussed below.

ARGUMENT

I. The issue of arbitrability is preserved for appellate review, as it was squarely presented to and ruled upon by the circuit court and the Court of Appeals.

Boat-N-RV's certiorari request asks this Court to review the arbitrability of this case. That is the issue that Boat-N-RV presented to the circuit court: "Defendant respectfully moves the Court for an order dismissing or staying this case and compelling this matter to arbitration." (Appx. 78; Boat-N-RV's Motion to Dismiss or Compel Arbitration at 1.) The circuit court denied that motion: "Because the condition precedent to the formation of the contract was not met or excused, the arbitration clause contained in the 'purchase agreement' is not enforceable because the parties never formed a contract for the purchase of an RV." (Appx. 72; Order Denying Defendants' Motion to Compel Arbitration at 3.)

It is also the issue that Boat-N-RV presented to the Court of Appeals: "Did the circuit court err when it refused to enforce the parties' arbitration agreement?" (Appx. 22; Boat-N-RV's Opening Appellate Br. at 1 ("Statement of Issues").) The Court of Appeals reiterated that this was the issue before it when affirming the circuit court's denial: "As to Boat-N-RV's argument that the circuit court erred by denying its motion to compel arbitration: [citing two cases, including *New Hope Missionary Baptist Church*]." (Appx. 2; Court of Appeals Order ¶ 1.)

Despite that issue being the centerpiece of every stage of this litigation, Ms. Walsh argues that the arbitrability of this dispute is not preserved for appellate review. (Opp'n Br. at 7–10.) She first frames it as a question about the admissibility of the Regulation Z disclosure, and then reframes it as a question about the applicability of the Federal Arbitration Act, but her overall point is that this Court should turn a blind eye to the unmistakable error below on grounds of preservation. Ms. Walsh is incorrect.

As should be evident from the case's history recited above, Boat-N-RV specifically raised the issue of arbitrability and received a ruling on that issue at every stage of litigation. That is all that the Court's preservation jurisprudence requires. *See, e.g., Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733–34 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”).

Likewise, the Court of Appeals recognized that the question of arbitrability was preserved for review because it affirmatively ruled on the issue, albeit in summary fashion, and albeit incorrectly as a matter of law. (Appx. 2; Court of Appeals Order ¶ 1.)

There is simply no merit to Ms. Walsh's preservation argument. Moreover, the specific sub-issues that she raises—the Regulation Z disclosure, and the applicability of the Federal Arbitration Act—are strawman arguments.

Regarding the Regulation Z disclosure, Boat-N-RV explained on Pages 10 and 11 of its certiorari petition how it preserved its objection to consideration of anything outside of the four corners of the parties' Sales Contract. To summarize: Boat-N-RV objected to consideration of anything beyond the parties' Sales Contract, but the circuit court did so anyway. Because the circuit court based its ruling exclusively on an extracontractual document, it rejected Boat-N-RV's objection, and thus preserved this sub-issue for review.

Similarly, Ms. Walsh's argument regarding the Federal Arbitration Act is puzzling. Other than her rote argument that no arbitration laws can govern here at all because the parties did not finalize the Sales Contract as a whole, no one has ever disputed the applicability of the Federal Arbitration Act, and with good reason.

As recited in the complaint, this case involves a dispute between a New Jersey resident and a South Carolina corporation regarding the purchase of a recreational vehicle. (Appx. 73; Compl. ¶¶ 1–3.) This is a quintessential example of interstate commerce needed to trigger the Federal Arbitration Act. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 594–96, 553 S.E.2d 110, 117–18 (2001) (examining the parties’ contract and the allegations of the complaint to determine whether the transaction involved “interstate commerce as contemplated by the FAA”). The arbitration agreement itself even confirms that the parties’ transaction involves interstate commerce and is governed by the Federal Arbitration Act. (Appx. 81; Sales Contract at 2, ¶ 10.) Because the applicability of the Federal Arbitration Act has never been genuinely contested, there was nothing for Boat-N-RV to do to preserve the point as this case advanced from the circuit court through the appellate process; it is an undisputed and indisputable point of law.

Ultimately, Ms. Walsh’s preservation argument is designed to redirect focus away from the lower courts’ rulings that go against an unbroken, half-century line of controlling cases from this Court and the United States Supreme Court. The Court should not be misled. The question of arbitrability has been preserved for appellate review, as the Court of Appeals itself acknowledged, and the Court should reject Ms. Walsh’s argument to the contrary.

II. Ms. Walsh provides no defense of the substance of the Court of Appeals’s ruling.

Following her preservation argument, Ms. Walsh devotes the remainder of her return brief to arguing her view of the facts surrounding the parties’ transaction. (Opp’n Br. at 1–5, 11–17.) She first admits that she visited Boat-N-RV’s store and “entered negotiations with agents or employees of [Boat-N-RV] for the purchase of a recreational vehicle and on that date also signed a document referred to as a ‘purchase agreement.’” (*Id.* at 2.) She then admits that the parties began performing their respective obligations under that agreement. (*Id.* at 3.) Despite these admissions,

Ms. Walsh argues that the parties never truly entered into their Sales Contract because the Regulation Z disclosure form created a “condition precedent to formation” of the Sales Contract. (*Id.* at 11–17.)

Missing from her argument is any explanation as to how that makes a difference here. Indeed, it does not.

Ms. Walsh has never argued, and no court has ever held, that the Regulation Z form actually impacts the parties’ arbitration agreement itself. Instead, Ms. Walsh argued (Appx. 105), the circuit court held (Appx. 71–72), and the Court of Appeals affirmed (Appx. 2) that the Regulation Z form rendered the Sales Contract unenforceable as a whole.

But as a matter of law, Ms. Walsh’s attack on the Sales Contract as a whole cannot exempt this case from arbitration. *See, e.g., Rent-A-Center*, 561 U.S. at 70 (“[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.”); *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 analysis of *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), 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).

Likewise, the enforceability of the parties’ Sales Contract as a whole is not even a question that a court can address; instead, it is committed exclusively to the arbitrator. *See, e.g., Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (“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.”).

This is particularly so where, as here, the arbitration agreement delegates “gateway” issues to the arbitrator. *See, e.g., Rent-A-Center*, 561 U.S. 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.”).

In short, Ms. Walsh’s argument and the lower courts’ acceptance of it are directly at odds with controlling authority that has been settled for over fifty years. Tellingly, Ms. Walsh does not even attempt to defend, justify, or explain the lower courts’ rulings on this dispositive point.

Instead, she again misdirects by:

- Listing the regulatory details underlying the Regulation Z disclosure form. (Opp’n Br. at 12–13.) Notably, she does not provide any authority or support for her conclusion that the form is actually a part of the parties’ Sales Contract, because there is no such authority.
- Citing *Wahl v. Hutto*, 249 S.C. 500, 155 S.E.2d 1 (1967), as support for her argument that the Sales Contract as a whole contained an unsatisfied condition precedent to formation. (Opp’n Br. at 13.) That case has no applicability here, though, because both the buyer and seller in *Wahl* affirmatively testified that they had purposefully conditioned the existence of their contract on future events. 249 S.C. at 504, 155 S.E.2d at 3.¹ That is certainly not the case here, where there is no such testimony, and where both parties had started performing under the Sales Contract. And, in any event, this argument does not impact the parties’ arbitration agreement specifically, making it irrelevant to the controlling analysis.
- Futility attempting to distinguish *New Hope Missionary Baptist Church* from the facts of this case. (Opp’n Br. at 15–16.)

This final point deserves additional discussion because it shines a bright spotlight on the lower courts’ error.

¹ In fact, recognizing *Wahl*’s peculiar facts, South Carolina’s courts have been quick to disregard it when holding that a financing condition is a condition of contract performance, not formation. *See, e.g., Champion v. Whaley*, 280 S.C. 116, 122–23, 311 S.E.2d 404, 407–08 (Ct. App. 1984) (rejecting an argument based on *Wahl* because of its unique facts and holding instead that one party’s “duty of performance was qualified by the condition that she obtain a 100% FmHA loan, [but] **the existence and validity of the contract did not depend upon the happening of the condition**”) (emphasis added).

In *New Hope Missionary Baptist Church*, the Court of Appeals required arbitration in a dispute regarding the return of a deposit (just like in this case), where the plaintiff alleged it never entered into the contract that required the deposit (also just like in this case) and contained the arbitration agreement (also just like in this case). 379 S.C. at 624–25, 667 S.E.2d at 3–4. There, the plaintiff, just as Ms. Walsh does here, argued as follows:

In its complaint, at the hearing, and in its brief to this court, the Church does not specifically allege the arbitration clause in the Contract is invalid, unenforceable, or does not exist. Instead, the 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 the plaintiff’s objection to arbitration because the objection went to the contract as a whole, just as Ms. Walsh’s does here:

Pursuant to *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), and *The Housing Authority of City of Columbia v. Cornerstone Housing, LLC*, 356 S.C. 328, 588 S.E.2d 617 (Ct. App. 2003), we find the trial court erred in denying Paragon Builders’ Motion to Compel Arbitration since the Church failed to specifically challenge the arbitration agreement.

Id. at 626, 667 S.E.2d at 3.

The Court of Appeals cited *New Hope Missionary Baptist Church* in its ruling here (Appx. 2), but it reached the opposite outcome than that which is required by that case, *Prima Paint*, and the dozen-plus other controlling cases that are cited on Pages 8 and 9 of Boat-N-RV’s certiorari petition. Its decision is clearly in error and contrary to long-established law, which Ms. Walsh essentially concedes with her silence on this dispositive point. Accordingly, that decision should be reversed, and the parties’ uncontested arbitration agreement should be enforced.

CONCLUSION

Rule 242(b)(3), SCACR, provides that certiorari review is proper “[w]here the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.” This is indisputably the case here, as the lower courts’ rulings are inconsistent with at least five decisions of this Court that are listed on Page 9 of Boat-N-RV’s certiorari petition. They are also inconsistent with several decisions from the Court of Appeals itself, which are also listed on that same page of the petition.

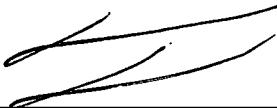
Rule 242(b)(5), SCACR, provides that certiorari review is proper “[w]here a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.” This is also indisputably true here, as the lower courts’ rulings are inconsistent with at least six decisions from the United States Supreme Court that are listed on Page 8 of the certiorari petition.

Because this case fits squarely within the categories of matters deserving of certiorari review, Boat-N-RV respectfully requests that the Court grant this petition, review and reverse the Court of Appeals’s decision, and compel this matter to arbitration.

Respectfully submitted,

WOMBLE BOND DICKINSON (US) LLP

RECEIVED
AUG 12 2019
S.C. SUPREME COURT

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

Attorneys for Petitioner Boat-N-RV Megastore

Columbia, South Carolina
August 12, 2019

PROOF OF SERVICE

I, the undersigned Legal Assistant of the law offices of Womble Bond Dickinson (US) LLP, Attorneys for Petitioner, 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: Reply in Support of Petition for a Writ of Certiorari

Parties Served:

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

Attorneys for Respondent



Edwin T. Mathis

August 12, 2019