THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM JASPER COUNTY
Court of Common Pleas

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.

BRIEF OF RESPONDENT

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November 19, 2019

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STATEMENT OF THE CASE

This appeal comes after the South Carolina Court of Appeals affirmed the findings and conclusions of the trial court in denying Petitioners' 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 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 (FAA), 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. As discussed above, these terms 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).

ARGUMENTS

I. 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 *de novo*, 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, 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, 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.[1]

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.

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

[1] In their brief, Petitioners state that Ms. Walsh refused to provide information necessary to secure financing. However, this has no basis in fact and is contrary to the facts of record in this case. In support of this baseless statement, Petitioners refer to attachments to an email sent to the circuit court judge's chambers, after the circuit court had requested that Ms. Walsh submit a proposed order. Any argument derived from those emails that were not addressed in the Court's order were not properly preserved for appellate review, as Petitioner failed to move for reconsideration pursuant to SCRCP Rule 59(e), and the email attachments that Petitioners purport to be from partner lenders could only be characterized as hearsay.

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 substantial 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 Disclosure 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 that there was no contract or agreement, based on a plain reading of this agreement. Moreover, while they were not compelled by Regulation Z to state that the agreement was "pending[2]," in doing so, Petitioners verified that there was no contract until there was financing.

[2] 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).

II. 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.

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.

A. In failing to move the circuit court to amend or set aside judgment pursuant to Rule 59(e), Petitioners failed to preserve issues and arguments for appeal, not ruled upon or addressed by the circuit court in its Order.

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.*

While not addressed directly by the Court of Appeals in its summary Order, Petitioners failed to preserve 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.

B. The Court of Appeals properly held that the circuit court did not err in denying Petitioners' Motion to Compel Arbitration

In support of its decision to affirm the decision of the circuit court, the Court of Appeals cited *New Hope Missionary Baptist Church v. Paragon Builders,* 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008). While Petitioners have argued that this case actually supports reversal of the circuit

court, that case and others cited by Petitioners in their Brief, are factually distinguishable from the present case. In *New Hope Missionary Baptist Church*, representatives of the 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, due to fraud in the inducement and 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 as follows:

> 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 indisputable 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 representatives of the church had no authority to bind the church and that there was fraud in the inducement, 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.

In support of their argument, Petitioners also cite *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), which involved a federal court action seeking to rescind an agreement between the parties on the basis that the agreement itself was procured by fraud, similar to arguments made by the church in *New Hope Missionary Baptist Church*. Contrary to the assertions of Petitioners, Ms. Walsh did not make that argument, and the courts below did not hold that there was an independent challenge to the contract as a whole; rather, the very terms of the proposed agreement between the parties expressly provided that there was no agreement for purchase or agreement to arbitrate. 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 or agreement to arbitrate 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.

Additionally, the United States Supreme Court and multiple state and federal courts have wrestled with the problem of whether gateway issues of arbitrability should be submitted to an arbitrator when there is a question as to the *existence* of a contract, as opposed to a challenge to its *validity*. The U.S. Supreme Court considered whether a court or an arbitrator should consider the claim that a contract containing an arbitration provision is void for illegality in *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440 (2006). In *Buckeye,* the U.S. Supreme Court reiterated that challenges to the validity of arbitration agreements are typically divided into two types: "[o]ne type challenges specifically the validity of the agreement to arbitrate . . . [and] [t]he other challenges the contract as a whole, either on a ground that directly affects the entire agreement (e.g., the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid." *Buckeye Check Cashing*, 546 U.S. at 444. However, Justice Scalia, writing for the majority, recognized a third category of issues as well, that of the existence – as opposed to the validity – of the contract, stating as follows:

> The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and oblige was ever concluded. Our opinion today addresses only the former, and does not speak to the issue decided in the cases cited by respondents (and by the Florida Supreme Court), which hold that it is for courts to decide whether the alleged obligor ever signed the contract, whether the signor lacked authority to commit the alleged principal, and whether the signor lacked the mental capacity to assent.

Buckeye Check Cashing, 546 U.S. at 444, n.1 (internal citations omitted).

While the U.S. Supreme Court did not reach a conclusion on the issue, the Ninth Circuit Court of Appeals considered a challenge to the existence of a contract containing an arbitration clause and concluded that the challenge was a matter for the court to consider, distinguishing *Buckeye*. *Sanford v. Memberworks*, Inc., 483 F.3d 956 (9th Cir. 2007). In *Sanford*, the plaintiff argued that she never agreed to a "membership agreement containing an arbitration clause, and thus, a basic

requirement for formation of a contract had not been met. In light of *Buckeye*, the Ninth Circuit stated "[i]ssues regarding the validity or enforcement of a putative contract mandating arbitration should be referred to an arbitrator, but challenges to the *existence* of a contract as a whole must be determined by the court prior to ordering arbitration." *Sanford*, 483 F3d at 962. Thus, because the plaintiff challenged the existence of the contract, the Ninth Circuit concluded that the district court was required to rule on the contract formation issue prior to compelling arbitration. In a case eerily similar to the one at bar, the Supreme Court of Montana held that where a contract containing an arbitration clause is challenged on the basis of the failure of a condition precedent to contract formation, the appropriate adjudicator is the court, not an arbitrator. *Thompson v. Lithia Chrysler*, 343 Mont. 392, 185 P.3d 332 (Mont. 2008). In *Thompson*, the Plaintiffs signed a retail installment contract with Lithia that contained an arbitration clause, which provided that the contract was not bin ding "until approval of the terms hereof is given by a bank or finance company willing to purchase a retail installment contract between the parties hereto based on such terms." *Id* at 394-395. Much like the present case, no third-party financing was secured on the terms agreed upon in the proposed sales contract. The Supreme Court of Montana, citing *Buckeye* and *Sanford*, and recognizing a narrow exception to *Buckeye*, decided that when a party challenges a contract containing an arbitration clause on the ground that the parties never entered a contract due to the failure of a condition precedent to formation, "then the parties never agreed to arbitrate and it would be inappropriate to submit the matter to arbitration," *Id* at 401. Thus, the decision of the circuit court and the holding of the Court of Appeals are not in conflict with the FAA, or precedent regarding the application of the FAA.

C. As an additional sustaining ground, the arbitration clause found in the terms of the proposed sales contract between the parties should not be enforced by this Court because the arbitration clause is unconscionable.

Though she did not, assuming *arguendo* that Ms. Walsh had entered an agreement with Petitioners, the arbitration clause provided in the proposed agreement is unconscionable and should not be enforced, as it intentionally and impermissibly hampers Ms. Walsh's access to justice and was made on terms that were fundamentally unfair to Ms. Walsh.

In South Carolina, "unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24-25, 644 S.E.2d 663, 668 (2007). Whether one party lacks a meaningful choice in entering the arbitration agreement at issue typically speaks to the fundamental fairness of the bargaining process. *Gladden v. Boykin*, 402 S.C. 140, 148, 739 S.E.2d 882, 886 (2013) (quoting *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669). While adhesion contracts, often described as standard form contracts offered on a take-it-or-leave-it basis with terms that are not negotiable, are not unconscionable per se, courts tend to look upon them with "considerable skepticism" because they give rise to "considerable doubt that any that any true agreement existed to submit disputes to arbitration." *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016) (quoting *Simpson*, 373 S.C. at 26-27, 644 S.E.2d at 669-70) (citing *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001)). In *Smith v. D.R. Horton, Inc.*, this Court recognized that a modern buyer of residential housing is normally in an unequal bargaining position as against the seller, and found in that case that the buyers lacked a meaningful choice in their ability to negotiate the arbitration clause in the agreement, and that

the terms of the agreement were "clearly one-sided and oppressive." *Smith v. D.R. Horton, Inc.*, 417 S.C. at 50, 790 S.E.2d at 4-5.

The document referred to as the "purchase agreement" by Petitioners provides on the first page as follows:

> If You cancel this Purchase Agreement or otherwise refuse to take delivery of the Vehicle identified below, unless otherwise prohibited by law, you agree that you shall tender liquidated damages in the amount of $11,250.00 or adhere to the decision of the tribunal identified on Page 2 of this Agreement.

Appx. 88.

The terms on the second page provide as follows:

> 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 though (sic) binding arbitration, with the seat of such arbitration to be located in Knox County, Tennessee, to the exclusion of all other locales.

Appx. 89.

It is clear from the record, including Petitioners' citing of similar arbitration clauses in memoranda from other cases in which it has been involved (appx. 82 – 103), that the arbitration clause found in the "purchase agreement" is a standard form offered on a take-it-or-leave-it basis, and that Ms. Walsh had no meaningful ability to negotiate. It is also very clearly one-sided and oppressive. Though she did not "cancel" an agreement or "otherwise refuse to take delivery" of the vehicle, as third-party financing could not be secured, Petitioners would argue that Ms. Walsh should tender $11,250.00, which they have kept throughout the pendency of this litigation. Petitioners have, at every stage of appeal from the circuit court's order, made the point of stating that the only Petitioner is Ridgeland Recreational Vehicles, LLC, which is an entity organized and existing under the laws of, and doing business in, the State of South Carolina, with its main place of business in Ridgeland, South Carolina. In the alternative to tendering the $11,250.00,

Petitioners would have this Court compel Ms. Walsh to arbitration in Knoxville, Tennessee, across two state lines, more than 500 miles away from Ridgeland, South Carolina, where all negotiations took place and where the witnesses to those negotiations would likely be. Essentially, Petitioners are asking this Court to award them $11,250.00 or compel Ms. Walsh to a forum hundreds of miles away from Petitioners' place of business and Ms. Walsh's home, for the simple task of shopping Ms. Walsh's credit, something any reputable vehicle dealer would do. The only conceivable purpose for compelling arbitration in Knoxville, Tennessee is to burden potential buyers' access to justice, and the arbitration clause, together with the liquidated damages clause, is so oppressive and one-sided, that it is unconscionable, and should not be enforced by this Court.

CONCLUSION

For the reasons stated above, the Respondent would respectfully submit that the holdings of the Court of Appeals and findings of the circuit court, should be AFFRIMED.

Respectfully Submitted,

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November 19, 2019

PROOF OF SERVICE

I hereby certify that I have this 19th day of November 2019, placed a copy of Brief of Respondent, in the US Mail, with sufficient postage attached, and addressed to the following:

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