THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

Case No. 2017-CP-23-03402
Appellate Case No. 2017-002259

Casey Masters . . . . . Respondent,

v.

KOL, Inc. d/b/a Kia of Greenville . . . . . Appellant.

APPELLANT'S FINAL BRIEF

Bradford N. Martin, Esq. (SC Bar No. 3658)
Laura W. H. Teer, Esq. (SC Bar No. 16698)
Bradford Neal Martin & Associates, PA
Post Office Box 10410
Greenville, South Carolina 29603
(864) 552-9990

Attorneys for Appellant KOL, Inc.

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STATEMENT OF ISSUE ON APPEAL

I. **DID THE LOWER COURT ERR IN FAILING TO ENFORCE THE ARBITRATION AGREEMENT BY FINDING THE EXECUTION OF CONTRACTS SUBSEQUENT TO THE APRIL 10TH TRANSACTION RENDERED THE ORIGINAL CONTRACT AND ITS ARBITRATION AGREEMENT, MOOT AND UNENFORCEABLE?**

STATEMENT OF THE CASE

Respondent filed her Complaint in Spartanburg County on May 25, 2017 alleging causes of action arising out of an April 2017 contract to purchase a car. The Purchase Order contained a heading that the Agreement was subject to binding arbitration pursuant to the Federal Arbitration Act. The Respondent also signed a separate Arbitration Agreement that provided any disputes, including any resulting transactions, would be arbitrated pursuant to the FAA. There was a resulting transaction involving the sale of the car on June 2, 2017, which included the same arbitration heading and Arbitration Agreement.

Appellant filed a Motion to Stay and to Compel Arbitration on July 26, 2017. The Motion was heard by the lower court on August 23, 2107 and denied on October 12, 2017. The lower court found that the execution of subsequent contracts to the original April 2017 contract rendered the original Arbitration Agreement moot and unenforceable.

Appellant filed a Motion to Alter or Amend on October 17, 2017. This Motion was denied by an Order dated October 25, 2017. Notice of Appeal was served on October 26, 2017.

STATEMENT OF THE FACTS

Every day in America thousands of people enter into agreements to buy cars. If they cannot pay cash, they can enter into a conditional agreement and take the car home subject to approval of financing. Respondent did just that and drove a brand new 2017 Kia Forte home on April 10, 2017, on condition of approval of her financing. (R. 32)

The conditional Purchase Order stated in bold, underlined, capitalized letters at the top of the page that it was subject to arbitration:

> NOTICE: THIS AGREEMENT IS SUBJECT TO BINDING ARBITRATION PURSUANT TO THE FEDERAL ARBITRATION ACT ("FAA") 9 U.S.C. § 1, ET SEQ. . . .

(R. 42) This same text informed her that the arbitration would be governed by the Respondent's Policies and Procedures. (R. 42)

Respondent also signed a stand-alone Arbitration Agreement (R. 21) which modified any prior documents to more fully describe the arbitration agreement between the parties. See *U.S. Bank Trustee Nat'l Ass'n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 204 (Ct. App. 2009) (stating a contract can be modified by another contract that includes a meeting of the minds on essential terms).

The Arbitration Agreement stated, in pertinent part:

> PLEASE REVIEW – IMPORTANT- AFFECTS YOUR LEGAL RIGHTS
> 1. BOTH THE DEALER AND CUSTOMER(S) SHALL HAVE THE RIGHT TO HAVE ANY DISPUTE BETWEEN THEM DECIDED IN ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.
> . . .
>
> Any claim . . . dispute or controversy between Dealer and Customer . . . which arise out of or relate to Customer's . . . purchase . . . or any resulting transaction . . . shall be resolved by . . . binding arbitration. (emphasis added)
> . . .
>
> The Agreement evidences a "transaction involving commerce" under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16 and shall be governed by the FAA.
>
> . . .
>
> This Agreement shall survive the termination of any and all of Customer's business with Dealer.

(R. 21)

Appellant allowed Masters to take conditional delivery of the car based on the income she claimed she made. The contingency was not met and the conditional sales contract could not be finalized. (R. 32, Affidavit of Richard Canova)

Appellant continued to work with the Respondent and was able to eventually find a lender for the car. (R. 33, Affidavit of Richard Canova) Respondent did not negate her intention

to arbitrate any disputes related to the April 10th transaction. In fact, when she signed a new Purchase Order for the same car (R.46) and the Arbitration Agreement (R. 35) on June 2nd (a resulting transaction), she agreed again that any disputes she had with Appellant were subject to arbitration.

Whether the lower court viewed this as a single continuing transaction or two separate transactions, the only evidence in the record was that the parties intended to arbitrate any disputes between them.

ARGUMENT

I. The Lower Court Erred in Failing to Enforce the Arbitration Agreement by Finding the Execution of Contracts Subsequent to the April 10th Transaction Rendered the Agreement to Arbitrate Moot and Unenforceable.

A. Standard of Review

The determination whether a claim is subject to arbitration is subject to de novo review. *See Gissel v. Hart,* 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *See Aiken v. World Fin. Corp. of South Carolina,* 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007).

B. The Lower Court Overlooked the Strong Presumption in Favor of the Validity Of Arbitration Agreements

Arbitration is a good thing for the consumer. Its value lies in its greater efficiency, speed, and cost-effectiveness and the ability to choose "expert adjudicators to resolve specialized disputes." *Stolt-Nielsen SA v. Animalfeeds Intern. Corp.*, 559 U.S. 662, 685 (2010). By agreeing to arbitrate, a party "trades the procedures and opportunity for review of the courtroom for the

simplicity, informality and expedition of arbitration." *Mitsubishi Motors v. Soler-Chrysler Plymouth, Inc.*, 473 U.S. 614, 628 (1957).

Due to the numerous benefits of arbitration, there is a strong presumption in favor of its validity and both federal and state laws favor them. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Carolina Care Plan, Inc. v. United Healthcare Servs., Inc.*, 361 S.C. 544, 606 S.E.2d 752 (2004). "The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 103, 739 S.E.2d 209, 213 (2013).

Unless a court can say with **positive assurance** that the clause is not susceptible to an interpretation that covers the dispute, arbitration is required. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001). Anyone challenging the enforceability of an arbitration agreement bears the burden of proving the provision is unenforceable. *Green Tree Fin. Corp. – Ala. v. Randolph*, 531 U.S. 79, 91 (2000).

The parties also contractually agreed that any dispute arising out of the purchase of the car would be subject to the Federal Arbitration Act. (R. 21) The sale of automobiles is considered commerce sufficient for the FAA to apply. *See Saturn Distribution Corp. v. Williams*, 905 F.2d 719 (4th Cir. 1990). The purpose of the Federal Arbitration Act "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and has been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). "[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer*, 500 U.S. at 26.

The FAA preempts any state law regarding arbitration. The "principal purpose" of the FAA is to "ensure[e] that private arbitration agreements are enforced according to their terms." *AT&T Mobility v. Concepcion*, 563 U.S. 333, 343, 131 S.Ct. 1740, 1748 (2011). To the extent any state law prohibits the agreement between the parties; it is preempted by the FAA. *Id.* Respectfully, the lower court overlooked the strong presumption in favor of arbitration in not enforcing it.

C. The Parties Agreed to Arbitrate any Disputes Arising between Them.

1. The April 10th Purchase Order[1]

The parties clearly agreed that any disputes between them would be decided by arbitration. "Where an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." *Park Regency, LLC v. R & D Dev. of the Carolinas, LLC*, 402 S.C. 401, 412–13, 741 S.E.2d 528, 534 (Ct. App. 2012); *accord Heins v. Heins*, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001) (stating the court must interpret contractual language in its natural and ordinary sense). Furthermore, a party who signed a contract is deemed to have read and understood "the effect" of the contract. *Munoz v. GreenTree Fin. Corp.* 343 S.C. 531, S.E.2d 360 (2001); *Wachovia Bank v. Blackburn*, 394 S.C. 579, 585, 716 S.E.2d 454, 458 (Ct. App. 2011).

The Purchase Order indicated the parties' unambiguous, mutual intent to arbitrate. The Purchase Order stated in bold, underlined text at the top of the page that the agreement was subject to binding arbitration pursuant to the FAA and the Appellant's arbitration policies and procedures. The South Carolina Court of Appeals has found the contractual language "'be[ing]

[1] To the extent the June 2nd Purchase Order and June 2nd Arbitration Agreement are relevant, they are identical to the documents signed by Respondent on April 10th, as to arbitration. (R. 21, 22, 46-48, 88-91)

subject to the Federal Arbitration Act' means, in light of FAA Section 2 and the ordinary meaning of 'subject to,' that all disputes within the scope of the provision must be arbitrated." *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 81, 749 S.E.2d 139, 146 (Ct. App. 2013). *See* 9 U.S.C. § 2 ("A written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable ....").

2. The April 10th Arbitration Agreement

The subsequently signed[2] stand-alone document entitled "Arbitration Agreement" stated, in capital letters:

> **PLEASE REVIEW – IMPORTANT- AFFECTS YOUR LEGAL RIGHTS**
>
> 1. BOTH THE DEALER AND CUSTOMER(S) SHALL HAVE THE RIGHT TO HAVE ANY DISPUTE BETWEEN THEM DECIDED IN ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.
>
> . . .
>
> Any claim . . . dispute or controversy between Dealership and Customer . . . which arise out of or relate to Customer's . . . purchase . . . **or any resulting transaction** . . . shall be resolved . . . by . . . binding arbitration. (emphasis added)
>
> The Agreement evidences a "transaction involving commerce" under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16 and shall be governed by the FAA.
>
> . . .
>
> This Agreement shall survive the termination of any and all of Customer's business with Dealer.

(R. 21)

The Arbitration Agreement was consistent with the Purchase Order and more fully stated the agreement between the parties. *See U.S. Bank Trust Nat'l Ass'n v. Bell,* 385 S.C. 364, 374, 684 S.E.2d 199, 204 (Ct. App. 2009) (stating a contract can be modified by another contract

[2] Respondent agreed in writing that the Arbitration Agreement was the last signed agreement between the parties. (R. 21)

that includes a meeting of the minds on essential terms).[3] Therefore, Respondent clearly agreed on April 10th that any resulting transaction regarding a car purchase would be subject to arbitration pursuant to the FAA.

D. The Parties Agreed that any Transactions Resulting from the April 10th Transaction would be Subject to Arbitration.

The courts view arbitration as "a matter of contract, and the range of issues that can be arbitrated is restricted by the terms of the agreement." *Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 492, 593 S.E.2d 480, 484 (Ct. App. 2004). The central or "primary" purpose of the FAA is to ensure that "private agreements to arbitrate are enforced according to their terms."[4]

The Arbitration Agreement signed on April 10, 2017 by Respondent stated in paragraph 4:

> Any claim ...dispute or controversy between Dealer and Customer ... which arise out of or relate to Customer's credit application, purchase, lease, financing ... or any resulting transaction or relationship . . . shall be resolved by neutral, binding arbitration.

(R. 21)

Therefore, the parties agreed that the execution of subsequent contracts resulting from the April 10th transaction would also be resolved by arbitration.

E. The Duty to Arbitrate Survived any Termination of the April 10th Transaction as a Matter of Law

Respondent agreed in writing that the Arbitration Agreement would survive any termination of other transactions between the parties:

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[3] The lower court did not find that the Arbitration Agreement was unconscionable. To determine whether a contract provision is unconscionable, a court must find both an "absence of meaningful choice on the part of one party due to the one-sided contract provisions" and "terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 395, 498 S.E.2d 898, 902 (Ct.App.1998).

[4] *Stolt-Neilsen, supra,* 559 US at 682, 305 Ct. at 1774 (2010) (citing *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57, 58, 115 S.Ct. 1212 (1995).

> This Agreement shall survive the termination of any and all of Customer's business with Dealer. (R. 21)

The South Carolina Supreme Court has previously upheld the "general rule that the duty to arbitrate under an arbitration clause in a contract survives termination of the contract." *Jackson Mills, Inc. v. BT Capital Corp.*, 312 S.C. 400, 403, 440 S.E.2d 877, 879 (1993).

The facts in *Jackson Mills* are analogous. Jackson Mills's (JM) 1983 Shareholder's Agreement (S/A) provided BTC the option to sell its outstanding shares to JM. The S/A was terminable "at any time by an instrument in writing signed by Shareholders holding 75% or more of the issued and outstanding common stock...." The S/A contained the following arbitration clause:

> Any controversy arising under, out of, in connection with, or relating to, this Agreement, and any amendment hereof, or the breach hereof, shall be determined and settled by arbitration in New York City.

In 1985, at the Annual Shareholder's meeting, 76.66% of the shareholders voted, orally, to terminate the S/A. The oral termination was not reduced to "an instrument in writing signed by the shareholders" as required by the S/A. In the summer of 1991, JM was notified by its accountants that the 1985 termination of the S/A needed to be in writing and signed. However, BTC refused to sign a termination agreement, claiming the 1983 S/A was still in effect. On October 9, 1991, BTC advised JM that it was exercising its option to sell its remaining 3,000 shares pursuant to the S/A.

JM filed a declaratory judgment action in circuit court seeking a ruling that the 1983 S/A had been terminated and was therefore null and void. BTC responded, moving to stay the action pending arbitration, as provided for in the S/A.

The South Carolina Supreme Court found that "arbitration clauses are separable from the contracts in which they are imbedded." *Jackson Mills, Inc.*, 312 S.C. at 403, 440 S.E.2d at 879

(citing *Prima Paint Corp. v. Flood & Conklin*, 388 U.S. 395 (1967)). The South Carolina Supreme Court had recently adopted the Prima Paint reasoning, holding that "a party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause." *South Carolina Public Service Authority v. Great Western Coal, Inc.*, 312 S.C. 559, 562-563, 437 S.E.2d 22, 24 (1993).

In the present case, there is no independent challenge to the Arbitration Agreement itself. The Supreme Court also held that its holding in *Great Western* accords with the general rule that the duty to arbitrate under an arbitration clause in a contract survives termination of the contract. *Id.*

Because JM did not allege termination of the arbitration clause itself, but of the entire S/A, the South Carolina Supreme Court found it was a controversy "arising under, in connection with and relating to" the termination provision of the S/A, therefore subject to arbitration. The South Carolina Supreme Court found that "under a broad arbitration clause, termination of the parties' substantive obligations under the contract involves conduct and matters subsequent to contracting which are to be determined by an arbitrator." *Id.*

Likewise, in the present case, any conduct subsequent to the April 10th transaction is a matter to be determined by an arbitrator. The Arbitration Agreement expressly stated it would survive any and all of Respondent's business with Appellant. The lower court's Order did not challenge the Arbitration Agreement itself in ruling it was moot and unenforceable. Therefore, the failure of the April 10th conditional Purchase Order to be completed did not render the Arbitration Agreement unenforceable.

F. The June 2nd Transaction was not before the Lower Court.

The lower court noted at the hearing that the Complaint dealt only with contracts signed prior to the filing of the Complaint. (R. 84, ll. 23-25). Respondent has not sued on the subsequent contracts, but only the original April 10th Purchase Order.[5] Therefore, Respondent's agreement to arbitrate any dispute or controversy arising out of the April 10th Purchase Order was the only issue before the lower court.[6]

It was error for the lower court to consider later contracts entered into by the parties[7] when there was no evidence in the record that the parties intended the later contracts to negate their previous agreement to arbitrate any disputes between them. In fact, the record shows that the parties intended for any "resulting transactions" to be subject to arbitration.

"The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the Court will consider and construe them together." *Cafe Assocs. v. Gerngross,* 305 S.C. 6, 10, 406 S.E.2d 162, 164 (1991). The April and June transactions were not executed at the same time. The April and June documents constituted two transactions and contained different terms because a new financing source had to be located and new terms were approved by the new lender. Therefore the agreements would not be construed as the same agreement. See *Harris v. Ideal Solutions, Inc.*, 385 S.C. 74, 682 S.E.2d 523 (Ct. App. 2009).

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[5] Nevertheless, Respondent agreed on April 10, 2017 that "any resulting transaction" would also be arbitrated. (R. 21).

[6] Appellant raised the June 2nd transaction regarding the purchase of the car by the Respondent to show that she continued to agree to arbitrate any disputes that arose between the parties related to the car.

[7] The lower court mentions in its October 12, 2017 Order that Appellant alleged that Respondent entered into a "third contract" regarding the disputes between the parties. (R.1) There are no contracts in the record other than those dated April 10th and June 2nd. During the hearing, Appellant mentioned that Respondent had signed a Release on June 15th in which she released the Appellant of all liability related to the car. Because the Release is a defense to the merits of Respondent's causes of action and not related to the issue of arbitration, it was not before the lower court. Appellant did not claim that that the Release was related to the Arbitration Agreement, and in fact stated that the Release was unrelated to the issue of arbitration and not before the lower court. (R. 80, ll. 8-12)

G. The June 2nd Transaction did not Negate the April 10th Agreement to Arbitrate

To the extent the June 2nd transaction could be considered by the lower court, it did not evidence an intent to negate any earlier arbitration agreement. An arbitration agreement generally lives on even when the agreement containing it expires, such that disputes over a provision of that expired agreement remains arbitrable. *See Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union,* 430 U.S. 243 (1977). The presumption that such a dispute is arbitrable "must be negated expressly or by clear implication." *Id.*

There is no evidence in the record that the parties negated their agreement to arbitrate any disputes arises from the April 10th conditional Purchase Order. Neither the June 2nd Purchase Order nor the June 2nd Arbitration Agreement referenced the April 10th transaction. The parties agree in both documents to submit any disputes to arbitration, indicating an intent to uphold the prior agreement to arbitrate and not to negate any arbitration agreement.

H. Respondent Evidenced the Intent to Arbitrate in all Transactions

To the extent that the subsequent June 2nd transaction is found to have been properly before the lower court, Respondent evidenced the intent to arbitrate in all transactions she entered into. Even after filing her Complaint, she entered into another Arbitration Agreement.

The lower court's Order overlooks the fact that even if the June documents are viewed as a modification of the April transaction, they evidence the same intent by the parties to arbitrate disputes. See *U.S. Bank Trustee Nat'l Ass'n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 204 (Ct. App. 2009) (stating a contract can be modified by another contract that includes a meeting of the minds on essential terms). If viewed as a single transaction, the intention of the parties was clearly that any dispute between them be resolved by arbitration.

CONCLUSION

The lower court gave no support for its finding that the signing of multiple consistent Arbitration Agreements on separate occasions rendered the earlier Arbitration Agreement moot or unenforceable. The central or primary purpose of the FAA is to ensure that private agreements to arbitrate are enforced according to their terms. The lower court's ruling conflicts with established law and is not reasonably supported by the evidence in the record.

The April 10th sale of the car was not completed because financing could not be obtained. To the extent it was proper for the lower court to consider the June 2nd transaction, the sales terms in the June 2nd Purchase Order would replace any terms contained in the April 10th documents. The Arbitration Agreement, however, stands wholly on its own and is not rendered moot or unenforceable by the fact that the parties entered into a subsequent agreement. The lower court's ruling would mean that parties who engaged in a long course of dealing with one another would not be able to enforce agreements to arbitrate simply because they entered into later contracts with one another agreeing to arbitrate.

This Court should therefore, vacate the order of the lower court, and stay the case and compel arbitration.

Respectfully submitted,

Date Apr. 20, 2018

Bradford N. Martin, SC Bar No. 3658
Laura W. H. Teer, SC Bar No. 16698
BRADFORD NEAL MARTIN & ASSOCIATES, PA
201 West McBee Avenue, Suite 302
Post Office Box 10410
Greenville, SC 29603
864.552.9990
ATTORNEYS FOR APPELLANT KOL, INC. D/B/A KIA OF GREENVILLE

ATTORNEY CERTIFICATION

The undersigned, attorney for Appellant, hereby certifies that this Final Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Date April 20, 2018

Laura W. H. Teer, SC Bar No. 16698
BRADFORD NEAL MARTIN & ASSOCIATES, PA
201 West McBee Avenue, Suite 302
Post Office Box 10410
Greenville, SC 29603
864.552.9990
ATTORNEYS FOR APPELLANT KOL, INC. D/B/A KIA OF GREENVILLE