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 REPLY BRIEF

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TABLE OF CONTENTS

Table of Authorities

Cases

STATEMENT OF THE CASE
REPLYING TO RESPONDENT'S COUNTERSTATEMENT

Respondent's Counter Statement of the Case contains contested matters and matters not in the Record. There is no evidence in the Record regarding a request to Appellant's counsel to accept service of the Complaint. Also, the Respondent did not file her Affidavit until August 23, 2017, the morning of the hearing. Rule 6(d), SCRCP requires that opposing affidavits be served not later than two days before the hearing. Appellant had no chance to respond to the Affidavit and Appellant's counsel objected at the hearing to its introduction. (R.66) Finally, the lower court's Order does not address the issue of duress and does not indicate that it considered the Respondent's Affidavit. It would therefore be unjust for the Court to rely on the Respondent's Affidavit.

STATEMENT OF THE FACTS REPLYING TO RESPONDENT'S COUNTERSTATEMENT

Respondent's Counter Statement of Facts is rife with information not relevant to the issues on appeal and not presented to the lower court. Due to the tone and magnitude of the misstatements, Appellant is compelled to correct them.

The April 10, 2017 Purchase Order reflects an arms-length transaction between the parties. Respondent was not "required" to trade in her 2002 Chevrolet Cavalier. She asked to trade in the Cavalier in order to lower the price of the 2017 Forte she wanted to purchase. (R.89) Neither was the Respondent "required" to finance any portion of the purchase price. Finally, Respondent references a retail installment contract containing financing terms; however, this document was not in the Record before the lower court.

Appellant did not make misrepresentations to Crescent Bank or falsely tell Respondent that repairs were needed to her vehicle subject to a recall. None of these claims are in the

Record. Also Respondent's Affidavit was served on the day of the hearing, which was untimely under SCRCP 6(d). There is no evidence in the Record to support this assertion; instead, the only evidence before the lower court was that Respondent's purchase was contingent upon financing, and the contingency was not met. (R.32)[1]. When the conditional financing for the Forte fell through, Appellant continued to work to locate alternative financing (R.33) and provided Respondent with a loaner car. (R.92). There is also no evidence in the Record about a recall or that Appellant took Respondent's copies of the documents from her on June 2nd.

There is nothing in the Record that "one week later" (April 17th) Respondent returned to the Dealer's Service Department for regularly scheduled maintenance, let alone that Appellant "took possession of the vehicle for service but refused to return it" or allow her to retrieve her personal belongings. There is nothing in the Record to support the claim that on April 17th the Appellant refused to return the down payment or the trade in. None of these allegations are true.

In fact, Respondent's Affidavit (which was untimely filed) stated that on June 2nd, the down payment was not available that day, but was available the "following few days," (R.93). Respondent also admitted that on June 3rd she was told that her "down payment was ready" (R. 93) The financing terms are not in the Record for either the April 10th or June 2nd transactions.

The Affidavit stated nothing about her refusal to sign any documents or being harassed. Respondent willingly agreed to accept the car with a reduced sale price by $5,593. She is driving the car to this day.

The only evidence in the Record before the lower court reflects that Respondent: 1) had adequate time to review the Arbitration Agreement; (2) showed no signs of being incapable of understanding the documents; (3) would have had her questions answered; (4) never stated she

[1] The loan was not approved when the bank discovered Respondent's sworn income was reduced by court ordered child support payments.

was under a doctor's care or unable to understand the transaction or the documents on April 10th or June 2nd; and (5) was not pressured to sign any of the paperwork. (R. 32)

Respondent filed her Complaint on May 25th. (R. 6) Her late filed Affidavit stated that she was contacted after the Complaint was **filed** to come back into the dealership. (R. 92) She does not say, as alleged in the Counter Statement of Facts, that she was contacted after Appellant was **served** with the Complaint. The Record contains no evidence regarding a courtesy copy of the Complaint being provided to Appellant's counsel.

Respondent was not pressured to sign documents on April 10th nor June 2nd, and was free to decide not to purchase the new Forte. (R.33) Respondent did not sign additional purchase documents on June 15th (only a release) and no such documents appear in the Record.

There is no evidence in the Record that Appellant signed a purchase order, retail installment contract, or arbitration agreement on June 15th. Respondent's Affidavit makes clear that she does not recall what she signed. (R.92)

Finally, there is no evidence in the Record regarding communications between Respondent's counsel and Appellant's counsel after June 15th. In conclusion, Respondent's Counter Statement of the Facts is filled with impermissible references to facts that were never before the lower court that are highly prejudicial to Appellant.

ARGUMENTS

I. Standard of Review

Respondent's Brief is most unusual in that it does not address the Court's Order but instead attempts to assert new matter. It is full of factual assertions that are not supported in the Record. Although Rule 220(c) SCACR allows this Court to affirm any order upon any grounds appearing in the Record, the basis for additional sustaining grounds must appear in the Record. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419-420, 526 S.E.2d 716, 723 (2000); Rule

210(h), SCACR (limiting appellate review to facts appearing in the Record on Appeal). A further limitation is that an appellate court may not rely on Rule 220(c), SCACR, when the "court believes it would be unwise or unjust to do so in a particular case". *Id.*

II. Respondent is Attempting to Make Arguments not in the Record

Respondent is attempting to present new arguments to this Court that were not argued to the lower court and not included in the Record. Rule 210(h), SCACR prohibits the appellate courts to consider any facts not in the Record.

The Complaint in the present case does not contain a verification and, therefore, is not evidence. (R. 6) See *Bowers v. Bowers,* 304 S.C. 65, 403 S.E.2d 127 (Ct.App.1991) (allegations in an unverified counterclaim were not evidence). Arguments of counsel are also not evidence. *See McManus v. Bank of Greenwood*, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) ("This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered."); *Gilmore v. Ivey*, 290 S.C. 53, 348 S.E.2d 180 (Ct.App.1986) (the trial court properly disregarded the statements of counsel that he claimed reflected testimony appearing in depositions not otherwise entered into evidence).

III. The Law Strongly Favors Arbitration

There is a strong presumption in favor of the validity of arbitration agreements, because 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 Agreement states that it involves interstate commerce and it is subject to the Federal Arbitration Act ("FAA") (9 U.S.C. § 1 *et seq.*), which preempts state law. 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. To the extent any state law prohibits the agreement between the parties, it is preempted by the FAA. *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).

IV. The April 10th and June 2nd Documents do not Constitute a Single Transaction

Respondent does not claim that she signed the April 10th Arbitration Agreement under duress. If, as Respondent argues, the June 2, 2017 contract was part of a single transaction, then Respondent is admitting that the April 10th Arbitration Agreement would include any disputes arising from the June 2nd Purchase Order.

Respondent did not, however, argue to the lower court that the April 10th and June 2nd documents constituted a single transaction. In fact, she argued that a different car was involved in the two transactions, although there is no evidence in the Record to suggest it. (R. 74, l. 23- p. 16, l. 12) Therefore, the basis for this "additional sustaining ground" should not be considered. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000).

If the Court were to consider this issue, it should find that the Aril 10th and June 2nd documents constitute separate transactions. The second transaction was not properly before the lower court as it arose after the Complaint was filed and no amendment of the Complaint was made to include any allegations arising from that transaction.

"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) (emphasis added). Respondent does not dispute The April and June transactions were not executed at the same time.

In *Café Associates*, the parties executed an Asset Purchase Agreement on December 30, 1986 whereby respondent agreed to purchase a restaurant from the appellant. The Asset Purchase Agreement contained a non-competition clause. The transaction was completed on January 30, 1987, and the appellant executed a Covenant Not to Compete. The Covenant Not to Compete contained the same terms as the Asset Purchase Agreement, with the exception of a five-year time designation. The Court found the two agreements "are substantially the same, cover the same subject matter, and both were executed during the course of the same transaction by the same parties for the same purpose." *Id.*

This case is instead analogous to *Harris v. Ideal Solutions, Inc.*, 385 S.C. 74, 682 S.E.2d 523 (Ct. App. 2009) in which two agreements were signed and then the parties decided to remain partners before a third agreement was signed. This Court found that the agreements were not executed during the course of the same transaction for the same purpose because of the change in circumstances. *Id.* The two agreements in the present case are not substantially the same. Respondent's own Brief states that they "were considerably different." (Respondent's Initial Brief, p. 5)

Respondent does not dispute that the duty to arbitrate survives termination of the contract. *See South Carolina Pub. Serv. Auth. v. Great Western Coal, Inc.*, 312 S.C. 559, 437 S.E. 2d 22 (1993). The April 10th Arbitration Agreement stated, in pertinent part:

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

(R. 21)

Therefore, this Court should find that the lower court erred in finding the Arbitration Agreement was moot and unenforceable.

V. The Respondent did not Execute the Arbitration Agreement under Duress

A. The April 10th Arbitration Agreement covers all Respondent's Allegations

Respondent does not claim to have signed the April 10th Arbitration Agreement under duress nor that the scope is not broad enough to encompass the allegations in her Complaint. "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). This Court should find that all of Respondent's allegations are subject to arbitration under the April 10th Arbitration Agreement alone.

B. Respondent was not under Duress on June 2nd

The Record on Appeal does not support Respondent's contention that she executed the June 2nd Arbitration Agreement under duress. Duress is a condition of mind produced by improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or form a contract not of his own volition. *Cherry v. Shelby Mut. Plate Glass & Casualty Co.*, 191 S.C. 177, 4 S.E.2d 123 (1939) (quoting *In re Nightingale's Estate*, 182 S.C. 527, 189 S.E. 890 (1937)). A party seeking to invalidate a contract on the ground of duress must show the party (1) "was coerced to enter into the contract," (2) "was put in such fear that he was bereft of the quality of mind essential to the making of a contract," and (3) "the contract was thereby obtained as a result of this state of mind" *Gainey v. Gainey*, 382

S.C. 414, 428, 675 S.E.2d 792, 799 (Ct. App. 1999). It should not be forgotten that since Respondent is attacking an arbitration agreement, there is a strong presumption in favor of its validity. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1998).

In *Brock v. Entre Computer Centers, Inc.*, 933 F.2d 1253, 1260 (4th Cir.1991), the plaintiff entered into a franchise agreement with the defendant. In the franchise agreement, the parties agreed that the defendant would not unreasonably withhold his consent to a transfer of the franchise, but the transfer was conditioned upon the franchisee executing a release in a form satisfactory to franchisor. When plaintiff's business was unprofitable and he sought to sell, defendant insisted that the release be given or consent would be withheld. Eventually, plaintiff signed the consent, sold the franchises and then filed a lawsuit.

Plaintiff in *Brock* argued that the release was void because it was entered into under economic duress. The Fourth Circuit disagreed and focused on the fact that plaintiff had expressly agreed in the franchise agreements, at a time when he was under no duress, that defendant had the right to condition its consent on the execution of a general release in defendant's favor. Because the plaintiff was free to walk away from the original deal and did not, the Court found the releases were not procured through duress.

Likewise, Respondent has presented no evidence that she was under duress on April 10th. Appellant had the right to condition the purchase of the car by requiring arbitration of any disputes. Respondent was free to walk away from the original deal and did not. Therefore, just like *Brock*, Respondent is bound by her written word. There was no evidence in the Record that external pressure practically destroyed her free will.

In *Gainey v. Gainey*, 382 S.C. 414, 428, 675 S.E.2d 792, 799 (Ct. App. 1999), the wife alleged that she entered into a property and separation agreement under duress. She alleged

mental abuse by the husband, by his refusal to vacate the marital home until the agreement was signed and approved, and his complete control over her access to legal representation. The Court in *Gainey* found that wife failed to demonstrate specific instances of mental abuse that influenced her state of mind to such an extent that she could not exercise her free will. The Court also found no evidence that husband made any improper threat to wife that left her with no reasonable alternative. Nor did the Court find sufficient evidence that wife was under any unusual stress, other than the stress normally attendant to the breakup of a marriage.

In the present case, Respondent does not claim that Appellant made any improper threat that left her with no reasonable alternative to signing the Arbitration Agreement. Nor does Respondent present any evidence that she was under unusual stress. Respondent does not claim to have been "sick and distressed" until days after she signed the June 2nd Agreement. (R. 92) Respondent does not claim that duress caused her to sign either the April 10th or the June 2nd Arbitration Agreements. She stated in her late filed Affidavit only that she was told she had to sign "the new contract" if she wanted a car. (R. 92) This is clearly a reference to the June 2nd Purchase Order, which set forth the terms for buying the Forte.

Respondent fails to mention that she had already hired legal counsel and, in fact, had filed a lawsuit prior to signing the June 2nd documents. *See House v. Aiken Co. National Bank,* 956 F.Supp. 1284 (D.S.C. 1996), *aff'd,* 103 F.3d 118, 1996 WL 726801 (4th Cir.1996)(table) (access to an attorney supports finding a validity of release).

Respondent was required to sign the June 2nd documents in order to take possession of the Forte, however, she didn't have to purchase the new car. Respondent does not claim to have been under duress when she agreed on April 10th to arbitrate and that she would return the Forte if financing could not be procured. Respondent was provided with a loaner vehicle as a good

will gesture; the loaner was not required under the April 10th Purchase Order. Respondent was then provided with the opportunity to sign new paperwork to purchase the Forte or be returned to her original car. Richard Canova, the Finance & Insurance Manager at Kia of Greenville, stated that Respondent was not pressured into signing any paperwork and was free to reject the deal. (R.33)

Respondent states that she was understandably told that she would need to return the loaner car to take the Forte. (R. 92) Respondent does not state that she was told that she could not continue to drive a loaner vehicle or that her trade-in would not be returned. (R. 92) Respondent's Affidavit stated that she voluntarily gave her keys to an employee of the Appellant when she arrived at the dealership. (R. 92)

C. There is no Evidence that Respondent signed an Arbitration Agreement on June 15th

Respondent contended in her late filed Affidavit that after June 2, 2017, she was so distressed that she went to the hospital and that she signed new documents sometime after June 15, while she was under the influence of medication. (R.93) The only agreements in the Record, however, were signed by the Respondent on April 10th and June 2nd. (R. 21, 22, 46-48, 89-91)

The Record does not show that Respondent was put in such fear that she was "bereft of the quality of mind" essential to the making of a contract. There is no evidence in the Record that she would have been left without transportation on June 2nd or that she would not have been put back in her original car. At no time does Respondent allege that she did not want the 2017 Forte. Respondent agreed to pay a balance of $16,333 for the Forte on April 10th (R.89) and was able to take possession of the same car with a balance of only $14,189 on June 2nd (R. 46).

D. Respondent had a Reasonable Alternative

Respondent had many alternatives available to her on June 2nd. Duress does not occur if the victim has a reasonable alternative to succumbing and fails to take advantage of it. *Blejski v. Blejski,* 325 S.C. 491, 480 S.E.2d 462 (Ct.App. 1997) (citing Restatement (Second) of Contracts § 175 cmt. b & c (1981)). Respondent's Affidavit stated that she voluntarily gave the keys to the loaner to an employee of the Appellant when she arrived at the dealership. (R. 92) Respondent stated that she was understandably told that she would need to return the loaner car to take the 2017 Forte. (R. 92) Respondent was also understandably told that she would need to sign the new contract if she wanted the 2017 Forte (R. 93) as she had been turned down for financing previously. (R. 32)

Respondent has not stated that she was told that she could not continue to drive a loaner vehicle or that her trade-in would not be returned. (R. 92) Respondent did not state that she was unable to call a friend or family member to give her a ride home that day or that Appellant would not have provided a ride home for her children and her.

Richard Canova, the Finance & Insurance Manager at Kia of Greenville, stated that Respondent was not pressured into signing any paperwork and was free to reject the deal. (R.32-33)

E. Respondent Ratified the Agreement

Even if a contract is procured by duress, it is not void, but merely voidable and is capable of being ratified. See *Hyman v. Ford Motor Co.*, 142 F.Supp.2d 735, 748 (D.S.C. 2001). The person claiming duress must act promptly to repudiate the contract, or she will be deemed to have waived her right to do so. *Id.* Respondent has retained the benefits of the Forte and has not sought to repudiate the Purchase Order.

VI. The Arbitration Clause is not 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). "In analyzing claims of unconscionability in the context of arbitration agreements, the Fourth Circuit [Court of Appeals] has instructed courts to focus generally on whether the arbitration clause is geared towards achieving an unbiased decision by a neutral decision-maker." *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007).

Respondent has not established that the agreement in the present case is an adhesion contract. To establish that a contract is one of adhesion, a party must demonstrate both that the terms are non-negotiable *and* that the contracting party is unwilling to waive enforcement in order to deal. *See Wingard v. Exxon Co.*, 819 F. Supp. 497, 503 (D.S.C. 1992); *see also Lackey*, 330 S.C. at 394, 498 S.E.2d at 901. There is no evidence in the Record that Respondent requested "the agreements be changed and Appellant refused. Even if this Court were to find the arbitration agreement was a contract of adhesion, it would not be unconscionable *per se. See Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 498 S.E.2d 898 (Ct. App. 1998).

The Arbitration Agreement in the present case is not similar to the one in *Simpson* as erroneously stated by Respondent. Respondent notes that the *Simpson* Court observed that the purpose of the contract in that case was for Simpson's "primary transportation." There is no evidence in the Record that the 2017 Forte was for Respondent's "primary transportation." Respondent's Affidavit stated only that she did not have an alternative method of getting home

from the dealership on June 2nd. (R.93) The issue was not raised at the hearing before the lower court.

Unlike *Simpson,* Respondent does not claim that the Arbitration Agreement was presented "hastily" for her signature and the issue was not raised before the lower court. (R. 92) The *Simpson* Court found the arbitration provision in that case to be inconspicuous because it was contained in paragraph ten of sixteen paragraphs. Respondent cannot be claiming that the Arbitration Agreement was inconspicuous as it was a stand-alone agreement that was clearly labeled. (R. 21-22)

A. **Respondent Had a Meaningful Choice**

Respondent had a meaningful choice. She signed a stand-alone arbitration agreement. (R. 21, 22) A person who can read is bound to read an agreement before signing it. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001). There is no evidence in the Record that Respondent was incapable of understanding the clear language of the Arbitration Agreement and the fact it would affect her right to a jury trial.

Respondent signed an Arbitration Agreement on April 10, 2017 and took conditional delivery of the Forte. (R. 21, 89-91) There was no issue regarding transportation at that time. Masters does not claim that she was told on June 2nd that she could not continue to drive a loaner vehicle or that her trade-in would not be returned if she did not sign an arbitration agreement. (R. 92) Respondent had a meaningful choice as she could have decided not to purchase the 2017 Forte and taken back her 2002 Cavalier instead. *See. Hardee v. Hardee*, 355 S.C. 382, 585 S.E.2d 501 (2003) (finding wife had a meaningful choice: she could have refused to sign the agreement and opted against marrying husband if he insisted on a prenuptial agreement.)

Finally, the Respondent did not lack meaningful choice because the Policies and Procedures were available upon request. Arbitration agreements regularly cite to the FAA or an arbitration body like the American Arbitration Association as possessing the applicable rules and direct the parties to look at those rules on their own. "[P]arties are generally free to structure their arbitration agreements as they see fit . . . . [S]o too may they specify by contract the rules under which that arbitration will be conducted." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). An Agreement to arbitrate is enforceable and valid despite the fact that it does not establish a specific set of applicable rules and procedures. See *Green Tree Fin. Corp. – Ala. v. Randolph*, 531 U.S. 79, 89-92 (2000) (holding that an arbitration agreement's failure to designate a particular controlling arbitration association, which resulted in a silence with respect to costs and fees, did not render the agreement unenforceable).

B. The Terms of the Arbitration Agreement are not Unconscionable

The Arbitration Agreement does not contain "terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Simpson v. MSA Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 668 (2007). The Arbitration Policies and Procedures contain mutual provisions for both sides.

1. Procedural Issues are for the Arbitrator to Determine

Objections to the nature of arbitral proceedings are generally for the arbitrator to decide. *See Hayes v. Delbert Servs. Corp.*, 811 F.3d 666 (4th Cir. 2016) (once the court finds that the parties agreed to assign their dispute to arbitration, it typically is for the arbitral authority to sort out both the major and minor details of how the arbitration will proceed). Only after arbitration may a party then raise a challenge to the procedures if they meet the narrow grounds set out in 9 U.S.C. § 10 for vacating an arbitral award. *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 941 (4th Cir. 1999).

2. The Provisions are Mutual

Respondent mischaracterizes many of the terms in the Arbitration Agreement or the Policies and Procedures as being one-sided when they are in fact, mutual terms. To the extent that the Court can consider the terms in the Policies and Procedures, the provisions to which Respondent objects are mutually available to the parties and are not unconscionable.

The Policies and Procedures allow either side to be represented by an attorney or to appear pro se. (R. 55, ¶ 20) A business entity, while a legally recognized "person", needs to be allowed to designate an individual who can participate in the proceedings. This does not give the Appellant an advantage over the Respondent, in fact, it merely places them on the same footing. This Court has allowed a business to be represented by a non-lawyer officer, agent or employee in civil magistrate's court proceedings, with the only requirement being written authorization by the business of such representation. *See In re Unauthorized Practice of Law Rules Proposed by South Carolina Bar,* 422 S.E.2d 123, 309 S.C. 304 (1992). Respondent also complains that both parties are afforded the ability to use counsel licensed in a state other than South Carolina. This provision also is mutually available to both parties.

Appellant misconstrues the terms of the Arbitration Agreement by suggesting that only the Appellant can proceed with claims for the possession and sale of the vehicle while an arbitration is proceeding, as was the case in *Simpson, supra.* This issue was not raised before the lower court and should not be considered by this Court. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). Respondent ignores the fact that the Arbitration Agreement in the present case provides for a mutuality of remedies between the parties, with each able to pursue self-help remedies in court or to pursue action in small claims court. (R. 21) *See, York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 90, 749 S.E.2d 139, 151

(Ct. App. 2013) (recognizing the preservation of self-help remedies for both parties as demonstrating the terms of the agreement were not one-sided).

3. The Designation of the Arbitration Administrator is not Oppressive

Procedural issues are for the arbitrator and not the Court to decide. Further, Respondent did not raise the issue of Appellant serving as the Arbitration Administrator before the lower court and it should not be considered by this Court as an additional sustaining ground. (R. 77, l. 14 – p. 19, l. 19); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000).

If the Court finds it was raised below, the Arbitration Administrator is not given an advantage over the Respondent under the Policies and Procedures that would make the terms of the agreement oppressive. The Administrator serves only a clerical role in receiving the initial Request for Arbitration and filing fee and in receiving the Response to the Request for Arbitration. (R.49, ¶¶5-6) Contrary to Respondent's assertion, it is the Arbitrator who determines whether the filing fee will be waived if the Respondent asserts financial inability to pay. (R. 49, ¶5). The Administrator has no more power than the Respondent regarding the selection of the Arbitrator. If the Administrator and Respondent (the two parties to the arbitration) cannot agree on the Arbitrator, then they each select one and the Arbitrators select a third. The three Arbitrators together comprise the panel. (R. 51, ¶ 9.c)

4. The Arbitration Agreement is not Rendered Unenforceable by the Magnuson Moss Warranty Act

The Arbitration Agreement is not rendered unenforceable, as argued by the Respondent, simply because its scope could be broad enough to include an action under the Magnuson Moss Warranty Act. Respondent's counsel argues only to the lower court:

> So now not only, as I raised yesterday, is my client to arbitrate matters with third parties, including warranty claims with Kia, which had nothing to do with this . . . .

(R. 78, ll. 12-14) This issue should not be considered because it does not appear in the Record on appeal. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000).

Respondent has not brought a claim under the Magnuson Moss Warranty Act. Respondent overlooks the fact that the Arbitration Agreement states that if federal law provides that a claim is not subject to binding arbitration, then arbitration will not apply to that claim. Furthermore, the Arbitration Agreement contains a severance clause. If Respondent brought a claim under the Magnusson Moss Warranty Act, which she has not, it could be severed from the Arbitration Agreement.

In *Simpson* (cited by Respondent), the South Carolina Supreme Court relied on an Alabama District Court decision in finding the MMWA had been interpreted to supersede the FAA with respect to consumer claims for breach of a written warranty. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 26-27, 644 S.E.2d 663, 669-670 (S.C. 2007), citing *Boyd v. Homes of Legend, Inc.*, 981 F. Supp. 1423, 1437-38 (M.D. Ala. 1997). The *Simpson* opinion precedes both *Concepcion, supra* in which the United States Supreme Court made clear that the FAA preempts state holdings that invalidate the parties' agreement to arbitrate and *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, (2012), where it emphasized that the creation of a statutory right of action does not preclude the availability of binding arbitration.

The Fourth Circuit has not addressed the issue but recognized that courts are divided on the question. *Seney v. Rent-A-Center, Inc.*, 738 F.3d 631, 635 (4th Cir. 2013).[2]

[2] In *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), the Supreme Court instructed courts to evaluate the arbitrability of statutory rights in light of the liberal policy "federal policy favoring arbitration." *Id.* at 226. The Fourth Circuit recognized that the Federal Trade Commission did not employ a pre-arbitration presumption in interpreting the MMWA. *Seney v. Rent-A-Center, Inc.*, 738 F.3d 631, 635 (4th Cir. 2013). If that interpretation is reasonable, it would control. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467

The Fifth Circuit found "the text, legislation, history, and purpose of the MMWA do not evince a congressional intent to bar arbitration of MMWA written warranty claims." *Walton v. Rose Mobile Homes, LLC*, 298 F.3d 470, 478 (5th Cir. 2002). The *Walton* court further found the MMWA does not prohibit warrantors from requiring consumers to submit to binding arbitration. *Id.* at 479. The Eleventh Circuit has also concluded the MMWA did not prohibit binding arbitration. *Davis v. Southern Energy Homes*, 305 F.3d 1268 (11th Cir. 2002). The *Davis* court held the MMWA's "provision for a judicial forum does not preclude enforcement of a binding arbitration agreement under the FAA." *Id.* at 1279.[3]

The Middle District of North Carolina has agreed with the Fifth and Eleventh Circuits and found the MMWA does not preclude binding pre-dispute arbitration of claims pursuant to a valid written arbitration agreement, absent proof of other grounds in law or equity preventing it. *Krusch v. TAMKO Bldg. Prods.*, 34 F. Supp. 3d 584, 590 (M.D.N.C. 2014).

This Court should likewise find that the Magnuson Moss Warranty Act does not prohibit binding arbitration. If the Court found that the Magnuson Moss Warranty Act does prohibit arbitration, the Arbitration Agreement provides that claim is severable and not subject to binding arbitration. Therefore, the Arbitration Agreement is not rendered unenforceable because it covers claims related to the "condition of the vehicle."

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presumption in interpreting the MMWA. *Seney v. Rent-A-Center, Inc.*, 738 F.3d 631, 635 (4th Cir. 2013). If that interpretation is reasonable, it would control. *Chevron, U.S.A.; Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 842-43 (1984). The Fourth Circuit noted "[t]he way in which Chevron squares with McMahon . . . is uncertain, and courts have divided on the question." *Seney*, 738 F.3d at 635. The Fourth Circuit did not reach the issue because the Seneys' warranty was in a lease rather than a sales agreement, and therefore fell outside the FTC regulations.

[3] Although the Ninth Circuit rejected the Fifth and Eleventh Circuits' reasoning in *Kolev v. Euromoaters West/The Auto Gallery*, 658 F.3d 1024 (9th Cir, 2011), the Ninth Circuit later withdrew its opinion (*Kolev v. Euromoaters West/The Auto Gallery*, 676 F.3d 867 (9th Cir. 2012)), leaving the Fifth and Eleventh Circuit as the only published circuit decisions on the issue. Following the first decision in *Kolev*, the Supreme Court emphasized in *CompuCredit, supra*, that the creation of a statutory right of action does not preclude the availability of binding arbitration.

CONCLUSION

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, these sales terms 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 parties explicitly agreed the Agreement would survive the termination of any and all of Respondent's business with Appellant. The lower court's ruling would mean that parties who engaged in a long course of dealing would not be able to enforce agreements to arbitrate simply because they entered into later contracts agreeing to arbitrate. Arbitration agreements are strongly favored.

Respondent wanted to purchase a 2017 Forte. The financing fell through for the April 10th Purchase Order and Appellant was able to secure new financing at a lower purchase price. Respondent was not under duress when she signed a second Arbitration Agreement on June 2nd. She could have decided not to purchase the Forte and been returned to her original car. There is no evidence in the Record that Respondent signed a third Arbitration Agreement on June 15th.

The Arbitration Agreement is not unconscionable. It contains mutually available terms that are not oppressive to the Respondent. This Court should therefore, vacate the order of the lower court, and stay the case and compel arbitration.

Respectfully submitted,

Date April 20, 2018

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ATTORNEY CERTIFICATION

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

Date April 20, 2018

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