THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Please

The Honorable Carmen T. Mullen, Circuit Court Judge

Case No. 2020-CP-07-00091
Appellate Case No. 2020-000883

Barbara Killingsowrth and Brian Killingsworth.....Respondents,

v.

Stokes Brown Toyota of Hilton Head.....Appellant.

RESPONDENTS' BRIEF

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STATEMENT OF THE CASE

Respondents commenced the subject action with the filing of a complaint on January 16, 2020 alleging negligence and loss of consortium as the result of a fall that occurred after the completion of the purchase of a vehicle at Appellant's dealership. Appellant filed a Motion to Stay and Compel Arbitration on February 20, 2020. A hearing was held May 15, 2020; and the circuit court issued an order denying Appellant's Motion on May 22, 2020. Appellant filed a Motion to Alter or Amend on May 27, 2020. The court denied the Motion by Order dated June 4, 2020. Appellant filed an appeal on June 8, 2020.

STATEMENT OF THE FACTS

This is a personal injury case which arises out of a fall Mrs. Killingsworth suffered at Appellant's dealership on April 11, 2018. That evening, Mr. and Mrs. Killingsworth had finished all the paperwork, including financing paperwork, to complete the purchase of a vehicle and were proceeding to the parking lot to drive the car home. The lights in the parking area were off and the lot was dark[1]. Due to this, Mrs. Killingsworth was unable to see the unlit, hidden, and obscured curb, which caused her to fall and suffer grievous harm[2]. Respondents brought suit for personal injuries and loss of consortium arising out of Mrs. Killingsworth's injuries.[3]

Appellants seek to compel arbitration of Respondents' personal injury claims, alleging the parties intended to arbitrate personal injury claims with the execution of an agreement to arbitrate as part of the purchase of a 2008 Toyota Highlander. (R.___). The signed Arbitration Agreement applies to "Any claim or dispute [. . .] which arise out of or relate to the vehicle [. . .] your credit application, your purchase of this vehicle, your purchase of any additional products or services[,. . .] the financing of your

[1] It is unknown whether the Dealer's employee shut off the lights in the parking lot or whether the lights were on an automatic timer, as discovery is ongoing. Dealer disputes that the lights were off.
[2] Mrs. Killingsworth's medical bills to date are in excess of $110,000.
[3] The Plaintiffs are raising their young grandchild and, in addition to having to shoulder housework and the impact on their marital relationship, Mr. Killingsworth has also been a significant caregiver for the child.

purchase of the vehicle, [or] repairs to and serving of the vehicle or any matters related thereto...". (R.____).

ARGUMENT

I. Standard of Review

Arbitrability determinations are subject to *de novo* review. *Bradley v. Brentwood Homes, Inc.,* 398 S.C. 447, 453, 730 S.E.2d 312, 315 (2012). However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Id.* At 453, 730 S.E.2d at 315. The party challenging the enforceability of an arbitration agreement bears the burden of proving the claims are unsuitable for arbitration. *Green Tree Fin. Corp.-Ala. V. Randolf,* 531 U.S. 79, 91, 121 S.Ct 513, 148 L. Ed.2d 373 (2000).

II. The Federal Arbitration Act Requires a Claim Fall Within the Scope of the Purported FAA Arbitration Agreement

Appellant alleges that the Federal Arbitration Act ("FAA") applies to this personal injury dispute between the parties. As a preliminary matter, Appellants apparently concede that the only basis for invoking the FAA is because the purchase of an automobile is "considered commerce" (App. Br. at 4). The claims being brought by Respondents exist entirely independently of the sale of an automobile. Instead, the applicable rule of law that must be analyzed is simple South Carolina premises liability law.

Under South Carolina law, when an individual is on the premises of a business, the individual can fall into one of three categories: "an 'invitee,' i.e., an invited (express or implied) business guest; a 'licensee,' i.e., a person not invited, but whose presence is suffered; a 'trespasser,' i.e., a person whose presence is neither invited nor suffered." *Sims v. Gilels* 343 A.C. 708, 715, 541 S.E.2d 857, 861 (Ct. App. 2001). The individual present to purchase a car at a dealership is denominated an "invitee," and the invitee is "on the land of another if he enters by express or implied invitation, his entry is connected with the owner's business or with an activity the owner conducts or permits to be conducted on his land, and there

is a mutuality of benefit or a benefit to the owner" *Id.* at 716-17, 862 (Internal Citations Omitted). Respondents' rights against Appellant result directly from South Carolina premises liability law. The rights that Respondents have in the case at bar would exist, identically, whether they had purchased a vehicle or whether they had accidentally wandered into Stokes Brown under the misapprehension that it was a Honda dealership. The existence or nonexistence of the arbitration agreement at issue would not be admissible in the underlying tort claim to prove any fact material to the claim for physical injuries or any defenses to that claim, as Respondents would not be afforded lesser or greater rights on the basis that they had or had not actually consummated the purchase of a vehicle while they were on Appellants' premises. Accordingly, Appellants right to enforce this arbitration provision upon Respondents is no stronger than it would be if Appellants attempted to enforce it upon a party who had fallen after refusing to purchase a vehicle and had signed no agreement.

Even if a South Carolina common law premises liability tort claim was subject to the FAA, the agreement itself would still have to specify that the premises liability tort claim was contemplated as being encompassed by the agreement when it was signed. As noted by the South Carolina Supreme Court, "a party seeking to compel arbitration under the FAA must establish that (1) there is a valid agreement, and (2) the claims fall within the scope of the agreement [. . .] While the presumption in favor of arbitration applies to the scope of an arbitration agreement, it does not apply to the existence of such an agreement" *Wilson v. Willis*, 426 S.C. 326, 827 S.E.2d 167 (S.C. 2019). This is due to the fact "[Arbitration] is predicated on an agreement to arbitrate because parties are waiving their fundamental right to access to the courts." *Wilson v. Willis*, 426 S.C. 326, 827 S.E.2d 167 (S.C. 2019). "Even though arbitration has a favored place, there still must be an underlying agreement between the parties to arbitrate". *Zabinski v Bright Acers Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Furthermore, our Court holds, "even the exceptionally strong policy favoring arbitration cannot justify requiring litigants to forego a judicial remedy when they have not agreed to do so." *Wilson v. Willis*, 426 S.C. 326, 827 S.E.2d 167 (S.C. 2019).

A. Enforceability of arbitration agreements is based in contract rules

Our Supreme Court requires a meeting of the minds in order to create an enforceable contract, or "mutual assent". The Court first evoked the "mutual assent" requirement to conclude that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Id.* at 149, 644 S.E.2d at 708 (citing *Zabinski v. Bright Acres Assocs.,* 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001)) (emphasis added). Thus, the enforceability of an arbitration agreement is a simple question of contract interpretation which should be resolved using general contract rules. *Aiken v. World Fin. Corp. of S.C.,* 373 S.C. 144, 151, 644 S.E.2d 705, 709 (2004).

Our Supreme Court furthered the connection between contract rules and the scope of an arbitration agreement in *Chassereau v. Global Sun Pools, Inc.,* 373 S.C. 168, 644 S.E.2d 718 (2007), in which a woman who financed a swimming pool was not compelled to arbitrate her claim that the pool seller's agents defamed and harassed her when she fell behind on her payments. *Chassereau* examined the broadly worded arbitration provision carefully but, given the lack of connection between the sales contract and the defamation claim, the court was left with "no doubt that [the woman] did not intend to arbitrate" the claim. 373 S.C. at 172, 644 S.E.2d at 721; *See also Partain v. Upstate Automotive Group,* 386 S.C. 488, 689 S.E.2d 602 (2010) (holding that a car buyer "did not intend to submit" to arbitration his claim that a dealer maliciously switched the agreed-upon car with an inferior model).

Similarly, this Court has held that an arbitration provision in a financial services contract between investor and advisor did not cover negligence or consumer fraud claims because the prospect of an advisor converting his client's funds for personal use was "not within the parties' contemplation" when the contract was formed. *Hatcher v. Edward D. Jones & Co., L.P.,* 379 S.C. 549, 554, 666 S.E.2d 294, 297 (Ct. App. 2008) (finding misconduct underlying negligence claim was "completely outside the expectations of the parties at the time the contract was entered"). *Hatcher* went one step further, holding that to interpret a broadly worded arbitration provision to apply to claims wholly unforeseeable at contract formation would be inconsistent with pro-arbitration policy by contravening the parties' intentions. *Id.*

Significantly, in the above cases, the existence of a contract between the parties was a prerequisite to the subsequent tort claims that arose. That is, the defendants in *Chassereau* who called Chassereau's place of employment and disclosed the particulars of her agreement with them only had that personal information about her because of the agreement she had with them and the information she provided to them as a consequence of that agreement. In *Hatcher*, it was only because there was an agreement between the parties that the defendant had the plaintiff's money and could convert it. The existence of a contractual relationship (including broad arbitration agreements) was the *sine qua non* of the tort claims that followed the agreement. That is, when the parties were arguing over the tort claims in those cases, it was necessary that they use the existence of the contractual relationship between the parties as the starting point of the disputes at issues—but the ties between the original contracts and the subsequent torts had become so tenuous as to not be subject to the arbitration agreements. In the case at bar, the existence of a contract between the parties not only does not serve as the starting point for Respondents' claims for personal injuries, it cannot serve as the basis of any claim or defense of the parties that is recognized by South Carolina premises liability law—and therefore could not possibly have been contemplated between the parties as being within the scope of the arbitration agreement.

A. Contract law holds an arbitration contract's scope cannot be unbounded

In *Aiken*, borrowers alleged negligent and intentional torts against a consumer lender after its employees took borrowers' personal identifying information and misappropriated them to obtain sham loans in the borrowers' name. 373 S.C. at 146-47, 644 S.E.2d at 707. The lender cited a broad arbitration provision within the borrower's legitimate contract, stating the arbitration provision scope extended to cover claims based on the unrelated misconduct of the lender's employees. *Id.*, at 147, 644 S.E.2d at 708.

Our Court rejected the argument that because the borrower's contracts with World Finance gave the conspirators access to his personal information (which allowed them to commit the crimes), there was a "significant relationship" between his claims and the underlying loan agreement, thereby requiring arbitration. The Court found the argument was unpersuasive, noting that the defendant was applying what

amounted to a "but for" causation standard which would essentially include every dispute imaginable between the parties. *Id. See also Seifert v. U.S. Home Corp.*, 750 So.2d 633, 638 (Fla.1999) ("[T]he mere fact that the dispute would not have arisen but for the existence of the contract and consequent relationship between the parties is insufficient by itself to transform a dispute into one `arising out of or relating to' the agreement."); *The Vestry and Church Wardens of the Church of the Holy Cross v. Orkin Exterminating Co., Inc.*, 356 S.C. 202, 209, 588 S.E.2d 136, 140 (Ct.App.2003) ("[T]he mere fact that an arbitration clause might apply to matters beyond the express scope of the underlying contract does not alone imply that the clause should apply to every dispute between the parties.") (*cited with approval* in *Aiken v. World Finance Corp. of SC*, 644 S.E.2d 705, 373 S.C. 144 (S.C. 2007)). No matter how broadly worded an arbitration contract is written, generally applicable contract law holds that its scope cannot be unbounded. Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 115, 739 S.E.2d 209, 217 (2013) ("even the broadest of [arbitration] clauses have their limitations"). "

The lower court properly found the claims of Respondents' were far outside the scope of the Arbitration Agreement, as finding otherwise would allow any dispute or claim that arose at Appellant's dealership would necessitate arbitration and would take away a parties fundamental right to access the courts.

B. Broadly worded arbitration agreements have limits

While fully crediting state and federal pro-arbitration policy, *Aiken* held that "even the most broadly-worded arbitration agreements still have limits." *Aiken,* 373 S.C. at 151, 644 S.E.2d at 709; *See also Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 115, 739, S.E.2d 209, 217 (2013). Arbitration rests on the agreement of the parties, and the range of issues that can be arbitrated is restricted by the terms of the agreement. *Zabinski v. Bright Acres Assocs.,* 346 S.C. 580, 596–97, 553 S.E.2d 110, 118 (2001) citing *Simmons v. Lucas & Stubbs Assocs., Ltd.,* 283 S.C. 326, 322 S.E.2d 467 (Ct.App.1984).

In *Zabinski,* the disputed broadly worded arbitration agreement covered "any controversy or claim arising out of the partnership agreement" created between the parties. 346 S.C. 580, 596–97, 553 S.E.2d

110, 118 (2001). While the Court found issues related to dissolution of the partnership fell within the scope of the arbitration agreement, the court found various claims such as malpractice against attorneys who were part of the partnership and a failed purchase agreement were not subject to arbitration because there was no significant relationship between the claims and the partnership agreement as they "concern the partnership only indirectly, and cannot be considered claims 'arising out of the partnership agreement'" as "the facts involved...are completely independent of any dispute arising out of the partnership agreement and are not arbitrable". *Id.*

Similar to the claims brought in *Zabinski*, Respondents' claims cannot be considered as related to, or arising out of, the purchase of a vehicle as there is no significant relationship.

C. The executed agreement does not cover Respondents' personal injury claims

Our Supreme Court has made clear that a "significant relationship" is required to enforce an arbitration agreement; in this case, none exists. Mrs. Killingsworth sustained a life altering injury due to negligence on the part of Appellant and its agents. Catastrophic personal injuries are not credibly within the scope of this Agreement and were never foreseeable at the time of execution of a purchase agreement for a vehicle. There is no significant relationship between the fall Mrs. Killingsworth experienced in an unlit parking lot and the purchase and financing of the Toyota vehicle, as a catastrophic fall is in no way foreseeable as being related to the purchase of a vehicle.

Under a broad interpretation "but for" interpretation of the arbitration agreement, any person who purchased a vehicle at Appellant's dealership who sustained injury while at the dealership would be required to arbitrate their claims for personal injuries no matter how unforeseeable or outside the minds of the parties when executing the agreement. Such a result is "illogical and unconscionable" under South Carolina law as "even the most broadly-worded arbitration agreements still have limits founded in general principles of contract law" and "this Court will refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer". *Aiken v. World Finance Corp. of SC*, 644 S.E.2d 705, 373 S.C. 144 (S.C. 2007).

III. The Substantial Relationship Test was Properly Applied by the Lower Court

A. Arbitration is a matter of contract, so the substantial relationship test applies

"The purpose of the rules of contract construction is to ascertain the intention of the parties as gathered from the contents of the entire document and not from any particular provision within the contract. Where one interpretation of a contract makes it unusual or extraordinary and another interpretation, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction prevails. An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided." *Koon v. Fares*, 666 S.E.2d 230, 379 S.C. 149 (S.C. 2008).

The lower court properly held Respondents' claims bear no substantial relationship to the arbitration agreement.

B. Unlike *Landers*, the Facts in This Case Do Not Meet the Substantial Relationship Test

In *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 739 S.E.2d (2013) the tort claims asserted bore a significant relationship to the arbitration agreement. In *Landers*, the plaintiff had signed an employment contract which provided "any controversy or claim arising out of relating to this contract, or breach thereof, shall be settled by binding arbitration..." 739 S.E.2d 211. The claims alleged by the plaintiff in *Landers* were for breach of contract, slander, and other "on the job" conditions, thus, the Supreme Court found the tort claims were significantly related to the employment agreement, noting "the perceived inability to perform one's job certainly relates to an employment contract". *Id.*

Unlike the *Landers*, there is no significant relationship between the purchase of a vehicle and a fall. The fall does not arise out of, or relate to, the purchase of the vehicle and the Plaintiffs' claims are outside the scope of the Arbitration Agreement.

CONCLUSION

As a tragic fall causing grievous injury is so unforeseeable when executing a contract to purchase a vehicle, there is no possibility Respondents' intended to waive their access to the courts for personal injury in an arbitration agreement. The fall bore no substantial relationship to the arbitration agreement. For the foregoing reasons, this Court should uphold the lower court's order.

November 23, 2020

s/Christy Kellerhals

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Barbara Killingsowrth and Brian Killingsworth.....Respondents,

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PROOF OF SERVICE

I, Sandy Ignacio, paralegal to attorney for Appellant, certify that I have served a copy of the Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal by depositing a copy in the U.S. Mail, postage prepaid, on November 24, 2020 addressed to attorneys of record, Brandfor N. Martin, Esq. and Laura W.H. Teer, Esq, Bradford Neal Martin and Associates, PA, PO Box 10410, Greenville, SC 29603

11/24/2020 date

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November 24, 2020

The Honorable Jenny Abott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *Barbara Killingsworth v. Stokes Brown Toyota*
Appellate Case No. 2020-000883

Dear Ms. Kitchings:

Enclosed for filing please find the original and one copy of Respondent's Brief and Proof of Service in the above captioned matter. Please file the original with your Court and return the clocked copies to me in the enclosed envelope.

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Christy Kellerhals

Christy L. Kellerhals

CLK/si
Enclosures

cc: Brandfor N. Martin, Esq.
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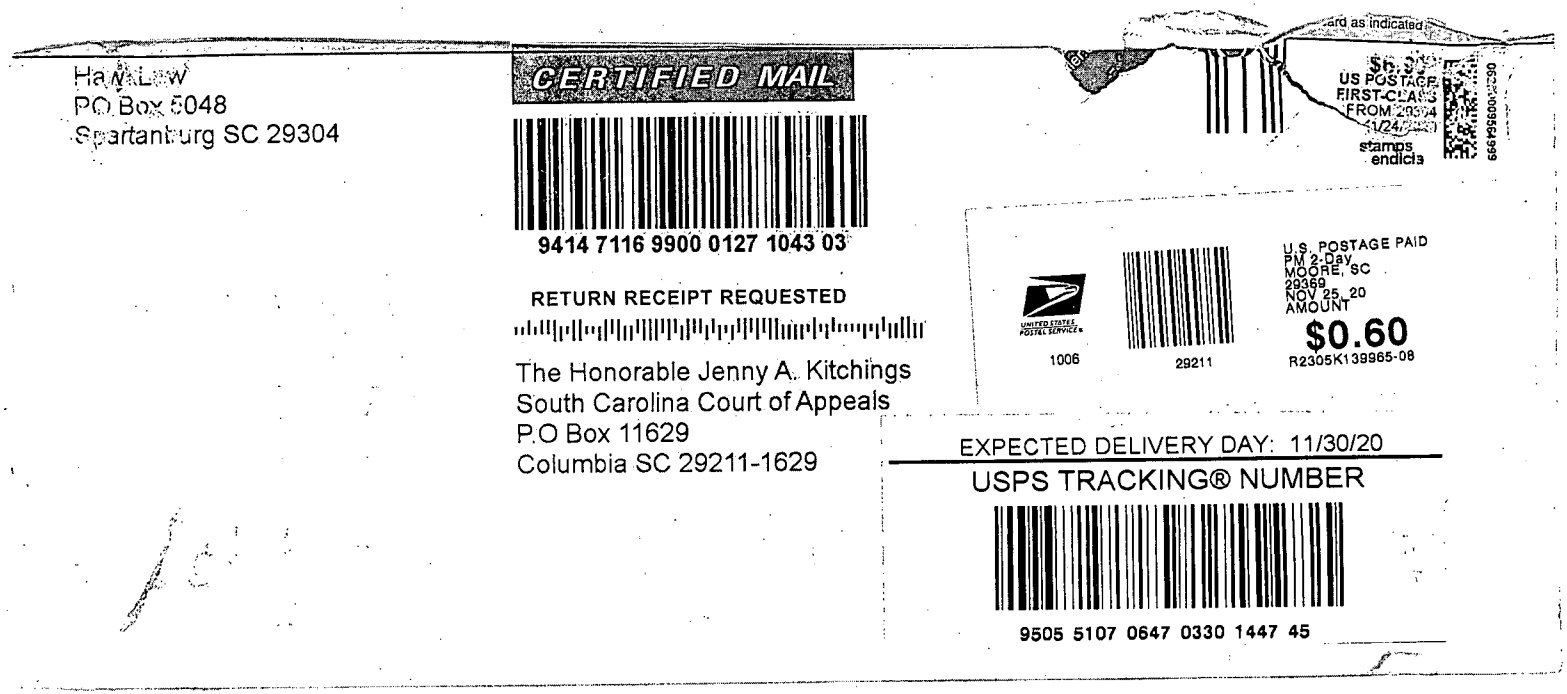

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