RECEIVED
Feb 26 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Carmen T. Mullen, Circuit Court Judge

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

Barbara Killingsworth and Brian Killingsworth .... Respondents,

v.

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

FINAL REPLY BRIEF OF APPELLANT

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 Stokes Brown Toyota of Hilton Head

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. RESPONDENTS CONTINUE TO IGNORE THE REQUIRED SIX POINT TEST OF *LANDERS* 1

II. RESPONDENTS MISUNDERSTAND "SUBSTANTIAL RELATIONSHIP" IN LIGHT OF *LANDERS* 2

A. The Strenuous "Significant Relationship" Test has been Lessened and Clarified by the Supreme Court 2
B. The "Touch Matters" Test is the Proper Analysis 2
C. The Case is Analogous to *Landers* 4

III. RESPONDENTS' CLAIMS FALL WITHIN THE BROAD SCOPE OF THE ARBITRATION AGREEMENT 4

A. Respondents' Claims were Foreseeable 4
B. The Scope of Arbitration is Not Limited to Contract Claims 6

IV. THE ARBITRATION AGREEMENT IS SUBJECT TO THE FAA 7

CONCLUSION 8

CERTIFICATE OF COUNSEL 8

TABLE OF AUTHORITIES

Cases

Aiken v. World Fin. Corp. of S.C., 373 S.C. 144, 644 S.E.2d 705 (2007)....5
Allied– Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995)....7
AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011)....5
Bowers v. Bowers, 304 S.C. 65, 403 S.E.2d 127 (Ct.App.1991)....5
Chassereau v. Global Sun Pools, 373 S.C. 168, 644 S.E.2d 718 (2007)....5
Ellin v. Empire Today, LLC, C.A. 11-2312 (E.D. Pa. August 25, 2011)....4
Gilmore v. Ivey, 290 S.C. 53, 348 S.E.2d 180 (Ct.App.1986)....5
Hatcher v. Edward D. Jones & Co., L.P., 379 S.C. 549, 666 S.E.2d 294 (Ct. App. 2008)....5
I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 713 (2000)....7
J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315 (4th Cir.1988)....6
Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100,
739 S.E.2d 209 (2013)....1, 2, 3, 4, 6, 7, 8
McManus v. Bank of Greenwood, 171 S.C. 84, 171 S.E. 473 (1933)....5
Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360 (2001)....7
Parsons v. Homes, 418 S.C. 1, 791 S.E.2d 128 (2016)....5
Partain v. Upstate Automotive Group, 386 S.C. 488, 689 S.E.2d 602 (2010)....5
Wachovia Bank, N.A. v. Schmidt, 445 F.3d 762 (4th Cir. 2006)....3
Wilson v. Willis, 426 S.C. 326, 827 S.E.2d 167 (2019)....7
Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001)....3

ARGUMENT

I. RESPONDENTS CONTINUE TO IGNORE THE REQUIRED SIX POINT TEST OF *LANDERS*

The Supreme Court in *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 739 S.E.2d 209 (2013) carefully applied a six-point test in analyzing any arbitration agreement applying federal substantive law. Analysis under *Landers* requires the following:

1. any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration;

2. when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration;

3. the heavy presumption in favor of arbitration is strengthened when an arbitration clause is broadly written;

4. unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute, arbitration must generally be ordered;

5. broad clauses are "capable of an expansive reach;" and

6. under the expansive reach of the FAA a tort claim need not raise an issue that requires reference to or the construction of some portion of the contract in order to be encompassed by a broadly-worded arbitration clause.

Rather than apply the analysis of *Landers,* Respondents attempt to analogize cases in which the scope of arbitration was limited to a particular contract or in which an outrageous tort was unforeseeable when the Arbitration Agreement was executed. The Arbitration Agreement in the present case is not tied to a particular contract between the parties. If the Arbitration Agreement required the claim to relate to the purchase contract, Respondents' claims may have merit. Instead, the Arbitration Agreement more broadly covers torts which arise out of or are related to any matters related to the purchase of the Highlander, like being instructed on its options or taking delivery of

the car. The Arbitration Agreement in the present case is broad in its scope. The parties agreed to arbitrate:

> Any claim or dispute . . . in . . . tort . . . which arise out of or relate to . . . your purchase of this vehicle . . . or any matters related thereto (a "Claim") shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. . . . (R. 20)

Appellant therefore respectfully requests this Court to apply the analysis under *Landers* and compel arbitration.

II. RESPONDENTS MISUNDERSTAND "SUBSTANTIAL RELATIONSHIP" IN LIGHT OF *LANDERS*

A. The Strenuous "Significant Relationship" Test has been Lessened and Clarified by the Supreme Court

Respondents misapprehend what is meant by a "significant relationship," as clarified by the South Carolina Supreme Court in *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 739 S.E.2d 209 (2013). They insist instead on the more strenuous test which is at odds with the Supreme Court's mandate to apply the ordinary tools of contract interpretation in construing an arbitration agreement, and resolve any ambiguities in favor of arbitration. *Id.* 402 S.C. at 117, 739 S.E.2d at 218. As the Supreme Court concluded:

> "[W]e note that if ever there did appear to be an appreciable conflict between the two phraseologies in the future, given the text of the FAA, the United States Supreme Court's interpretation of such, and the strong policy favoring arbitration, we would necessarily find that the "touch matters" term hues more closely to Congressional intent concerning the FAA."
> *Id.*

It was error for the lower court to apply the more strenuous analysis, and eschew the use of "touch matters."

B. The "Touch Matters" Test is the Proper Analysis

Appellant has never argued that the scope of an arbitration agreement is unbounded. Respondents' repeated arguments that there is no "significant relationship" between their claims

and the Arbitration Agreement misconstrues the clarification in *Landers* that the claim has to "touch matters" in the Arbitration Agreement which only requires that the claims "relate to" the Agreement. The "touch matters" analysis has been increasingly construed as requiring a lesser showing on the party desiring arbitration. *Landers, supra*. The Fourth Circuit Court of Appeals recognized:

> . . . that requiring a significant relationship in order to compel arbitration ... appears to be at odds with the language of the [ ] arbitration clause, which only requires that the [ ] claims "relate to" the [agreement]. We recognize as well that to require such a significant relationship may appear to be in tension with the Supreme Court's mandate that we apply the ordinary tools of contract interpretation in construing an arbitration agreement, and resolve any ambiguities in favor of arbitration."

Wachovia Bank Nat'l Assoc. v. Schmidt, 445 F.3d 762, 767 n. 5 (4th Cir.2006). The lower court erroneously applied the enhanced burden when analyzing the scope of the Arbitration Agreement.

It is undisputed that Barbara Killingsworth was still in the process of purchasing the Highlander as she was to be instructed on the use of its options and finally take delivery at the time of her fall. Being instructed on the use of the options and taking delivery of the Highlander were foreseeable parts of the purchase process. Thus, there is an interpretation of the Arbitration Agreement that "touches matters" covered by the Arbitration Agreement. The fact that a fall could be unrelated to the purchase of a vehicle does not mean it is unrelated in the present case. Unless the Court can say with positive assurance that the agreement is not susceptible to an interpretation that covers the dispute, arbitration is required. *Landers, supra*, 402 S.C. at 109, 739 S.E.2d at 213, citing *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 597, 553 S.E.2d 110, 118 (2001).

Barbara Killingsworth's claims "arise out of" or are "related to" her purchase of the Highlander. They certainly "touch matters" covered by the contract. The fact Respondent could have experienced a fall without purchasing a car does not alter the fact that in the present case,

Respondent was in the act of walking to the Highlander to review the features with the salesman and take delivery of the car at the time of her fall. (R. 31, Cooler Affidavit, ¶13)

Appellant therefore respectfully requests this Court to apply the "touch matters" analysis and compel arbitration.

C. This Case is Analogous to *Landers*

Respondents argue there is no significant relationship between the purchase of a vehicle and a fall. As discussed above, Respondents misconstrue the meaning of "significant relationship." As with *Landers*, Respondents' pleadings support a finding that her fall is related to the purchase of the Highlander. Respondents allege Barbara Killingsworth was injured while walking to "retrieve the vehicle she had purchased." (R. 14, Complaint ¶8). At the time of her alleged fall, Killingsworth was still engaged in the purchase process where the sales associate reviews the features of the car and the customer takes delivery. (R. 31, Cooler Affidavit ¶13). Therefore, the fall is related to the purchase of the Highlander and it was error for the lower court to find otherwise.

III. RESPONDENTS' CLAIMS FALL WITHIN THE BROAD SCOPE OF THE ARBITRATION AGREEMENT

A. Respondents' Claims were Foreseeable

The parties agreed to submit all disputes related to the purchase of the Highlander, "or any matters related thereto. . .", to arbitration. Being instructed on the use of its options and taking delivery of the car are part of the purchase process and a fall that occurs during that process is related to the purchase. *See Ellin v. Empire Today, LLC,* C.A. 11-2312 (E.D. Pa., August 25 2011) (finding the plaintiff's injuries sustained when she was struck by carpet installers negligently moving a piece of furniture was within the scope of her Arbitration Clause with Empire Today for the purchase and installation of carpet.) Respondents cite no authority to the contrary.

Not only do the cases cited by Respondents pre-date the "touch matters" analysis of *Landers*, they are also factually distinguishable. The present case does not involve an outrageous tort.[1] *See Aiken v. World Finance Corp. of SC*, 373 S.C. 144, 644 S.E.2d 705 (2007) (finding a tort action based on the theft of the plaintiff's personal information by employees of a consumer finance company was outside the scope of the arbitration agreement because it was unanticipted and unforeseeable); *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 644 S.E.2d 718 (2007) (finding the common law tort of outrage in seeking to collect an overdue debt was unforeseeable); *Partain v. Upstate Automotive Group*, 386 S.C. 488, 689 S.E.2d 602 (2010) (finding Partain could not be held to have foreseen that Upstate Auto, after completing a sale, would substitute an entirely different vehicle in place of the truck he had agreed to purchase).[2] The present case does not involve an outrageous tort, rather Barbara Killingsworth fell while in the process of purchasing the Highlander.

Being instructed on the use of the options and taking physical possession of the Highlander were required; therefore, an injury sustained while on the way to be instructed and taking physical possession were foreseeable to Respondents. This is unlike *Hatcher v. Edward D. Jones & Co., L.P.*, 379 S.C. 549, 666 S.E. 2d 294 (Ct. App. 2008), cited by Respondents, where the Court

---

[1] There is no evidence in the record that the parking lot was unlit or that Mrs. Killingsworth suffered a "catastrophic fall". Rule 210(h), SCACR (limiting appellate review to facts appearing in the Record on Appeal).The Complaint in the present case does not contain a verification and, therefore, is not evidence. 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).

[2] Two Justices of the South Carolina Supreme Court made it clear in *Parsons v. Homes*, 418 S.C. 1, 791 S.E.2d 128 (2016) that the outrageous torts exception is no longer viable after *AT&T Mobility, L.L.C. v. Concepcion,* 563 U.S. 333, 343 (2011). The Justices reiterated their position that courts must place arbitration agreements "on equal footing with all other contracts." *Parsons,* 418 S.C. at 10, 791 S.E.2d at 132. Because the outrageous torts exception is not a general contract principle, but instead one that has been applied only to arbitration clauses, the Justices found the exception inconsistent with *Concepcion* and its supporting federal jurisprudence and overruled previous cases that had applied the exception. *Id.*

found that the negligence and SCUTPA claims were based on the electronic transfer of Hatcher's funds at the direction of a third party and without Hatcher's prior consent while the scope of the arbitration agreement covered the investment of Hatcher's monies.

Appellant therefore respectfully requests this Court to reverse the Order of the lower court and compel arbitration.

B. The Scope of Arbitration is Not Limited to Contract Claims

Respondents argue that in order for a claim to be within the scope of an arbitration agreement, the existence of a contract between the parties is a "prerequisite" to the subsequent tort claims (Resp. Br. at 6) While the existence of an arbitration agreement is certainly a prerequisite, their argument suggests arbitration cannot apply unless the claims involve a contract other than the arbitration agreement. This is clearly not the case as parties can choose to arbitrate any disputes between them. The Fourth Circuit additionally made it clear that the scope of the clause does:

> not limit arbitration to the literal interpretation or performance of the contract, [but] embraces every dispute between the parties having a significant relationship to the contract.

J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A., 863 F.2d 315, 321 (4th Cir.1988). *See also Landers, supra*, 402 S.C. at 109, 739 S.E.2d at 214.

Respondents' suggestion that a premises liability tort claim is not within the scope of an arbitration agreement unless it is individually specified within the agreement ignores the South Carolina Supreme Court's finding that "[u]nder the expansive reach of the FAA a tort claim need not raise an issue that requires reference to or the construction of some portion of the contract in order to be encompassed by a broadly-worded arbitration clause." *Landers, supra*, 402 S.C. at 111, 739 S.E.2d 209, at 214 (2013).[3]

[3] Respondents argue for the first time that the proper analysis is under South Carolina premises liability law. Although Rule 220(c) SCACR allows this Court to affirm any order upon any grounds appearing in the Record, the basis for

Respondents rely on *Wilson v. Willis*, 426 S.C. 326, 827 S.E.2d 167 (2019) in support of this proposition; however *Wilson* is inapplicable to the present case. The issue in *Wilson* was whether arbitration should have been enforced against nonsignatories to a contract containing an arbitration clause. There is no dispute in the present case that both Respondents were signatories to the Arbitration Agreement.

Appellant therefore respectfully requests this Court to reverse the Order of the lower court and compel arbitration.

IV. THE ARBITRATION AGREEMENT IS SUBJECT TO THE FAA

Respondent incorrectly states that the only basis for invoking the FAA is because the purchase of a car is considered interstate commerce. "Generally, any arbitration agreement affecting interstate commerce ... is subject to the FAA." *Landers*, *supra,* 402 S.C. at 108, 739 S.E.2d at 213. "Unless the parties have contracted to the contrary, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that in fact involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538–39, 542 S.E.2d 360, 363 (2001) (footnote omitted) (citing *Allied– Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995)). Furthermore, as stated in Appellant's Initial Brief (App. Br. at 4), the parties contractually agreed that the disputes between them would be subject to the FAA.

---

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). This issue was not raised before the lower court and does not appear in the Record; therefore, this Court should not be considered it.

CONCLUSION

The six-point test under *Landers* and the "touch matters" standard is the proper analysis when determining whether Respondents' claims fall within the scope of the broadly written Arbitration Agreement. A reasonable consumer would expect to have the car's features explained and the car delivered as part of the purchase process and an injury claimed while in this process "touches matters" in the Arbitration Agreement. Federal law preempts state law and staying the action to pursue arbitration is the proper remedy. For the foregoing reasons, this Court should reverse the lower court's Order, compel arbitration, and stay the case.

RECEIVED
Feb 26 2021
SC Court of Appeals

Respectfully submitted,

February 26, 2021

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

CERTIFICATE OF COUNSEL

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 February 26, 2021

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