

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

68304

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge

RECEIVED

MAY 08 2013

Circuit Court Case No. 2012-CP-23-07156

SC Court of Appeals

CHRISTINE WATTS

Respondent,

v.

SONIC AUTOMOTIVE 2752 LAURENS ROAD, GREENVILLE, INC. d/b/a
CENTURY BMW

Appellant.

INITIAL BRIEF OF APPELLANT

Kurt M. Rozelsky (S.C. Bar # 6856)
SMITH MOORE LEATHERWOOD LLP
300 East McBee Ave Suite 500
Post Office Box 87
Greenville, SC 29602

Dennis M. Black (*pro hac vice* pending)
Richmond T. Moore (S.C. Bar # 69881)
WILLIAMS & CONNOLLY LLP
725 Twelfth St., N.W.
Washington, DC 20005

ATTORNEYS FOR DEFENDANT SONIC AUTOMOTIVE 2752 LAURENS RD.,
GREENVILLE, INC. D/B/A CENTURY BMW

TABLE OF CONTENTS

	Page
<u>TABLE OF AUTHORITIES</u>	ii
<u>STATEMENT OF ISSUES ON APPEAL</u>	1
<u>STATEMENT OF THE CASE</u>	2
<u>STANDARD OF REVIEW</u>	7
<u>ARGUMENT</u>	8
I. <u>AT&T MOBILITY REQUIRES ARBITRATION OF RESPONDENT’S CLAIMS ON AN INDIVIDUAL BASIS.</u>	9
II. <u>CENTURY BMW IS NOT PRECLUDED FROM RENEWING ITS MOTION TO COMPEL ARBITRATION IN THE TRIAL COURT BASED ON NEW, CONTROLLING SUPREME COURT PRECEDENT.</u>	11
A. <u>Herron II Does Not Preclude Century BMW’s Renewed Motion To Compel Arbitration.</u>	11
B. <u>The Law of the Case Doctrine Does Not Apply.</u>	16
<u>CONCLUSION</u>	19

TABLE OF AUTHORITIES

	Page
FEDERAL CASES	
<i>Arellano v. T-Mobile USA, Inc.</i> , 2011 WL 1842712 (N.D. Cal. May 16, 2011).....	11
<i>AT&T Mobility LLC v. Concepcion</i> , 131 S.Ct. 1740 (2010)	<i>passim</i>
<i>Bellows v. Midland Credit Management, Inc.</i> , 2011 WL 1691323 (S.D. Cal. May 04, 2011).....	11
<i>Bernal v. Burnett</i> , 793 F. Supp. 2d 1280 (D. Colo. Jun 06, 2011).....	11
<i>Coneff v. AT & T Corp.</i> , 673 F.3d 1155 (9th Cir. 2012).....	10
<i>Cruz v. Cingular Wireless, LLC</i> , 648 F.3d 1205 (11th Cir. 2011)	10
<i>D'Antuono v. Service Road Corp.</i> , 789 F.Supp.2d 308 (D. Conn. May 25, 2011).....	11
<i>Day v. Persels & Associates</i> , 2011 WL 1770300 (M.D. Fla. May 09, 2011)	11
<i>Muriithi v. Shuttle Exp., Inc.</i> , 2013 WL 1287859 (4th Cir. Apr. 1, 2013)	10
<i>Sejman v. Warner-Lambert Co., Inc.</i> , 845 F.2d 66 (4th Cir. 1988).....	17, 18
<i>Sonic Automotive, Inc. v. Watts</i> , 131 S. Ct. 2872	6
<i>Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.</i> , 559 U.S. 662 (2010).....	5
<i>Zarandi v. Alliance Data Systems Corp.</i> , 2011 WL 1827228 (C.D. Cal. May 09, 2011)	11
STATE CASES	
<i>Binkley v. Burry</i> , 352 S.C. 286, 573 S.E.2d 838 (Ct. App. 2002).....	18
<i>Discover Bank v. Superior Ct.</i> , 113 P.3d 1100 (Cal. 2005).....	10
<i>Herron v. Century BMW</i> , 387 S.C. 525, 693 S.E.2d 394 (S.C. 2010).....	<i>passim</i>
<i>Herron v. Century BMW</i> , 395 S.C. 461, 719 S.E.2d 640 (2011).....	6, 12, 17, 18
<i>I'On, L.L.C. v. Town of Mt. Pleasant</i> , 338 S.C. 406 (2000).....	12

<i>Ross v. Med. Univ. of S. Carolina</i> , 328 S.C. 51, 492 S.E.2d 62 (1997).....	16
<i>Simpson v. Myrtle Beach, Inc.</i> , 373 S.C. 14, 644 S.E.2d 663 (2007)	3, 8
<i>Wallace v. Ganley Auto Group</i> , 2011 WL 2434093 (Ohio App. June 16, 2011)	10

OTHER AUTHORITIES

9 U.S.C. § 16(a)(1)(C)	7
Employee Retirement Income Security Act of 1974 (“ERISA”)	17
Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq.	<i>passim</i>
Rule 59(e), SCRPC	2, 7
S.C. Code Ann. § 15-48-200(a)(1).....	7
S.C. Code Ann. § 56-15-10 to -130 (2009).....	2

STATEMENT OF ISSUES ON APPEAL

- I. WHETHER, UNDER *AT&T MOBILITY LLC V. CONCEPCION*, 131 S. CT. 1740 (2011), THE FEDERAL ARBITRATION ACT PREEMPTS ANY SOUTH CAROLINA PUBLIC POLICY INVALIDATING A CLASS WAIVER IN AN ARBITRATION AGREEMENT.

- II. WHETHER THE TRIAL COURT ERRED IN HOLDING THAT APPELLANT COULD NOT RENEW ITS MOTION TO COMPEL ARBITRATION WHERE APPELLANT COULD NOT PREVIOUSLY HAVE RAISED THE ARGUMENTS IT RAISED IN ITS RENEWED MOTION BECAUSE: (i) THE SOUTH CAROLINA SUPREME COURT ANNOUNCED THE PUBLIC POLICY RULE APPELLANT CLAIMED WAS PRE-EMPTED *SUA SPONTE* IN THE COURSE OF AN EARLIER APPEAL; AND (ii) THE PREEMPTION ARGUMENT WAS PREMISED ON NEW, CONTROLLING SUPREME COURT OF THE UNITED STATES PRECEDENT NOT DECIDED UNTIL AFTER THE SOUTH CAROLINA SUPREME COURT'S RULING.

STATEMENT OF THE CASE

Appellant Sonic Automotive 2752 Laurens Rd., Greenville, Inc. (“Century BMW”) appeals the Orders of the Honorable Doyet A. Early denying Century BMW’s motion to compel arbitration of Appellant Christine Watts’s claims and Century BMW’s motion to reconsider, pursuant to Rule 59(e), SCRCP. [R.p. __ (Order denying Motion to Compel Arbitration); R.p. __ (Order denying Rule 59(e) Motion).]

In 2005, Michael Watts purchased a car from Century BMW as a graduation gift for his daughter, Christine Watts. At the time of the purchase, the parties executed a free-standing Arbitration Agreement providing that the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 et seq., governed, and that the parties would arbitrate any and all disputes relating to the transaction. [R.p. __ (Arbitration Agreement).] The Arbitration Agreement further provided that the parties “waiv[ed] their right to . . . bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration.” *Id.* (referred to herein as the “class action waiver” provision).

On October 31, 2006, Ms. Watts, along with other plaintiffs, brought this putative class action against Century BMW and other South Carolina car dealerships alleging, among other things, that the dealerships impermissibly charged “administrative fees” in connection with vehicle sales in alleged violation of the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (“Dealers Act”), S.C. Code Ann. §56-15-10 to -130 (2009). [R.p. __ (Am. Compl.).]

On December 29, 2006, Century BMW moved to compel arbitration of Ms. Watts’s claims based on the Arbitration Agreement. [R.p. (Notice of Motion (Dec. 29, 2006); R.p. __ (Mem. Supp. Def. Century BMW’s Mot. Compel Arbitration (Feb. 16, 2007).] In response, Ms. Watts argued that the entire Arbitration Agreement was

unconscionable, eventually premising her argument on the South Carolina Supreme Court's *Simpson v. Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007), decision, because Ms. Watts claimed she lacked a meaningful choice whether to enter into the agreement and because the agreement contained oppressive, one-sided terms. [R.p. ___(Order Denying Motion to Compel Arbitration).] For example, Ms. Watts argued that even though she did not read the Arbitration Agreement before signing it, the bargaining process was unfair and the Arbitration Agreement was not easily understandable. [R.p. ___ (Order Denying Motion to Compel Arbitration at 4-8).] She also argued that the Arbitration Agreement was oppressive and one-sided, like the arbitration agreement in *Simpson*. [R.p. ___ (Order Denying Motion to Compel Arbitration at 9).] On March 10, 2008, the trial court denied Century BMW's motion to compel arbitration, holding that under *Simpson* the Arbitration Agreement was unconscionable and unenforceable. [R.p. ___ (Order Denying Motion to Compel Arbitration at 4-8).]

Century BMW timely appealed to this Court. Century BMW argued, among other things, that the Arbitration Agreement was not unconscionable under *Simpson* because Ms. Watts had a meaningful choice as to whether to enter the agreement, and the agreement was not oppressive and one-sided. [R.p. ___ (Appellant's Final Brief); R.p. ___, (Appellant's Final Reply Brief).] Watts in response again argued that the entire Arbitration Agreement was unconscionable and, therefore, unenforceable. [R.p. ___ (Respondent's Final Brief).]

The South Carolina Supreme Court *sua sponte* certified the appeal for its own review. See *Herron v. Century BMW*, 387 S.C. 525, 529, 693 S.E.2d 394, 396 (S.C. 2010) (*Herron I*).

On April 19, 2010, the South Carolina Supreme Court ruled in Century BMW's favor on the issue that had been briefed to that Court, holding that the Arbitration Agreement was *not* unconscionable under *Simpson* because Ms. Watts had a meaningful choice in entering into the Arbitration Agreement and the terms were not so one-sided and oppressive as to be substantively unconscionable. *Herron I*, 387 S.C. at 537, 693 S.E.2d at 400 [R.p ____.] The court explained that “[w]e are firmly convinced and find the Wattses had a meaningful choice in signing the contract.” 387 S.C. at 532, 693 S.E.2d at 398. The Court noted that several of the provisions of the agreement favored the consumer, and held that “these terms are neither oppressive nor one-sided” and “stand in sharp contrast to the terms present in *Simpson*.” 387 S.C. at 534, 693 S.E.2d at 399.

Having found that the Arbitration Agreement as a whole was not unconscionable, however, the South Carolina Supreme Court went on to consider a question that the parties had not raised: whether the class action waiver viewed in isolation violated South Carolina public policy and should be severed from the Arbitration Agreement. The Court noted that Ms. Watts had not advanced this argument because “the Wattses seek to avoid the arbitration agreement and proceed in court” and, indeed, it was a “remedy that neither party seeks.” 387 SC at 537, 693 S.E.2d at 400. The Court nevertheless ruled that the class action waiver violated South Carolina public policy and was therefore unenforceable. 387 S.C.at 535-36, 693 S.E.2d at 399-400. Because Century BMW elected not to sever the class action waiver from the rest of the Arbitration Agreement, the South Carolina Supreme Court affirmed in result the trial court's order denying the motion to compel arbitration. *Id.*

Eight days later, the Supreme Court of the United States decided *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), which held that the FAA does not permit class arbitration to be imposed on parties who had not agreed to it. Century BMW petitioned for rehearing of the South Carolina Supreme Court's April 19, 2010 opinion, contending, among other things, that *Stolt-Nielsen* supported the proposition that the FAA preempted any state law that invalidates a class waiver in an arbitration agreement. [R.p. ____ (Petition for Rehearing).] The South Carolina Supreme Court denied the petition on June 9, 2010. [R.p. ____ (Order on Petition for Rehearing).]

On May 24, 2010, the Supreme Court of the United States granted certiorari in *AT&T Mobility LLC v. Concepcion*, 130 S. Ct. 3322 (2010), to address the specific issue of whether the FAA preempts state-law rules that invalidate class action waivers in arbitration agreements. Because the Supreme Court's grant of certiorari in *AT&T Mobility* involved the same issue that was the basis for the South Carolina Supreme Court's decision in *Herron I*, Century BMW filed a petition for writ of certiorari in the Supreme Court of the United States, asking the Court to hold the petition until the Court decided *AT&T Mobility*, and then to dispose of it accordingly. [R.p. ____(August 2010 Petition for Writ of Certiorari).]

On April 27, 2011, the Supreme Court of the United States held in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) that the FAA preempts state-law rules that invalidate class action waivers in arbitration agreements. [R.p. ____ (*AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011)).] Five days later, on May 2, 2011, the Supreme Court of the United States granted Century BMW's petition for a writ of certiorari, vacated the South Carolina Supreme Court's judgment, and remanded the case for further

consideration in light of *AT&T Mobility*. [R.p. ____; *Sonic Automotive, Inc. v. Watts*, 131 S. Ct. 2872).]

On remand, the South Carolina Supreme Court did not address the application of *AT&T Mobility* on the merits, but rather reinstated its opinion on the basis that Century BMW did not raise the issue of federal preemption before the trial court when it moved to compel arbitration and, therefore, had not preserved the issue for appellate review. *Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011) (“*Herron II*”) [R.p. ____.]

In March 2012, Century BMW filed a petition for a writ of certiorari in the Supreme Court of the United States seeking reversal of *Herron II*, which was denied on May 21, 2012. [R.p. ____ (Petition for Writ of Certiorari, dated March 2012; R.p. ____ (*Sonic Automotive, Inc. v. Watts*, 131 S. Ct. 2436).]

On May 11, 2012, Century BMW renewed its motion to compel arbitration in the trial court. [R.p. ____ (Century BMW’s Motion for Judgment on the Pleadings for Failure to Join an Indispensable Party or, in the Alternative, to Compel Arbitration).] The trial court held oral argument on November 28, 2012. In the course of the oral argument, the trial court noted that the only issue that had been raised the first time Century BMW had moved to compel arbitration was whether the Arbitration Agreement was unconscionable under *Simpson*. Specifically, the trial court stated: “[E]verybody agreed that *Simpson v. Myrtle Beach, MSA of Myrtle Beach*, was what I had to look at. And, that’s all I did,” [R.p. ____ (Tr. at 25)], to which Ms. Watts’s counsel agreed: “That’s right, Your Honor.” [R.p. ____ (Tr. at 25)]. The trial court further noted that it had been affirmed “on some other reason that I didn’t say,” [R.p. ____ (Tr. at 25)], and that “our Supreme Court ruled that I was wrong about being unconscionable but yet still denied arbitration because the

class action portion . . . was violative of public policy . . . [a]nd then once that came up” Century BMW argued “federal law would preempt that part of it. And sure enough, they came out with AT&T Mobility and there you are.” [R.p. ___ (Tr. at 36)]. The trial court nevertheless expressed concern about its interpretation of certain language in *Herron II* and, after oral argument, entered an order on January 8, 2013 denying Century BMW’s motion. [R.p. ___ (Jan. 8, 2013 Order)].¹ Century BMW then filed a motion to reconsider, pursuant to Rule 59(e), SCRCP, which was denied in an order entered on March 11, 2013. [R.p. ___ (Order denying Rule 59(e) Motion); R.p. ___ (Century BMW’s Rule 59(e) Motion).] Century BMW timely filed and served its Notice of Appeal on March 15, 2013. Appellant received the transcript of the trial court proceedings on April 7, 2013.

STANDARD OF REVIEW

Pursuant to S.C. Code Ann. § 15-48-200(a)(1), “[a]n appeal may be taken from . . . [a]n order denying an application to compel arbitration made under § 15-48-20” Similarly, the Federal Arbitration Act (“FAA”) states: “An appeal may be taken from . . . an order . . . denying an application under section 206 of this title to compel arbitration.” 9 U.S.C. § 16(a)(1)(C). Therefore, as this Court held in *Towles v. United Healthcare Corp.*, “an order that favors litigation over arbitration—whether it refuses to stay litigation in deference to arbitration [or] refuses to compel arbitration . . . —is immediately appealable, even if interlocutory.” 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999) (internal quotation and emphasis omitted). Arbitrability determinations are

¹ Century BMW also made an alternative motion to dismiss Ms. Watts’s claims for failure to join an indispensable party. Century BMW does not appeal at this time the trial court’s order denying its motion to dismiss for failure to join an indispensable party, but reserves its right to appeal that issue at a later time.

subject to *de novo* review. *Simpson v. Myrtle Beach, Inc.*, 373 S.C. 14, 22, 644 S.E.2d 663, 667 (2007).

ARGUMENT

The trial court's denial of Century BMW's motion to compel arbitration is contrary to controlling precedent from the Supreme Court of the United States and the South Carolina Supreme Court. The combination of both Courts' rulings now makes clear that the Arbitration Agreement between Century BMW and Christine and Michael Watts, including its provision waiving class actions in arbitration, is valid and enforceable. In *Herron I*, the South Carolina Supreme Court held that the Arbitration Agreement was valid and enforceable, except for its class action waiver provision. But the Supreme Court of the United States later held in *AT&T Mobility* that the FAA preempts state-law rules that invalidate class action waivers in arbitration agreements. *AT&T Mobility*, 131 S. Ct. at 1747. It therefore vacated the South Carolina Supreme Court's decision in *Herron I*. On remand, however, the South Carolina Supreme Court held in *Herron II* that Century BMW had not preserved its preemption argument for appellate review because it had not raised it in its initial motion to compel arbitration in the trial court.

As a result, Century BMW promptly renewed its motion to compel arbitration in the trial court, seeking to apply *AT&T Mobility*, which was new, controlling federal preemption precedent from the Supreme Court of the United States not available at the time of its initial motion. But the trial court still did not reach the merits of Century BMW's motion. Instead, it erroneously denied Century BMW's motion on procedural grounds that misinterpret the South Carolina Supreme Court's *Herron II* decision and unfairly deprive Century BMW of its ability to enforce its right to compel arbitration.

Thus, this Court should reverse the trial court's opinion and direct it to enter an order compelling arbitration of Respondent's claims on an individual basis, as this controlling precedent requires.

I. AT&T MOBILITY REQUIRES ARBITRATION OF RESPONDENT'S CLAIMS ON AN INDIVIDUAL BASIS.

In *Herron I*, the South Carolina Supreme Court held that the Arbitration Agreement was valid and enforceable under South Carolina law, *except* for the class action waiver, which it held violated South Carolina public policy. *Herron I*, 387 S.C. at 532-37, 693 S.E.2d at 398-400. The Court explained that Ms. Watts "had a meaningful choice in making the decision to enter into this contract with Century" and that the terms of the Arbitration Agreement "are neither oppressive nor one-sided." *Id.* at 533-34, 693 at 398-99. It determined, however, that "the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act," and, for that reason, it concluded that "any contract prohibiting a class action suit violates our State's public policy and is void and unenforceable." 387 S.C. at 536, 693 S.E.2d at 399.

In *AT&T Mobility*, however, the Supreme Court of the United States held that the Federal Arbitration Act ("FAA") pre-empts state-law rules—including rules based on state public policy—that invalidate class action waivers in arbitration agreements. *AT&T Mobility*, 131 S. Ct. at 1747. The Court held that a state-law rule that conditioned the enforceability of an arbitration agreement on the availability of class arbitration "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 131 S. Ct. at 1748.

AT&T Mobility requires the enforcement of the Arbitration Agreement. The state-law rule that the Supreme Court held to be preempted in *AT&T Mobility* is materially indistinguishable from the state-law rule adopted in *Herron I*. Like the rule in *AT&T Mobility*, the rule adopted in *Herron I* was grounded in public policy: specifically, the perceived concern that it would be impractical to resolve claims involving relatively small amounts in bilateral arbitration. Compare *Discover Bank v. Superior Ct.*, 113 P.3d 1100, 1110 (Cal. 2005) (noting, in adopting the rule considered in *AT&T Mobility*, that the claims at issue “predictably involve small amounts of damages”), with *Herron I*, 387 S.C. at 535, 693 S.E.2d at 399 (noting that “[d]amages are typically small” in Dealers Act cases). Significantly, in *AT&T Mobility*, the Supreme Court of the United States deemed that public-policy concern insufficient to avoid preemption, reasoning that “States cannot require a procedure that is inconsistent with the FAA[] even if it is desirable for unrelated reasons.” 131 S. Ct. at 1753. Thus, the FAA preempts the state-law rule that the South Carolina Supreme Court adopted in *Herron I*.

Courts since *AT&T Mobility* have consistently enforced class action waivers in arbitration agreements. See, e.g., *Muriithi v. Shuttle Exp., Inc.*, 2013 WL 1287859 (4th Cir. Apr. 1, 2013) (state law “may not be applied in a manner that targets the existence of an agreement to arbitrate as the basis for invalidating that agreement”); *Coneff v. AT & T Corp.*, 673 F.3d 1155, 1161 (9th Cir. 2012) (*AT&T Mobility* “controls [and] the FAA preempts the Washington state law invalidating the class-action waiver”); *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1207 (11th Cir. 2011) (“[I]n light of [*AT&T Mobility*], the class action waiver in the Plaintiffs’ arbitration agreements is enforceable under the FAA.”); *Wallace v. Ganley Auto Group*, 2011 WL 2434093 (Ohio App. June

16, 2011) (*AT&T Mobility* “makes clear that enforcement of arbitration clauses cannot be conditioned upon the availability of classwide arbitration”); *Arellano v. T-Mobile USA, Inc.*, 2011 WL 1342712, at *2 (N.D. Cal. May 16, 2011) (*AT&T Mobility* “decided that states cannot refuse to enforce arbitration agreements based on public policy”); *D’Antuono v. Service Road Corp.*, 789 F.Supp.2d 308 (D. Conn. May 25, 2011); *Zarandi v. Alliance Data Systems Corp.*, 2011 WL 1827228 (C.D. Cal. May 09, 2011); *Day v. Persels & Associates*, 2011 WL 1770300 (M.D. Fla. May 09, 2011); *Bellows v. Midland Credit Management, Inc.*, 2011 WL 1691323 (S.D. Cal. May 04, 2011); *Bernal v. Burnett*, 793 F. Supp. 2d 1280 (D. Colo. Jun 06, 2011).

Thus, under controlling precedent from the Supreme Court of the United States, Respondent’s claim is subject to arbitration on an individual basis.

II. CENTURY BMW IS NOT PRECLUDED FROM RENEWING ITS MOTION TO COMPEL ARBITRATION IN THE TRIAL COURT BASED ON NEW, CONTROLLING SUPREME COURT PRECEDENT.

Instead of addressing Century BMW’s motion to compel arbitration, in accordance with *AT&T Mobility*, the trial court declined to reach Century BMW’s argument on the merits, based on a misinterpretation of the *Herron II* opinion and the law of the case doctrine.

A. *Herron II* Does Not Preclude Century BMW’s Renewed Motion To Compel Arbitration.

The trial court misinterpreted *Herron II* as holding that Century BMW was prohibited from renewing its motion to compel arbitration in the trial court. [R.p. ___ (Order at 3-4).] But nothing in *Herron II* prohibited Century BMW from renewing its motion to compel arbitration in *the trial court* based on *AT&T Mobility*. Instead, the South Carolina Supreme Court reinstated its decision because it held that Century BMW

had not preserved the issue of federal preemption *for appellate review* because it had not first raised the issue in the trial court. *Herron II*, 395 S.C. at 461, 719 S.E.2d at 640. The Court explained that “[i]ssue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.” 395 S.C. at 465, 719 S.E.2d at 642 (internal citations omitted). “Imposing such a requirement on the appellant ‘is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.’” *Id.* (quoting *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422 (2000)). Thus, the South Carolina Supreme Court said nothing about Century BMW being permanently barred from raising the issue of federal preemption in the trial court; rather, it held that, as a matter of appellate procedure, Century BMW could not raise the issue *in that appeal* because it had not allowed the trial court an opportunity to rule on the issue first.

The trial court misinterprets the South Carolina Supreme Court’s statement in *Herron II* that the preemption issue had not been preserved in “our courts” as precluding further review of this issue by the trial court. [R.p. ___ (Order at 4).] The Court made that statement in the context of its discussion of “issue preservation principles.” 395 S.C. at 470, 719 S.E.2d at 645. Accordingly, it means simply that the issue had not been preserved in the “courts” (either the trial or appellate courts) for purposes of *that appeal*. *Id.* Indeed, the Court in *Herron II* did not address the issue of whether there could be further review of the issue in the trial court because *that issue was not before it*. As the Court itself noted, “[a]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.” 395 S.C. at 469, 719 S.E.2d at 644 (internal quotation marks omitted). Thus, *Herron II* addressed only the

issues before it, which did *not* include whether Century BMW could renew the issue of arbitration in the trial court based on new, controlling precedent from the Supreme Court of the United States.

As a result, *Herron II* did not preclude Century BMW's renewed motion to compel arbitration. In renewing its motion, Century BMW was not seeking to raise an issue on appeal that was not raised in the trial court. To the contrary, Century BMW's renewed motion to compel arbitration did exactly the opposite: it raised the issue in the trial court. In other words, in *Herron II* the South Carolina Supreme Court refused to consider Century BMW's preemption argument on the basis that Century BMW had not first raised it before the trial court. As a result, Century BMW raised the issue in the trial court so that the trial court could rule on the merits. Thus, the rules of appellate procedure cited in *Herron II*, which prevent a party from holding an "ace card up its sleeve" in the trial court and then presenting it on appeal, are inapposite here.

Further, the trial court's interpretation of *Herron II* is erroneous because it would lead to the illogical and unjust result of finding that Century BMW waived a preemption argument that was not known to it when it filed its initial motion to compel. The state law rule at issue—that South Carolina public policy under the Dealers Act prohibits class action waivers in arbitration agreements—did not exist when Century BMW first moved to compel arbitration in 2006. Ms. Watts had always argued that the entire Arbitration Agreement was unconscionable under *Simpson* and never argued that even if the entire agreement were not unconscionable, the court should void the class waiver in isolation and send the parties to class arbitration. The South Carolina Supreme Court adopted in *Herron I*, *sua sponte*, the new rule that class action waivers violated South Carolina

public policy under the Dealers Act and must be severed. Indeed, the South Carolina Supreme Court acknowledged that Ms. Watts had not made this argument below or even on appeal, 387 S.C. at 535, 693 S.E.2d at 399, and it was “a remedy that neither party seeks.” 387 S.C. at 537, 693 S.E.2d at 400. Accordingly, it was only after the *Herron I* opinion that Century BMW first could have argued that the FAA preempts the South Carolina state law rule against class waivers because that was when that rule was announced. It is illogical and manifestly unjust to hold that Century BMW should have clairvoyantly known to make a preemption argument in response to an argument that Ms. Watts never made and that is based on a South Carolina rule of law first announced while the case was on appeal.

The trial court erred by interpreting the South Carolina Supreme Court’s opinion in *Herron II* as requiring this inequitable result. The trial court stated that “I’m sympathetic with your situation,” but concluded that it was bound by its interpretation of *Herron II*, even if it precluded Century BMW from asserting its right to arbitration, as recognized by *AT&T Mobility*. [R.p. __ (Tr. at 28).] Instead, the trial court should have concluded that the unfairness of the situation indicated a flaw in its interpretation of *Herron II*, not in the South Carolina Supreme Court’s reasoning, and adopted an interpretation that would avoid this result.

Moreover, Century BMW’s preemption argument is based on the Supreme Court of the United States’ controlling precedent in *AT&T Mobility*, which was not known when Century BMW filed its initial motion to compel because *AT&T Mobility had not yet been decided*. In 2006, when Century BMW first timely moved to compel arbitration, the Supreme Court of the United States had not yet ruled that the FAA preempts state

court rules invalidating class action waivers in arbitration agreements. Indeed, the South Carolina Supreme Court specifically noted in *Herron I* that “courts across the country are split over whether an arbitration agreement may include a waiver of the right to bring a class action suit.” 387 S.C. at 536; 693 S.E.2d at 399. The Supreme Court did not conclusively resolve this issue until *AT&T Mobility* was decided in 2011, *after* the trial court had already ruled on Century BMW’s motion and after the South Carolina Supreme Court had decided the appeal. Thus, in its renewed motion to compel, Century BMW was seeking to enforce new, controlling Supreme Court precedent that was not available in 2006 when it first moved to compel arbitration.

In addition, the trial court erroneously concluded that Century BMW “admitted in its briefing to the United States Supreme Court that the South Carolina Supreme Court’s ruling means that Century BMW forfeited the ability to raise preemption.” [R.p.____ (Order at 4).] The Order misinterprets Century BMW’s briefs by taking them out of context. Century BMW’s petition to the Supreme Court of the United States challenged the South Carolina Supreme Court’s ruling that it had not preserved the arbitration issue *in that appeal*. [R.p. ____ (Petition for a Writ of Certiorari at 14)] (“The South Carolina Supreme Court’s determination that petitioner had forfeited its preemption argument has no foundation in South Carolina law *on the preservation of arguments*.”) (emphasis added). Its statements regarding forfeiture thus relate to appellate issue preservation; they have nothing to do with the issue in Century BMW’s renewed motion to compel arbitration—whether Century BMW could raise the issue *in the trial court*. Century BMW’s petition to the Supreme Court of the United States exhausted its avenues of relief as to whether the issue had been preserved on appeal. But regardless of whether it was

preserved on appeal, Century BMW renewed its motion to compel in the trial court *while its petition to the Supreme Court of the United States was still pending*, so it clearly was not taking the position that the South Carolina Supreme Court's holding forever foreclosed Century BMW from raising the issue in the trial court. Accordingly, contrary to the trial court's order, Century BMW's petition to the Supreme Court of the United States was perfectly consistent with its renewed motion.

Thus, the trial court improperly extended the ruling in *Herron II*, which dealt solely with issue preservation rules under appellate procedure, to permanently bar further consideration in the trial court, based on new controlling authority. In doing so, it prevented Century BMW from *ever* having its motion heard on the merits. This court should reverse this ruling.

B. The Law of the Case Doctrine Does Not Apply.

The trial court further erred by stating that *Herron II* barred Century BMW's motion under "the law of the case" doctrine. [R.p. __ (Order at 3).]

First, the law of the case doctrine does not apply because the issues raised in Century BMW's renewed motion to compel have not been decided in the prior appeal. "The doctrine of the law of the case prohibits issues *which have been decided in a prior appeal* from being relitigated in the trial court in the same case." *Ross v. Med. Univ. of S. Carolina*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997) (emphasis added). As explained above, the South Carolina Supreme Court in *Herron II* decided only that Century BMW had waived the preemption argument in that appeal, not that it was precluded from renewing the motion in the trial court. Moreover, no appellate or trial court has ever decided the preemption issue raised in Century BMW's renewed motion to compel: whether the FAA preempts a South Carolina policy that invalidates the class action

waiver. Indeed, the South Carolina Supreme Court's ruling in *Herron II* was expressly based on its finding that the trial court had *not* yet ruled on the preemption issue. 395 S.C. at 461, 719 S.E.2d at 640. Thus, there is no law of the case because the relevant issues have not been decided.

Second, the law of the case doctrine does not apply because *AT&T Mobility* was an intervening change in controlling law. There is an exception to the law of the case doctrine if "controlling authority has since made a contrary decision of law applicable to the issue." *Sejman v. Warner-Lambert Co., Inc.*, 845 F.2d 66, 69 (4th Cir. 1988). In *Sejman*—a case strikingly similar to this one—employees sued their employer under South Carolina contract law for severance benefits. *Id.* at 67-68. The employer moved for summary judgment on the basis that the federal Employee Retirement Income Security Act of 1974 ("ERISA") preempted South Carolina contract law. *Id.* The trial court denied summary judgment, holding that because the employer had failed to raise the issue of preemption before an earlier appeal, it could not now raise the issue based on the law of the case. *Id.* The Fourth Circuit reversed, holding that the employer's "failure to assert federal preemption" did not "render[] that default part of the law of the case." *Id.* at 69. The court explained that "an omission may become part of the law of the case only if its subsequent assertion is an attempt to relitigate the ultimate issue previously decided." *Id.* Because the only issue raised previously was under state contract law, the court held that the employer's "claim of preemption does not challenge this Court's previous analysis," but rather "contends only that the rights of the plaintiffs must now be weighed in light of a hitherto unexamined legal doctrine." *Id.*

Similarly, the law of the case doctrine does not prohibit this Court from considering the “unexamined” question of whether *AT&T Mobility*—controlling new legal authority—requires enforcement of the Arbitration Agreement. *See also Binkley v. Burry*, 352 S.C. 286, 294, 573 S.E.2d 838, 843 (Ct. App. 2002) (law of the case did not apply because question of notice regarding the existence of an easement is distinct from the question of notice as it relates to the scope and enforceability of the easement.). Just as in *Sejman*, both the trial court and the South Carolina Supreme Court agree that the prior motion that led to *Herron I* was decided entirely on state law grounds; indeed, the *Herron II* Court emphasized this fact: “the trial court’s order denying Appellant’s motion to compel states the Plaintiff and Defendant agree that *Simpson v. MSA of Myrtle Beach, Inc.* . . . is the *controlling authority* of this motion,” 395 S.C. at 468, 719 S.E.2d at 644 (emphasis added by S.C. Supreme Court), which the Court said “demonstrates Appellant and Respondents’ mutual agreement that the case was to be decided by reference to state law,” *id.* With the intervening decision in *AT&T Mobility*, just as in *Sejman*, Century BMW “contends only that the rights of the parties must now be weighed in light of a hitherto unexamined legal doctrine.” *Sejman*, 845 F.2d at 69.

Finally, even if the law of the case doctrine would otherwise apply, under the Supremacy Clause it must yield to the Supreme Court’s interpretation of the Federal Arbitration Act in *AT&T Mobility*. As the court in *Sejman* explained:

A judicially created procedural doctrine cannot defeat the intent of Congress. When Congress preempts state law, it gives concrete expression to the constitutional authority granted by the Supremacy Clause of Article VI. The effect of a preemptive statute is, therefore, quasi-judicial. A state court confronted with a dispute governed by a preemptive federal statute would have no authority to

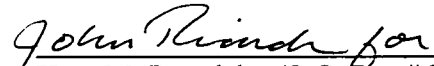
adjudicate the matter other than in accordance with the statute.

Id. Accordingly, the trial court should have compelled arbitration based on the now-established law that the Arbitration Agreement is valid and enforceable, and the FAA preempts any attempt to void its class action waiver.

CONCLUSION

For the reasons set forth above, Century BMW respectfully requests that this Court reverse the trial court's Order and direct the trial court to enter an order compelling arbitration of Appellant's claims against Century BMW on an individual basis in accordance with the terms of the Arbitration Agreement and dismissing her claims currently pending in circuit court.

Respectfully submitted,


Kurt M. Rozelsky (S.C. Bar #6856)
SMITH MOORE LEATHERWOOD
LLP
300 East McBee Ave Suite 500
Post Office Box 87
Greenville, SC 29602
864-242-6440; 864-240-2474 (fax)
Kurt.rozelsky@smithmoorelaw.com

Dennis M. Black (*pro hac vice*, pending)
Richmond T. Moore (S.C. Bar # 69881)
WILLIAMS & CONNOLLY LLP
725 Twelfth St., N.W.
Washington, DC 20005
(202) 434-5000
(202) 434-5029 (facsimile)

ATTORNEYS FOR DEFENDANT SONIC
AUTOMOTIVE 2752 LAURENS RD.,
GREENVILLE, INC. D/B/A CENTURY BMW

**IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas**

The Honorable Doyet A. Early, Circuit Court Judge

RECEIVED

MAY 08 2013

SC Court of Appeals

Case No. 2012-CP-23-07156

CHRISTINE WATTS

Respondent,

v.

**SONIC AUTOMOTIVE 2752 LAURENS ROAD, GREENVILLE, INC. d/b/a
CENTURY BMW**

Appellant.

PROOF OF SERVICE

The undersigned employee of the law offices of Smith Moore Leatherwood LLP, attorneys for Appellant, do hereby certify that service of the Initial Brief of Appellant was made on all counsel of record, specified below, by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:


Terry E. Richardson, Esq.
David Butler, Esq.
Brady R. Thomas, Esq.
RICHARDSON, PATRICK, WESTBROOK &
BRICKMAN, LLC
1750 Jackson Street
Barnwell, SC 29312
803.541.7850

Michael E. Spears, Esq.
MICHAEL E. SPEARS, PA
Post Office 5806
Spartanburg, SC 29304
(864)583-3535

A. Camden Lewis, Esq.
LEWIS, BABCOCK & GRIFFIN, L.L.P
1513 Hampton Street
Post Office Box 11208
Columbia, SC 29211
(803) 771-8000

Richard A. Harpoottlian, Esq.
RICHARD A. HARPOOTLIAN, PA
P.O. Box 1090
Columbia, SC 29202
(803) 252-4848

Gedney M. Howe, III, Esq.
GEDNEY M. HOWE, III, PA
Post Office Box 1034
Charleston, SC 29402
(843) 722-8048


Legal Assistant to M. Kurt Rozelsky

DATED: May 7, 2013



SMITH MOORE LEATHERWOOD

May 6, 2013

Via Federal Express
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
John C. Calhoun Building
1015 Sumter Street
Columbia, SC 29201

RECEIVED

MAY 08 2013

SC COURT OF APPEALS

Re: Christine Watts v. Sonic Automotive 2752 Laurens Road,
Greenville, Inc. d/b/a Century BMW
2012-CP-23-07156
Appellate Case No. 2013-000606

Dear Ms. Kitchings:

Enclosed please find the original and one copy of Appellant's Initial Brief and Designation of Matter in the above matter along with Proof of Service. Please return a file stamped copy in the enclosed return envelope.

Also enclosed for filing please find the original and seven copies of the Verified Application for Admission Pro Hac Vice for Dennis M. Black in the State of South Carolina in the above-referenced matter. We have forwarded the \$250.00 filing fee directly to the South Carolina Supreme Court Office of Bar Admissions. It is our understanding that upon receipt of the filing fee, the Clerk will then contact your office to confirm.

Also, please find enclosed the original and seven copies of the Motion for Admission and Proposed Order in this matter along with the \$25.00 filing fee.

Please forward a clocked copy of the Application and Motion to our office in the enclosed, self-addressed, stamped envelope provided.

Kurt M. Rozelsky | Direct 864.240.2424 | Fax 864.240.2475 | Kurt.Rozelsky@smithmoorelaw.com
Smith Moore Leatherwood LLP ■ Attorneys at Law

The Leatherwood Plaza 300 East McBee Avenue Suite 500 (29601) Post Office Box 87 Greenville, SC 29602
■ 864.242.6440 ■ www.smithmoorelaw.com

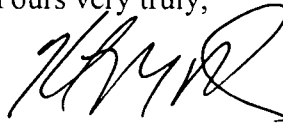
Atlanta, GA ■ Charleston, SC ■ Charlotte, NC ■ Greensboro, NC ■ Greenville, SC ■ Raleigh, NC ■ Wilmington, NC

May 6, 2013

Page 2

Please do not hesitate to give me a call if you have any questions or concerns.

Yours very truly,



Kurt M. Rozelsky
Smith Moore Leatherwood LLP

KMR/pd
Enclosures
Other Counsel of Record
Cc:

Terry E. Richardson
David Butler
Brady R. Thomas
Richardson, Patrick, Westbrook & Brickman, LLC
1750 Jackson Street
Barnwell, SC 29812

Michael E. Spears
Michael E. Spears, PA
PO Box 5806
Spartanburg, SC 29304

A. Camden Lewis
Lewis, Babcock & Griffin, L.L.P.
PO Box 11208
Columbia, SC 29211

Richard A. Harpootlian
Richard A. Harpootlian, PA
PO Box 1090
Columbia, SC 29202

Gedney M. Howe, III
Gedney M. Howe, III, PA
PO Box 1034
Charleston, SC 29402

May 6, 2013

Page 3

S.C. Supreme Court
Office of Bar Admissions
PO Box 11330
Columbia, SC 29211