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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Opinion No. 5900 (S.C. Ct. App. filed March 16, 2022)

Donald and Carlee Simmons, ... Respondents,

v.

Benson Hyundai, LLC, ... Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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INDEX

CERTIFICATE OF COUNSEL

The undersigned counsel for the Petitioner, Benson Hyundai, LLC, certifies the following: the Court of Appeals entered an Order on March 16, 2022 finding the language of the Special Delivery Agreement created a condition precedent of finance approval that applied to the stand-alone Arbitration Agreement and rendered the Arbitration Agreement void. A Petition for Rehearing was filed on March 22, 2022 and denied on March 25, 2022. This Petition for Writ of Certiorari follows.

Bradford N. Martin

QUESTIONS PRESENTED

I. **DID THE COURT OF APPEALS ERR IN ITS NOVEL FINDING THAT A CONDITION PRECEDENT CONTAINED IN ONE AGREEMENT CONTROLS A SEPARATE, UNCONDITIONAL, CONTRACT WHERE THE PARTIES HAVE EXPRESSED AN INTENT THAT THE DOCUMENTS NOT BE CONSTRUED TOGETHER?**

II. **DID THE COURT OF APPEALS ERR IN FAILING TO CONSIDER THE ISSUE OF CONTRACT MODIFICATION?**

III. **DID THE COURT OF APPEALS ERR IN FAILING TO INTERPRET THE STAND-ALONE ARBITRATION AGREEMENT SO AS TO GIVE MEANING TO ALL OF ITS TERMS AND TO THE INTENT OF THE PARTIES?**

IV. **DOES THE GRAMMATICAL CONSTRUCTION OF THE SPECIAL DELIVERY AGREEMENT RAISE AN ISSUE AS TO THE INCLUSION OF THE ARBITRATION AGREEMENT?**

V. **DOES THE COURT OF APPEALS' DECISION UNDERMINE THE GOALS AND POLICIES OF THE FEDERAL ARBITRATION ACT BY DISFAVORING THE STAND-ALONE ARBITRATION AGREEMENT AND BY FAILING TO FIND THAT THE SATISFACTION OF ANY CONDITION PRECEDENT IS AN ISSUE FOR THE ARBITRATOR?**

STATEMENT OF THE CASE

Respondents, Professor Donald Simmons and his wife, came from Macon, Georgia to Spartanburg, South Carolina on July 26, 2016 to purchase a car from Petitioner. They secured a purchase price over the phone before coming to Spartanburg, some 200 miles and four hours away. (R. 25). They originally agreed to pay $26,691 for the car by signing an initial Buyers Order. (R. 72). Respondents requested to see if they could be approved for a loan. (R. 26, R. 178)[1]

[1] It was discovered later that the Professor had recently declared bankruptcy (R. 280) and he blocked his credit at the time of the purchase.

The final Buyer's Order[2] provided that the sale was conditional on approval of financing. (R. 283-284). Mrs. Simmons (but not Professor Simmons) also signed a Special Delivery Agreement (SDA), which was incorporated into the RISC and reiterated that the purchase was conditioned upon financing approval. (R. 75). It provided:

> Seller will attempt to assign the contract on terms satisfactory to the Seller. If the Seller is successful in so doing, the contract (and all other documents executed by Buyer) shall be deemed delivered and fully binding.

It also provided that Respondents were required to return the car if not approved. (R. 75).

The RISC, signed by the Respondents, provided it was the entire agreement as to financing and could only be modified in writing, signed by both parties. (R. 221-224). Petitioner never signed the RISC because the condition precedent of loan approval by the lender had not yet occurred. (R. 222). Professor Simmons had frozen his credit report, so the lender could not review it. (R. 280). It was later discovered that Simmons had recently declared bankruptcy. (R.280).

Both parties signed the "Benson Arbitration Policies and Procedures," (the BAPP) (R. 57-62) which did not deal with financing, but only how to resolve any disputes.[3] The BAPP was not contingent upon approval of financing and clearly covered any disputes over financing, even if financing was not approved:

> 2. DISPUTES SUBJECT TO ARBITRATION. Disputes subject to arbitration are any claim or dispute . . . between Customer and Benson . . . which arise out of or

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[2] The final Buyer's Order had a $7,091 clerical error in Respondents' favor. Petitioner informed Respondents the next day of the $7,000+ clerical error, but Respondents refused to acknowledge the mistake. Respondents agreed to absorb the error, meaning Respondents received the car for far less than Petitioner paid for it. (R. 280).

[3] The BAPP stated, in italicized, capital letters on an 11 x 17 sheet of paper:

> *I AGREE TO ARBITRATE ANY DISPUTES AND UNDERSTAND THAT I AM GIVING UP MY RIGHT TO A JURY AND TO PARTICIPATE IN A CLASS OR GROUP ACTION.*

> relate to Customer's credit application . . . Customer's . . . financing contract or any resulting transaction or relationship.

(R. 57).

The BAPP expressed it was the full agreement of the parties as to dispute resolution and allowed the parties to modify the contract under the following conditions:

> The parties' Agreement and these Rules constitute the full agreement of the parties and can be changed only in writing signed by the individual and an executive officer of Benson.

The BAPP was never modified. The lender subsequently denied financing[4] to the Respondents (R. 76-83, Letters from Hyundai Motor Finance; R. 32-33, Complaint, ¶26); however, Respondents refused to return the car.[5]

Petitioner sought resolution of these issues by filing an Arbitration action on May 9, 2017. (R. 64-71). Respondents answered in Arbitration on June 12, 2017 and made a motion to dismiss. (R. 90-125). Respondents then filed a separate action in circuit court on June 14, 2017. (R. 53-56). Petitioner filed a Motion to Stay and Compel Arbitration on August 9, 2017, (R. 53-56) which was argued on September 15, 2017. The circuit court issued an Order, seven months later, on April 30, 2018 denying Petitioner's Motion. (R. 1-19). Petitioner filed a Motion to Reconsider on May 4, 2018. (R. 290-302). The Court denied the Motion nine months later by Order dated February 4, 2019. (R. 20-21). The Order was received on February 4, 2019 and a Notice of Appeal was filed February 27, 2019. The Court of Appeals issued its Opinion No. 5900 (S.C. Ct. App. filed March 16, 2022) affirming for different reasons not briefed or argued. A Petition for Rehearing was filed on March 22, 2022. The Petition was denied on March 25, 2022. Petitioner seeks a writ of certiorari to review these decisions.

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[4] Professor Simmons had frozen his credit, which hid a recent bankruptcy. (R. 280).

[5] Respondents have now had possession of the car for over five years.

ARGUMENTS

I. THE COURT OF APPEALS ERRED IN ITS DECISION REGARDING THE NOVEL ISSUE OF WHETHER A DOCUMENT CAN UNILATERALLY APPLY A CONDITION PRECEDENT TO A SEPARATE CONTRACT WHERE THE PARTIES HAVE EXPRESSED AN INTENT THAT THEY NOT BE CONSTRUED TOGETHER

Petitioner was shocked to read the Opinion of the Court of Appeals, as it was decided for "different reasons than the trial court." (Opinion No. 5900, p. 2). These reasons were never raised by Respondents in their briefs nor at oral argument by the Court of Appeals. As Justice Toal noted, "appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." See Jean Hoefer Toal et al., Appellate Practice in South Carolina 382 (3d ed. 2016) (quoting *Langley v. Boyter*, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct. App. 1984).

Instead, the Court made the novel decision that a document, which the parties expressly agreed would not be construed together with other agreements, controls a stand-alone agreement to arbitrate and operates as parol evidence to imply a condition precedent and render it void. In doing so, the Court of Appeals impermissibly read an implied condition precedent into the BAPP despite the clear intent of the parties that the BAPP and the RISC not be construed together.[6]

In the present case, the parties unambiguously agreed that the BAPP was the entire agreement among the parties as to dispute resolution and that no conditions precedent existed. (R. 57-62). "The presumption that the instant writing constitutes the entire agreement is buttressed by the recitation therein that it contains the complete agreement." *Richen-Gemco, Inc. v. Heltra, Inc.*, 540 F.2d 1235, 1239 (4th Cir. 1976). As this Court explained in *Carolina Mechanical*

[6] The BAPP and RISC both had an "entire agreement" clause illustrating the parties' intent not to construe the documents together. (R. 62, R. 222).

Contractors, Inc. v. Yeargin Construction Co., 261 S.C. 1, 198 S.E.2d 224 (1973): "(W)here in express terms it says it is the entire agreement, then it is presumed to be the sole agreement."

The RISC and the BAPP both expressed the intent that the documents not be construed together. The Court erred in failing to find this clear language expressed the intent of the parties. *See Suttles v. Wood*, 280 S.C. 272, 273, 312 S.E.2d 574, 576 (Ct. App. 1984). The BAPP was signed by both buyers. It was not incorporated into the RISC like the SDA. The BAPP had no conditions precedent, unlike the SDA.[7] The parties did not contemplate that anything remained to be done to enter into the BAPP. The Court of Appeals ignored the clear intent of the parties that the BAPP agreement be considered only on its four corners.

II. THE LOWER COURT ERRONEOUSLY OVERLOOKED THE ISSUE OF CONTRACT MODIFICATION

This Writ presents another novel issue to the Court. The Court of Appeals has found for the first time in South Carolina that where the parties agree that the sale of a car is conditioned upon approval of financing, a stand-alone arbitration agreement is not validly formed if financing is declined. In reaching its decision, the Court of Appeals failed to consider that the BAPP modified the RISC and SDA.

The SDA was incorporated into the RISC, but not the BAPP. (R. 75). The RISC expressly stated it could be modified in writing signed by both parties (R. 222). Respondents and Benson then signed the BAPP, modifying the RISC in writing (R. 57-58, 181).[8] A written contract may be modified by a subsequent agreement, provided the subsequent agreement contains all the

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[7] "[A] condition precedent may not be implied when it might have been provided for by the express agreement." *Worley v. Yarborough Ford, Inc.*, 317 S.C. 206, 210, 452 S.E.2d 622, 625 (Ct. App. 1994) quoting 17A C.J.S. Contracts § 338 (1963); 17A Am.Jur.2d Contracts § 471 (1991).

[8] In contrast, the RISC (with the incorporated SDA) cannot modify the BAPP because Petitioner did not sign the RISC or the SDA and the BAPP requires the signature of all parties to modify its terms.

requisites of a valid contract.[9] *U.S. Bank Trustee Nat'l Ass'n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 204 (Ct. App. 2009); *Florence City-County Airport Com'n v. Air Terminal Parking Co.*, 283 S.C. 337, 322 S.E.2d 471 (Ct. App. 1984). All the requisites were met as the consideration for the BAPP was forbearance of litigation, not payment for the vehicle. *See Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 304, 468 S.E.2d 292, 300 (1996). Therefore, the parties specifically provided that any dispute would be resolved by arbitration and modified all other agreements, including as to any conditions precedent.

Neither *Thompson v. Lithia Chrysler Jeep Dodge of Great Falls, Inc.*, 185 P.3d 332, 340 (Mont. 2008) nor *Brewer v. Stokes Kia, Isuzu, Subaru, Inc.*, 364 S.C. 444, 451, 613 S.E.2d 802, 806 (Ct. App. 2005), cited by the Court of Appeals, addressed the issue of contract modification.

In *Thompson*, the plaintiffs signed an RISC which included an arbitration provision and a Buyer's Order. The Buyers Order contained a "Notice to Purchaser" which stated:

> If this transaction is to be a retail installment sale, then this order is not a binding contract to the dealer and dealer shall not be obligated to sell until approval of the terms hereof is given by a bank or finance company . . .

The Buyer's Order also addressed arbitration, stating that "any controversy or claim arising out of or relating to this order, or breach thereof, shall be settled by arbitration. . . ." Therefore, when financing was not secured, the arbitration agreement did not apply. Clearly, the arbitration agreement was part of the RISC and the Buyer's Order with the condition precedent. There was no separate Arbitration Agreement modifying the RISC. Unlike *Thompson*, the BAPP is separate and a modification of any prior agreements regarding arbitration.

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[9] This modification does not create an inconsistency. The parties indicated their intent in the RISC and BAPP that they were not to be construed together except to the extent that one modified the other. (R. 62, ¶24; R. 222). See *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 84, 749 S.E.2d 139, 148 (Ct. App. 2013) (if a subsequently executed document signed by the Dealer effectuated a valid modification, no inconsistencies exist).

In *Brewer*, the Court of Appeals found there was not an enforceable contract for the sale of a car where a Buyer's Order contained a stamped declaration that delivery was subject to credit approval and a Bailment Agreement signed by Brewer provided: "In the event dealer is unable to provide financing Buyer(s) shall provide their own financing." *Brewer*, 364 S.C. at 447, 613 S.E.2d at 804. *Brewer* does not address the enforceability of a separate agreement with its own consideration which does not contain language indicating that is conditional upon financing approval.

The RISC and SDA do not modify the BAPP and the Court of Appeals cannot read a condition precedent into the BAPP where it is not provided in the contract itself.[10] It has long been held that parol evidence is not admissible to show that a writing in the form of an absolute contract was a conditional contract. *Ballenger Corp. v. City of Columbia*, 286 S.C. 1, 331 S.E.2d 365 (Ct. App. 1985) citing *Busby v. Hamby*, 123 S.C. 534, 117 S.E. 223 (1923). In *Cline v. Farmers' Oil Mill*, 83 S.C. 204, 65 S.E. 272 (1909), this Court found a promissory note for $150 for a mule could not be defeated by parol evidence to the effect that that sum was only to be paid in case the maker collected $50 from one man and $50 from another, as this evidence would vary the terms of the note.

The BAPP was a modification of any prior agreements as to arbitration. It is a complete agreement and parol evidence cannot be used to transform it into one that is conditional. This is in contrast to the RISC and SDA which include a condition precedent on their face. The Court of Appeals erred in failing to address modification.

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[10] *See Gilliland v. Elmwood Props.*, 301 S.C. 295, 302, 391 S.E.2d 577, 581 (1990); see also 11 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 33:1 (4th ed.1999) (explaining the parol evidence rule "prohibits the admission of extrinsic evidence of prior or contemporaneous oral agreements, or prior written agreements, to explain the meaning of a contract when the parties have reduced their agreement to an unambiguous integrated writing").

III. THE COURT OF APPEALS' DECISION OVERLOOKS THAT THE BAPP MUST BE READ TO GIVE MEANING TO ALL ITS TERMS AND TO THE PARTIES' INTENT

The clear intent of the parties was that all obligations other than the agreement to arbitrate were contingent on approval of financing.[11] "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). The SDA was incorporated only into the RISC. It is clear that without financing approval, there was no consideration for the purchase of the car or any related products. In contrast, the consideration for the BAPP was to forebear the right to a jury trial.

The parties agreed subsequent disputes regarding financing were subject to the BAPP:

> Disputes subject to arbitration are any claim or dispute . . . which arise from or relate to Customer's credit application. . . or financing contract or any resulting transaction or relationship.

(R. 57). The BAPP made it clear that there was no condition precedent for it to be binding. Both Professor and Mrs. Simmons signed the BAPP under the following capitalized words: "I AGREE TO ARBITRATE ANY DISPUTES . . ." (R. 57).

If, and only if, a document attempting to change this contract was signed (in writing) by all would it apply. Paragraph 24 provides:

> The parties' Agreement and these Rules constitute the full agreement of the parties and can be changed only in writing signed by the individual and an executive officer of Benson.

(R. 62).

Courts are to assume that the parties intended that a binding contract be formed, and "[t]hus, any choice of alternative interpretations, with one interpretation saving the contract and

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[11] Even the Court of Appeals nodded when it stated: ". . .that while it may seem everyone to the transaction was nodding about arbitration..." (Opinion No. 5900, p. 5).

the other voiding it, should be resolved in favor of the interpretation that saves the contract." *Stevens Aviation, Inc. v. Dyncorp Int'l LLC*, 407 S.C. 407, 756 S.E.2d 148, 153 (2014). Neither the SDA nor the RISC were signed by an executive officer of Petitioner, and therefore, they cannot modify the BAPP. Nothing in the BAPP refers to the SDA nor the RISC. Thus, the BAPP represented the full agreement of the parties.

Contracts are to be read to give meaning to all terms and not in such a way as to render a clause superfluous. *Ryals v. ILA Local 1771*, 33 F.Supp.3d 634 (D. S.C. 2014); Restatement (Second) of Contracts § 203 (1981) ("[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.") The Court's decision that the BAPP was not entered into absent financing approval would render arbitrating disputes regarding Respondents' credit application or financing contract superfluous as denial of credit was a clearly covered dispute.

IV. THE GRAMMATICAL CONSTRUCTION OF THE SPECIAL DELIVERY AGREEMENT RAISES AN ISSUE AS TO THE INCLUSION OF THE ARBITRATION AGREEMENT, THEREFORE ARBITRATION SHOULD BE COMPELLED

The SDA states Petitioner will attempt to assign the RISC on terms satisfactory to Benson, and "If the Seller is successful in so doing, the [RISC], (and all other documents executed by Buyer) shall be deemed delivered and fully binding."[12]

The Supreme Court of Vermont has noted that a parenthetical word or phrase is supplementary to the language it follows, and is optional for the reader. *Towslee v. Callanan*, 190 Vt. 622, 55 A.3d 240, 2011 VT 106 (Vt. 2011) citing The Oxford Companion to the English Language 750 (1st ed.1992) (explaining that a parenthesis is "a qualifying, explanatory, or

[12] It does not say, as the Court of Appeals held, that the opposite is true.

appositive word, phrase, clause, or sentence that interrupts a construction without otherwise affecting it," and that it "may be marked by pairs of commas, dashes, or round brackets/parentheses"); The New Dictionary of Cultural Literacy 156 (3d ed.2002) (stating that parentheses " subordinate ... the material within them so that readers save most of their attention for the rest of the sentence"). The Texas Court of Appeals similarly noted that a parenthesis is an "interruption" of a sentence. *Rowan Cos. v. Wilmington Trust*, 305 SW 3d 698 (Tex. App. 2010) citing R.W. Burchfield, The New Fowler's Modern English Usage, 571 (rev. 3d ed., Oxford Univ. Press 2000) (describing a parenthesis as an "interruption" of a sentence and stating, "It is important to bear in mind that a parenthesis may or may not have a grammatical relation to the sentence in which it is inserted.").

The intent of the SDA, as incorporated into the RISC, is that the transaction to purchase a car upon certain terms is not entered into unless financing is approved. This reflects the agreement of both parties that the purchase is to be financed. The BAPP, in contrast, does not have at its essence an agreement that the transaction is to be financed; rather it is an agreement regarding the forum for resolving disputes among the parties. The placement of the "all other documents" language in the SDA in a parenthetical raises a question as to whether that language is optional for the reader.

Because there is a question as to the Parties' intent regarding the BAPP, arbitration should be compelled. "Motions to compel arbitration should not be denied unless the arbitration clause is not susceptible of any interpretation that would cover the asserted dispute." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41-42, 524 S.E.2d 839, 846 (Ct. App. 1999).

V. THE LOWER COURT'S DECISION UNDERMINES THE GOALS AND POLICIES OF THE FAA

Due to the numerous benefits of arbitration, there is a strong presumption in favor of its validity and both federal and state laws favor them. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Carolina Care Plan, Inc. v. United Healthcare Servs., Inc.*, 361 S.C. 544, *606 S.E.2d 752* (2004). "[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

A. The Court of Appeals' Decision Overlooks the Fact that Arbitration Survives Termination of a Contract

The duty to arbitrate under an arbitration clause in a contract survives its termination. *Jackson Mills, Inc. v. BT Capital Corp.*, 312 S.C. 400, 440 S.E.2d 877 (1994). This reflects the clear intent of the parties. Otherwise, a party could avoid arbitration by simply terminating the agreement, or in this case, causing a condition precedent to the purchase of the car not to occur (like never unfreezing your credit).

As this Court has noted, it should be assumed the parties intended to form a binding contract and an interpretation saving the contract will be favored over one that voids it. *See Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 407 S.C. 407, 416-20, 756 S.E.2d 148, 152-54 (2014). The BAPP covers disputes regarding the denial of a financing contract and, therefore, must survive the denial. The interpretation of the Court of Appeals that the parties did not intend to form a binding arbitration agreement disfavors the BAPP and is, therefore, contrary to the FAA.

B. The Decision Overlooks the Fact that Whether a Condition Precedent has been Met is an Issue for the Arbitrator

It is presumed that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 86 (2002). This includes the satisfaction of "prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate." *Id.* at 85 (quoting the Revised Uniform Arbitration Act of 2000 § 6, Comment 2, 7 U.L.A. 13 (Supp.2002). See also 9 U.S.C. § 6(c) ("An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled"). The issue of a condition precedent is, therefore, an issue for the arbitrator under the FAA.

CONCLUSION

Respondents found an attractive price for a car and travelled over 200 miles, and four hours, to buy at that price. The parties entered into two sets of agreements: purchase and finance agreements, which were conditioned on finance approval, and an arbitration agreement which was unconditional and covered all disputes, including financing.

The parties agreed these two types of agreements were separate and would not be construed together. Petitioner made a $7,000 clerical error in favor of the Respondents in the final documents. Respondents refused to acknowledge the error and when their financing was declined, they refused to return the car. A number of legal and factual issues remain in this case, but it is clear that the parties entered into an Arbitration Agreement that stood alone and contained no conditions precedent to be enforceable.

The Court of Appeals ignored the clear intent of the parties and erroneously implied a condition precedent (a novel issue) to the Arbitration Agreement which the parties did not intend

and for which they did not contract. Petitioner requests that this Court grant it a Writ of Certiorari and hear this appeal.

Respectfully submitted,

April 21, 2022

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