

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Appellate Case No. 2022-000490

Donald and Carlee Simmons, Respondents,

v.

Benson Hyundai, LLC, Appellant.

RESPONDENTS' RETURN TO APPELLANT'S PETITION
FOR A WRIT OF CERTIORARI

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INDEX

CERTIFICATE OF COUNSEL..... 1

APPELLANT'S QUESTIONS PRESENTED..... 2

RESPONDENTS' STATEMENT OF THE CASE..... 2

RESPONDENTS' COUNTER-ARGUMENTS..... 4

 I. THE COURT OF APPEALS DID NOT ERR IN ITS DECISION REGARDING THE ISSUE OF WHETHER A DOCUMENT CAN APPLY A CONDITION PRECEDENT TO A SEPARATE DOCUMENT, BECAUSE THE COURT OF APPEALS FOUND THAT NO CONTRACT HAD EVER BEEN CREATED, AS HAD JUDGE COLE 4

 II. THE COURT OF APPEALS DID NOT OVERLOOK THE ISSUE OF CONTRACT MODIFICATION AND IN FACT SQUARELY ADDRESSED IT SEVERAL TIMES..... 7

 II. THE COURT OF APPEALS' DECISION DID NOT OVERLOOK THE STAND-ALONE ARBITRATION DOCUMENTS AND THE PARTIES' INTENTIONS. THE DOCUMENTS PRESENTED TO THE RESPONDENTS GAVE UNDUE DISCRETION TO THE APPELLANT SUCH THAT NO CONTRACT WAS EVER FORMED, FOR BOTH THIS REASON AND THE OTHER REASONS PREVIOUSLY STATED..... 7

 IV. THE GRAMMATICAL CONSTRUCTION OF THE SPECIAL DELIVERY AGREEMENT DOES NOT RAISE AN ISSUE ABOUT THE INCLUSION OF THE ARBITRATION AGREEMENT, THEREFORE ARBITRATION SHOULD NOT BE COMPELLED..... 8

 V. THE LOWER COURTS' DECISIONS DO NOT UNDERMINE THE GOALS AND POLICIES OF THE FAA BECAUSE THEY CONSTRUED THE DOCUMENTS PRESENTED TO APPELLANTS IN A NEUTRAL WAY AS REQUIRED BY THE FAA. MOREOVER, SATISFACTION OF A CONDITION PRECEDENT TO FORMATION OF A CONTRACT IS A MATTER FOR THE COURT..... 8

 A. The Court Of Appeals' Decision Does Not Overlook The Fact That Arbitration Survives Termination Of A Contract..... 9

B. The Court Of Appeals' Decision Does Not Overlook The Fact That Whether A Condition Precedent Has Been Met Is An Issue For The Arbitrator..... 9

CONCLUSION..... 10

CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondents, Donald and Carlee Simmons, certifies the following: the Return to Appellant's Petition for a Writ of Certiorari complies with Rule 242(f), SCACR and Appellant's counsel was served with a copy Respondents' Return to Appellant's Petition for a Writ of Certiorari by depositing a copy in the U.S. mail postage prepaid on June 9, 2022, addressed to Appellant's counsel of record, Bradford N. Martin and Laura W.H. Teer, Bradford Neal Martin & Associates, P.O. Box 10410, Greenville, South Carolina 29603.



E. Warren Moïse

APPELLANT'S 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 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 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?

RESPONDENTS' STATEMENT OF THE CASE

This is an auto-fraud case. Circuit Judge J. Derham Cole and a unanimous panel of the South Carolina Court of Appeals have found for the Respondent.

On July 26, 2016, Respondents went to Benson Hyundai, LLC ("the Dealership" or "Benson") in hopes of purchasing a car. They planned to have a baby and needed a reliable car at an affordable price. However, before driving to Benson's dealership, Respondents had done research to find a Hyundai Veloster at a suitable price. Respondents then called Benson and spoke to salesman Robert

Winecoff. Winecoff promised over the phone to match the price Respondents had gotten elsewhere for a Veloster.

Respondents met Winecoff at the Dealership. A credit check was done in Nathan Burden's office with Darryl Turner present. Mrs. Simmons' 833 score was exceptional (anything from 750 and above is considered "excellent" in the credit industry; between 700 and 749 is considered "good") and higher than Mr. Simmons' score. Mr. Simmons had a prior bankruptcy, which was disclosed to the Dealership. Even so, his credit would be designated as "good."

Plaintiffs then were taken into the office of Brian Perry, Finance and Insurance Manager, late that night, who presented numerous contracts to Respondents in a hurried fashion without giving Respondents time to read them closely and without properly explaining them. During contract negotiations, Benson's manager Nate Burden pressured them to sign, saying a substantial rebate would be available that night only. However, the Retail Buyer's Order (R. 53) drafted by Appellant and signed at the Dealership the night of the sale reflected the agreed-upon Manufacturer's Suggested Retail Price of \$19,600. After discounts, trade-in, and other credits and deductions, only \$10,043 remained to be financed.

In addition to a trade-in of Mr. Simmons' Saab, Benson debited \$1,000 directly from Respondents' bank account. A personal check for \$2,800 was written to Benson. Some of those funds and the Saab

are still in Benson's possession.

Future payments via a bank check made out to Hyundai Motor Finance were sent directly to Benson. This they did every month until learning that Benson was keeping them and not forwarding them.

Respondents could understand the dollar figures in the documents, but not being lawyers, Respondents did not understand many of the material legal aspects, for example, what exactly were the Federal Rules of Civil Procedure or the AAA Consumer Arbitration Rules.

The next morning, Respondents were contacted by the Dealership, told to tear up the contracts, and informed that the contracts (drafted by dealership managers experienced in financing auto sales) were invalid.

On a later call, the manager became irate, began cursing at Mr. Simmons, called him an "a**hole" and used words like "f**king" in an effort to pressure him. A repo man was later sent who confronted Mrs. Simmons while she was alone in her office at work.

The Plaintiffs were texted or emailed a cropped version of a document entitled a "Worksheet" closely resembling the Retail Buyer's Order they had signed the previous night. (This was the document submitted by Benson as Exhibit A to its Motion to Compel Arbitration.) The new document had significantly higher dollar

figures, which Benson claimed Plaintiffs owed. (R. 57).

RESPONDENTS' COUNTER-ARGUMENTS

I. THE COURT OF APPEALS DID NOT ERR IN A DECISION REGARDING THE ISSUE OF WHETHER A DOCUMENT CAN APPLY A CONDITION PRECEDENT TO A SEPARATE DOCUMENT, BECAUSE THE COURT OF APPEALS FOUND THAT NO CONTRACT HAD EVER BEEN CREATED, AS HAD JUDGE COLE.

Appellant's counsel's first objection is that he was shocked to learn that the Court of Appeals affirmed on a "different" basis than did the lower court. Respondents disagree. However, it is well-settled law that appellate courts will not reverse factual findings of the trial judge that are reasonably supported by the record. Put another way, an appellate court may affirm on any basis found in the record. See *Dept. of Transp. v. M & T Ent.*, 379 S.C. 645 (S.C. Ct. App. 2008) ("[W]e may affirm for any reason in the record[, and] we affirm as modified.").

Secondly, the condition precedent was a condition as to formation of a contract, not a condition precedent as to performance: See *Ex Parte Horton Family Housing, Inc.*, 882 So. 2d 838 (Ala. 2003) ("In the case before us, the Burtons allege that financing was a condition precedent to the formation of the entire contract between Horton and them."). See also *Ex parte Cobb*, 781 So. 2d 208, 210-11 (Ala. 2000) (approved financing was a condition precedent to the contract formation, and its nonoccurrence yielded no contract and thus no arbitration clause); *Ex parte Payne*, 741

So. 2d 398, 403 (Ala. 1999) (same) ("if no contract existed, no arbitration agreement existed.")¹

In the midst of a series of already overreaching contracts, the car dealer gave himself the right to unilaterally back out of the deal. Appellant does not explain how the Special Delivery Agreement, which claims to be incorporated into the Retail Installment Sale Contract is "unconditional."

Appellant expressly incorporated the Retail Installment Sale Contract giving the Dealership the right to assign the contract "on terms satisfactory to the Seller." R. 75, at para. 1 (emphasis added). Whether or not the dealer chose to stay or walk away from the sale was his, and his alone. Again, in the following paragraph (paragraph 2), the Special Delivery Agreement obligated Respondents to return the vehicle (buyer "shall return the vehicle") if financing is not found "on terms satisfactory to the Seller" (emphasis added).

In fact, the Court of Appeals and Judge Cole correctly opined that there was no contract. The car salesman simply outdid himself by presenting a group of boilerplate documents to Respondents so riddled with contradictions, exceptions, and holes in Appellant's favor that it could walk away with impunity.

¹Benson's actions the next day confirmed no contract was formed because it pressured Respondents to return the car and later tried to repossess it. It is a classic yo-yo deal.

In standard yo-yo fashion, the car salesman went so far in ensuring that he could walk away from the deal if it were unprofitable that no contract was ever formed. The documents were presented to Respondents by the Appellant's car salesmen not vice versa. Now, Appellant must live by with the language Appellant itself drafted. Between Appellant's conflicting theories of contract law and a general requirement that the Court rewrite the contract, the contracts are unreconcilable. See *Manzella v. State Farm Mut. Auto. Ins. Co.*, 480 Mich. 1115 (Mich. 2008) (rejecting "tortured" reading of the contract); *Osbon v. Nat'l Union Fire Ins. Co.*, 621 So.2d 78 (La. App. 1993) ("tortured reading").

As for Appellant's second objection to the trial judge's Order, Appellant argues as follows: among the various documents that Benson's car salesmen and the parties signed, Benson's Arbitration Policies and Procedures) (the "BAPP" a.k.a. the "stand-alone document") and the Retail Instalment Sales Contract RISC may be construed together. Instead, Benson now contends that the BAPP "was the entire agreement among the parties as to dispute resolution" and that "no conditions precedent existed." (R.6) (emphasis added). In the event of a conflict, Appellant contends that BAPP controls any and all dispute resolution.

The response to Appellant's argument is the same as to all of Benson's other contentions: Benson drafted the documents, including

the Special Delivery Agreement giving Benson unfettered discretion to walk away from the deal. Benson went too far and now wants the courts to rewrite his contracts.

II. THE COURT OF APPEALS DID NOT OVERLOOK THE ISSUE OF CONTRACT MODIFICATION AND IN FACT SQUARELY ADDRESSED IT SEVERAL TIMES.

Contrary to Appellant's assertion, the Court of Appeals *did* consider the issue of contract modification, just not to Appellant's liking: "The 'making' or formation of - in the sense of the very existence of - the agreement to arbitrate is always a decision for the court, not an arbitrator." *Granite Rock Co. Int'l Bhd. of Teamsters*, 561 U.S. 287, 296 (2010) (cited in Exhibit 1, *Donald and Carlee Simmons v. Benson Hyundai, LLC*, App. Case No. 2022-000490 (S.C. Ct. App. March 16, 2022), at p. 3) (Court of Appeals' opinion in this case). See also *Thompson v. Lithia Chrysler Jeep Dodge of Great Falls, Inc.*, 185 P.3d 332, 340 (Mont. 2008) (no binding contract formed under similar documents because satisfactory financing not obtained).

III. THE COURT OF APPEALS' DECISION DID NOT OVERLOOK THE STAND-ALONE ARBITRATION DOCUMENTS AND THE PARTIES' INTENTIONS. THE DOCUMENTS PRESENTED TO THE RESPONDENTS GAVE UNDUE DISCRETION TO THE APPELLANT SUCH THAT NO CONTRACT WAS EVER FORMED, FOR BOTH THIS REASON AND THE OTHER REASONS PREVIOUSLY STATED.

The Court of Appeals gave a detailed and logical opinion based on South Carolina law. No further analysis is needed.

However, Appellant's question assumes that a contract exists, and ignores the fact that the car salesman had Respondents sign an illusory agreement that bound Respondents but not Appellant.

IV. THE GRAMMATICAL CONSTRUCTION OF THE SPECIAL DELIVERY AGREEMENT DOES NOT RAISE AN ISSUE AS TO THE INCLUSION OF THE ARBITRATION AGREEMENT, THEREFORE ARBITRATION SHOULD NOT BE COMPELLED.

Appellant failed to raise this argument to the trial judge and Court of Appeals, and is barred. Moreover, it has been addressed in Respondents' other arguments.

V. THE LOWER COURTS' DECISIONS DO NOT UNDERMINE THE GOALS AND POLICIES OF THE FAA BECAUSE THEY CONSTRUED THE DOCUMENTS PRESENTED TO APPELLANTS IN A NEUTRAL WAY AS REQUIRED BY THE FAA. MOREOVER, SATISFACTION OF A CONDITION PRECEDENT TO FORMATION OF A CONTRACT IS A MATTER FOR THE COURT.

In no activity of life, except representing car dealers and other businesses, have I ever seen a consumer arrive at a business with an arbitration agreement and try to persuade the salesman to include it into the contract. The trend of modern law is to favor the consumer. As noted above, automobiles are one of the most significant purchases a family will make. The legislature's policy is to have arbitration contracts on an equal footing with other contracts. It does not condone overreaching by car salesmen who draft oppressive, illusory contracts of this sort.

A. The Court Of Appeals' Decision Does Not Overlook

The Fact That Arbitration Survives Termination Of A Contract.

The Appellant argues that the Court of Appeals overlooked the proposition that arbitration survives a contract's termination. However, there must first be a valid contract. This issue has been addressed several times already before the lower courts and now this Court.

In addition to the previous sustaining grounds raised, Respondent would argue that due to Appellant's overreaching in its drafting of the Special Delivery Agreement (and the other documents executed at that time), there is no valid contract to enforce and thus no valid arbitration clause to be terminated.

B. The Court Of Appeals' Decision Does Not Overlook The Fact That Whether A Condition Precedent Has Been Met Is An Issue For The Arbitrator.

Again, the decision does not overlook the fact that whether a condition precedent has been met is an issue for the arbitrator. Instead, the Appellant merely ignores the point that no valid contract was formed. When one party contends that no valid contract was formed under state law, the court must first decide this issue. In this case, a unanimous Court of Appeals and the trial judge have concluded that no contract existed.

CONCLUSION

The trial judge and the Court of Appeals correctly analyzed

the facts and law, and properly applied them. The case has been briefed and argued before the trial judge, who ruled in Respondents' favor. It has been thoroughly briefed and argued before the Court of Appeals. The Court of Appeals ruled unanimously in Respondents' favor. Respondents ask this Court to affirm the trial judge and Court of Appeals and affirm the lower courts.

Respectfully submitted,

June 9, 2022

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