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Case Number 162,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ASHLEY N. (REECE) ELIA,	)	
	)	
Plaintiff Below,	)	**No.: 162, 2014**
Appellant,	)	
	)	
v.	)	**Court Below:**
	)	**Superior Court in and For**
HERTRICH FAMILY OF	)	**Kent County**
AUTOMOBILE DEALERSHIPS, INC.,	)	**C.A. No.: K13C-06-036 RBY**
D/B/A/ HERTRICH'S CAPITOL,	)	
A corporation of the State of Delaware,	)	
	)	
Defendant Below,	)	
Appellee.	)	

APPELLANT'S REPLY BRIEF

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Dated: July 3, 2014

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ARGUMENT I. NO BINDING CONTRACT WAS FORMED.

The overarching error of Hertrich's argument is that there was a valid binding contract including an arbitration clause in the present case. However, Hertrich ignores pertinent contract language and Hertrich's actions in canceling the original contract when both Wells Fargo and Hertrich, the assignee and creditor named in the Retail Installment Sales Contract (RISC1), respectively, refused to finance the purchase. Since Hertrich cancelled those agreements, there was no contract formed by Sales Order 1 and RISC 1. Consequently, there was no contract that contained an arbitration clause.

When Hertrich could not assign the RISC to Wells Fargo, and would not finance it as it agreed by its signature on the RISC, Hertrich canceled both Sales Order1 and RISC1 and considered both at an end. This is evidenced by Hertrich requiring Ms. Reese to return to the dealership; return the vehicle or sign new replacement Orders and RISC papers; and coerced Reece into signing the new, higher interest rate RISC2 by refusing to return her traded-in vehicle, refusing to finance as she was promised in RISC1, and threatening to repossess her car if she refused.

Hertrich's argument ignores that in RISC1, A59, Hertrich named itself as "Creditor-Seller." Consequently, Hertrich made a Sales Order 1, for the cash sale

of the vehicle and an alternative financing Contract to sell and finance the vehicle at the 8.8% rate. It is not disputed that Hertrich promised that it obtained that interest rate for Reece from Wells Fargo. Hertrich ignores the fact that it, like Wells Fargo refused the financing Hertrich promised to Reece.

1. Hertrich Unilaterally Repudiated and Cancelled the Entire Contract When it Did Not Provide the Financing. Just as in *DaimlerChrysler Corp. v. Matthews*, 848 A.2d 577 (Del. Ch. 2004), Hertrich had no contractual language to supports its action in repudiating and cancelling the sale. Hertrich argues that *Matthews* does not apply to the present situation, because in that case, the agreement repudiated was the arbitration agreement. However, the principles for which it is cited, repudiation of contract, apply with equal force in the present case where it was the entire contract that Hertrich repudiated, canceled and new documents substituted in their entirety. That action released Reece from any obligation under Sales Order 1, by making it a nullity which did not support an arbitration clause. Those substitute documents did not have or incorporate a valid arbitration agreement, since the Merger clause of RISC 2 governed the sale, and contains no arbitration clause; and the arbitration clause in Sales Order 2 and 3 was not signed by Hertrich, as Hertrich required.

2. Hertrich Treated Financing as a Condition Precedent That Failed, Resulting In No Contract. Hertrich treated the financing as a condition precedent

to formation of the entire contract. This was the finding in similar circumstances in *Thompson v. Lithia Chrysler Jeep Dodge of Great Fall*s, 180 5 P.3d 332 (Mont. 2008) quoted in the Opening Brief at p.13. In order to avoid the consequences of that court's reasoning, Hertrich states, without evidence, that the title was turned over to Reece, when it was not. By this unsupported allegation, Hertrich tries to take it's actions and conduct out of the realm of a condition precedent and try to squeeze it into the principles governing a condition *subsequent*, as described by *Thompson*:

> "For example, assume a consumer enters into a condition precedent contract with the dealer to purchase a car that does not become effective until the financing goes through. If the financing does not go through, the consumer never owned the car and the contract was never effective. In a condition subsequent sale the dealer will have turned over title to the consumer and there is an agreement that, if the financing falls through, the consumer must return the title to the dealer."

Thompson held that a condition precedent contract was never entered in the circumstances similar to Reece's. Consequently, Sales Order 1 with the arbitration clause was never a contract. The result should be the same in the present case. It was within Hertrich's control to avoid any controversy by actually securing the 8.8% financing it told Reece was obtained for her, before turning the car over to her in a "spot delivery."

Hertrich argues that *Thompson* is based on language in the contract allowing the dealer to cancel the sale. However, that language in the *Thompson* contract

describes the way that Hertrich treated the contract. Hertrich told Reece that the financing that Hertrich arranged at 8.8% was approved. A7. Hertrich had to know this was not true. Hertrich insisted that Reece sign new, substitute Sales Order 2 and RISC 2; with a different lender; and a different and higher interest rate. The dealer's motivation to do this is stated in the RISC: "The Seller may...receive part of the finance charge." A60. The higher the interest rate, the more money the dealer receives has its portion. Hertrich's actions were not even justified or authorized by language that would alert Reece that it was a contingent contract in Hertrich's view.

Other jurisdictions cited in the Opening Brief at p. 14 agree with *Thompson*:

- *Eady v. Bill Heard Chevrolet Co.*, 274 F. Supp. 2d 1284 (M.D. Ala. 2003) (Agreement to arbitrate in contract for sale of new car lacked consideration and was thus unenforceable where the agreement stated that it was in consideration for the sale of the vehicle, and there was no sale because the buyers' financing was disapproved.)
- *Ex Parte Payne*, 741 So.2d 398 (Ala. 1999) (Dealership cannot enforce an arbitration provision, because the Retail Purchase Order is not a binding contract, when cancelled when financing not approved by bank.)
- *Ex Parte Horton Family Hous., Inc.*, 882 So. 2d 838 (Ala. 2003) (Where credit was denied, "If no contract existed, no arbitration agreement existed.")

These cases also hold that when the dealer told the customer that financing was approved and it fell through, it meant that no contract was formed, and without a contract, the arbitration clause was unenforceable.

Hertrich's actions demonstrate clearer than any language in the failed contracts in those cases that Hertrich considered financing a condition precedent. As a result, there was no valid and enforceable contract since financing, a material and express part of the contract, was never finalized. As telling, Hertrich did not honor RISC1 by supplying the financing it agreed. Like *Thompson* and other cases, cancellation of RISC 1 is Hertrich's admission by conduct this was a contingent contract, and that Hertrich considered it to be contingent, and at an end. Therefore, no valid underlying contract was formed. Consequently, there was no contract containing an arbitration agreement.

Hertrich's effort to bring the case within the contemplation of a condition subsequent by alleging the title was provided, is completely unsupported by evidence or logic. There is no reason that Hertrich would give the purchaser whose financing was not finalized, the title since Hertrich would need the title to be marked with the lien of the creditor. Moreover, in Delaware, Creditors retain the title as security. *See, e.g.*, *Farmers Bank of State of Del. v. Dickey*, 209 A.2d 752 (Del. Super. Ct. 1965) (Entry and notation on certificate of title indicating

automobile had been purchased from dealer and that there was lien in favor of bank established that bank had valid prior lien and was notice of existence of lien.)

3. Hertrich Never Signed The Arbitration Clauses as Required by The Replacement Sales Orders. Hertrich's form Sales Order containing the arbitration language requires Hertrich as well as the purchaser to sign and "accept" the arbitration clause and the Sales Order. Hertrich never signed any of the replacement arbitration clauses in RISC 2 or RISC 3. A65; A75. In addition, the substitute Sales Orders all state in capital letters "THIS ORDER IS NOT VALID UNLESS SIGNED AND ACCEPTED BY DEALER OR HIS AUTHORIZED REPRESENTATIVE." Consequently, the unsigned arbitration agreements are not enforceable by the terms required by Hertrich, and the proponent of the arbitration, since Hertrich did not sign.

The cases cited by Hertrich for holding one party to a contract that requires signature by both on an arbitration clause are of a different character than the present case. Here, there is a contract of adhesion between parties of grossly unequal bargaining power: a car dealer and its customer. *Loureiro v. Copeland* and *Nason Const.*, cited by Hertrich *are* cases of a different character. Each is a case involving parties of relatively equal bargaining power; under negotiated contracts as opposed to contracts of adhesion. In consumer arbitration cases, especially car purchase cases, courts agree that the car dealer is bound by the terms it chose to

require in its form adhesion contract.

This is an example of Hertrich attempting to escape from provisions of its own contract language that it does not want to have enforced against it, including:

1. The financing arranged by Hertrich as described Sales Order 1 and RISC 1;
2. That Hertrich was named the "creditor" in the RISC, but Hertrich would not finance;
3. That Hertrich is required to sign the arbitration clause, by its own terms;
4. That Hertrich is required to sign the Sales Order, by its own terms;
5. That Hertrich's RISC merger clause superseded the Sales Order;
6. But Hertrich can cancel the sale, and refuse to return the trade in; but even when Hertrich cancels the sale, Reece is bound by it. A8, ¶15.

Individually and together these factors demonstrate a lack of mutuality of contract. Hertrich must not be permitted to pick and choose the parts of the agreement it will be bound by, and which it will not.

4. RISC 2's Merger Clause Supersedes Sales Order 2, by its Own Terms. After Hertrich cancelled the Sales Order 1 and RISC 1 it coerced Reece into signing Sales Order 2 and RISC 2. Hertrich's argument overlooks that Hertrich did not sign the arbitration clause or Sales Order 2, and here again; Hertrich does not wish to be bound by RISC 2's merger clause. Not only was RISC 2 not signed "contemporaneously" with any of the first documents, (it was one

week later), but courts have consistently held that the RISC merger clause supersedes a Sales Order containing an arbitration clause where it is the intention that the purchase price be financed, as here.

This is discussed in a detailed analysis, in *Duvall Motors Co., v. Rogers*, 73 So.3d 261 (Fla. App. 2011). The Florida appellate court considered language nearly identical to the language found in the RISC in the present case. That court recited the following:

- The parties sign multiple documents related to a vehicle purchase transaction.
    - One of those documents is the retail installment sales contract or "RISC."
    - The RISC identifies the purchaser as the Buyer and the dealer as the Seller-Creditor.
- The RISC states "You, they Buyer … may buy the vehicle below for cash or on credit."
    - "By signing this contract, *you choose to buy the vehicle on credit under the agreements on the front and back of this contract*. You agree to pay the Seller-Creditor … the Amount Financed and Finance Charge…
- The RISC identifies the vehicle being purchased and provides the financial terms of the purchase,
- The RISC also contains a warning that:
    - "State law does not provide a 'cooling off' or cancellation period…"

- "After you sign this contract may only cancel if the seller agrees, or for legal cause."

- The RISC provides that: "Seller may assign this contract.
- Finally, and most importantly, to the *Duval* court, the RISC contains the following merger clause: "**HOW THIS CONTRACT CAN BE CHANGED**. This contract contains the entire agreement between you and us relating to this contract. Any change to this contract must be in writing and we must sign it. No oral changes are binding."
- The RISC does not contain an arbitration agreement.
- The arbitration agreement appears in a separate document, the Sales Order which was signed the same day. In the present case, Hertrich did not sign Sales Order 2 or RISC 2.

To this point the language quoted by the *Duvall* court is identical to the language in the Hertrich RISC. *Duvall* then discusses contract language which describes the identical conduct of Hertrich:

- The RISC is assigned by dealer to a bank/finance company. Hertrich did not sign either the RISC as required by Delaware Law, 5 *Del. C.* §2907 (a), (c) or its assignment to the finance company. A70.
- The dealer has the right to terminate "this order if the dealer is unable to sell the risk to financial institution on the terms in the contract." Hertrich did so

without the benefit of language that might have alerted Reece that it reserved that right to itself, but not mutually to Reece.

- "If the customer takes delivery of the vehicle before financing is approved, customer does not have nor will acquire any rights or interest in the vehicle by such delivery except dealers permission to use it, which can be revoked." Just as Hertrich did, without disclosing that it reserved this right to itself, but not mutually to Reece. A8.

Both the *Duvall* trial court and appellate court concluded that there was no valid agreement to arbitrate relating to the transaction, based on construction of the parties' contract.

- The *Duvall* court held that the purpose of a merger clause is "To affirm the parties' intent to have the parole evidence rule applied to their contracts..." Generally, merger clauses state "that the contract represents the parties' completed final agreement and supersedes all informal understandings and oral agreements relating to the subject matter of the contract," citing *Blacks Law Dictionary*, 813 (7th ed. 1999). The court continued to explain "A merger clause is a highly persuasive statement that the parties intended the agreement to be totally integrated and generally works to prevent a party from introducing parole evidence to vary or contradict the written terms." Delaware law requires that in Motor Vehicle Financing "A retail installment contract shall be in

writing, shall be signed by both the buyer and the seller and shall be complete in all essential provisions prior to the signing of the contract by the buyer." 5 *Del. C.* §2907 (a).

- Since the RISC does not refer to any other document as part of the contract, the natural interpretation of the phrase "this contract," as used in the merger clause, is the document on which the merger clause appears.
    - "The [Sales Order] does not refer to itself as a contract; instead, [it] refers to itself as 'This order' throughout the document." This is also true of the Sales Order in the present case. A27.
    - Consequently, the two documents together reveal that "this contract" refers to the RISC, while "this order" refers to the Sales Order.

The *Duvall* court held the RISC to be a complete contract, and the arbitration clause was not part of it. This Court should so hold.

The *Duvall* court also relied on *Kruger v. Heartland Chevrolet Inc*., 289 S.W. 3d 637 (MO. Ct. App. 2009) that requires consideration of only the RISC when interpreting the parties rights and obligations related to a vehicle purchase transaction. Consequently, the documents were not read together, as argued by Hertrich in the present case.

The Florida court also rejected the contention that the buyers order constituted a valid *change* to the Sales Order to add the arbitration clause because

"Nothing in the [Sales Order] indicates that it was intended as a modification of a pre-existing contract, and the parole evidence rule excludes evidence of other prior or contemporaneous agreements." RISC 2 was certainly not contemporaneously with Sales Order 1, signed a week prior, and is the only one signed.

The Florida court noted that the "important inquiry" is whether the RISC incorporates the Sales Order, not whether the Sales Order incorporates the RISC. The RISC does not mention the Sales Order. As a result the Sales Order "is irrelevant to the disputes arising out of the transaction at issue."

She exercised her right under the RISC to pay off her loan as permitted, "at any time without penalty." A71, ¶1. d.

As in other consumer car purchase cases, the RISC without an arbitration clause prevails over a Sales Order with an arbitration clause, even when there are competing merger clauses. This is required by 5 *Del. C.* §2907 (a).

Li v. Standard Fiber, 2013 WL1286202 (Del. Ch. Mar. 28, 2013) relied upon by Hertrich is distinguishable. First, it is not a Consumer v. Automobile Financing/Dealer adhesion contract case. The parties were of relatively equal bargaining power since Li was the founder of the corporation, and a 25% owner after selling his $44 million share of the company to Standard Fiber. Unlike the present case there was no issue that the contract was not formed nor that the

integration clause superseded the arbitration clause. There was also no statute similar to 5 *Del. C.* §2907 (a).

ARGUMENT II. THE ARBITRATION CLAUSE IS UNENFORCEABLE BECAUSE VIOLATES THE ONE DOCUMENT RULE.

Hertrich argues that the Magnuson Moss Act does not apply to Reece's cause of action because misrepresentation of the 2WD as 4WD is not covered by a "written warranty" as defined in the Magnuson Moss Act or its informal dispute resolution rules, 16 C.F.R. §703 *et seq.*

1. The First Mistake in Hertrich's Argument is in its Interpretation of the Magnuson Moss Act. Contrary to Hertrich's argument, the Magnuson Moss Act is not limited to violations of written warranties. It authorizes consumers to bring suit against a "warrantor" or "supplier" like Hertrich for "failure to comply with any obligation under the Act, or under a written warranty, implied warranty, or service contract." 15 *U.S.C.* §2310 (d) (2).

Regardless of whether the misrepresentation of 4WD is a written warranty,[1] it is certainly an implied warranty of merchantability or fitness within the Mag-Moss Act. The Uniform Commercial Code creates a number of implied warranties including merchantability, and fitness for particular use as alleged in the Complaint. A11-13.

[1] The written contract description of the purchased vehicle a having 4 Wheel Drive, is fully consistent with being a Magnuson Moss "written warranty," as discussed below at A108; 124-125.

The implied warranty of merchantability states that "Goods to be merchantable must be at least such (a) as pass without objection in the trade under the contract description, and ... (c) are fit for the ordinary purposes for which such goods are used…" The Official Comments to §2-313 state "Goods delivered under an agreement made by a merchant in a given line of trade must be of a quality comparable to that generally acceptable in that line of trade under the description ...of the goods used in the agreement…." A 2WD vehicle is not acceptable as a 4WD vehicle in the trade of automobile sales.

2. Hertrich's Second Error is Assuming That the "Arbitration Clause" is Limited To Resolving Disputes Involving a "Written Warranty." It is not. It covers any Mag-Moss dispute, as recognized in *Matthews* and *TGB Marine*, quoted in the Opening Brief at 27-28, referring to arbitration covering written warranty and Magnuson Moss Act claims. 16 C.F. R. 703.2 (b) (3).

A "written warranty" is a trigger to the requirement that "resort" to arbitration must be disclosed in a single warranty document. Since Hertrich supplied a written warranty covering the "Power Train" for 30 days, A25-26, that warranty triggered the requirement of the "one document rule:" that an arbitration clause must be within the warranty document. Since there is no arbitration clause in any warranty document, the arbitration clause in the Sales Order is unenforceable. In addition to *Daimler Chrysler v. Matthews, supra., see, Rudder v.*

American. Honda Motor Co., 1995 WL 216955 (E.D. PA. Apr. 12, 1995), fn 6. (Failure of the warranty to incorporate the requirement of "resort" to an informal dispute mechanism, permits suit to proceed without a consumer first using arbitration.) F.T.C. rules clarify that the mechanism is available to resolve Mag-Moss "disputes," not just those resulting from "written warranties." *Id.*, at fn 9. The requirement that a consumer must first "resort" to informal dispute resolution, requires disclosure in the warranty that if a consumer chooses to seek redress for rights and remedies not created by the Magnuson Moss Act, "resort" to the mechanism is not required. 16 C.F. R. 703.2 (b) (3); *Consumer Warranty Law* 2.8.1. Since the arbitration clause was not contained in the written warranty, it is unenforceable.

Hertrich notes several times that Ms. Reece did not discover the 2WD for about two years. She had no occasion to drive in snow before that time. A9. It was the vehicle's performance in snow that was so deficient as to require inspection to determine it had no 4WD. Hertrich was given a reasonable opportunity to "take remedial action" and did not. A9. Reece sued for breach of warranty within the 4 year statute of limitations for warranty violations. Since suit was filed 6-13-2013 following sale on 9-16-2010, at the earliest, A26, Hertrichs comment is insignificant.

III. THE ARBITRATION CLAUSE IS UNCONSCIONABLE.

Hertrich's only argument is that courts permit parties of equal bargaining position to negotiate fee splitting. However, it does not address this Court's admonition in *Worldwide Ins. Grp. v. Klopp*, 603 A.2d 788 (Del. 1992) that "approval of the arbitration concept does not extend to any feature of a contract of adhesion which is in whole or part unconscionable within the meaning of 6 *Del.C.* §2-302." ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.") It is generally held that unconscionability involves the question of whether the provision amounts to the taking of an unfair advantage by one party over the other. *J. A. Jones Const. Co. v. City of Dover*, 372 A.2d 540, 552 (Del. Super. 1977).

In the context of this case, the cases cited by the defendant are inapplicable. The *Musnick v. King Motors* case and cases cited therein deal only with the concept of splitting of fees in employment cases brought under Title VII, which alone may not be enough to find an arbitration clause unconscionable. In that case there was no evidence, as there is recited in the Opening Brief from the AAA

Rules that the fees and costs would be high, and were undisclosed. However, unlike the *Musnick* cases, the present arbitration clause is unconscionable for additional reasons.

As discussed further in the Opening Brief at p. 29 *et seq*., the arbitration clause in the present case is unconscionable not only for requiring waiver of statutorily required consumer remedies and protections, but also because it:

- Violates the prohibition of 5 *Del. C.* §2907 (k): relieving the seller from liability for any legal remedies;
- Violates the prohibition of 6 *Del. C.* §4311: relieving the seller from any legal remedies under the contract or any separate instrument ;
- Conceals which arbitration rules will be applied;
- Conceals that the arbitration *rules* conflict with the arbitration *clause*;
- Conceals the high costs and administrative fees by not including the rules;
- Conceals the amount of arbitrator's fees;
- Conceals that the true costs of the arbitration, and in particular the administrative fee and the fee to be paid to the arbitrator are substantially more than the consumer will face in consumer protection litigation.[2] Ex. A.

[2] In a study by Public Citizen of the "The Costs of Arbitration" the survey compared court fees to the fees charged by the three primary arbitration providers demonstrated the forum cost- the costs charged by the tribunal that will decide the dispute for an $80,000 consumer arbitration under AAA rules was 3009% higher that the court costs. AAA arbitration forum costs were

Hertrich did not even attach a copy of the rules to the contract. In *Harper v. Ultimo*, 7 Cal. Rptr. 3d 418, 422 (Cal. App. 2003), the court observed as oppressive and procedurally unconscionable a bare reference to arbitration rules: "The inability to receive full relief is artfully hidden by merely referencing the [arbitration] rules and not attaching those rules to the contract for the customer to sign. The customer is forced to go to another source and find out the full import of what he or she is about to sign-and must go to that effort *prior* to signing." As in the present case, that is "procedurally unconscionable" in a consumer adhesion contract context. That court also found "surprising" and substantively oppressive, limitations on the remedies available through arbitration, as in the present case.

Moreover, limits on statutory consumer remedies such as recovery of costs and attorneys' fees and forcing payment of high arbitration fees and arbitrator's fees are substantively unconscionable, and can be determined from the language of the arbitration agreement.

> "An essential element of …federal consumer legislation [like the Magnuson Moss Act in the present case] is the provision requiring courts to award attorneys fees to the prevailing consumer (but not to the prevailing [merchant or] creditor.) This statutory provision, more than any other, makes enforcement of … requirements in the statute practical. Not only does it make private litigation practical, but it deters creditors from improperly contesting meritorious claims. Otherwise creditors with deep legal pockets could overwhelm any attempt by consumers to press an action.

$6,650 compared to court costs in Cook County Illinois of $221. Executive Summary, http://www.citizen.org/congress /article_redirect.cfm?ID=7546. Ex. A.

> Consequently, arbitration agreements and that require each party to bear its own attorneys fees and costs, regardless of which party prevails, are fundamentally in conflict with the congressional intent underlying many federal consumer statutes. Such an arbitration provision is unenforceable."

National Consumer Law Center, *Consumer Warranty Law*, 6th ed. §§ 6.3; 4.4.2.2 (numerous citations omitted). Since the arbitration clause in the present case, on its face is both procedurally and substantively unconscionable, it is not enforceable. 6 *Del. C.* 2-302.

CONCLUSION

Superior Court erred in enforcing the Arbitration clause since:

- The entire contract was repudiated and cancelled by Hertrich when the condition precedent of obtaining the contracted 8.8% interest rate for financing the purchase failed;
- The second and third Sales Orders containing the forced arbitration clause were not signed by the dealer, as required by their own terms;
- The Arbitration clause violates the Magnuson Moss, "One Document Rule;"
- The Arbitration clause unconscionably limits statutory remedies and is inconsistent with the rules it identified for arbitration.

As a result, the decision and order of the Superior Court should be reversed, remanded to Superior Court and permitted to proceed to trial.

Respectfully submitted,

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