No. COA16-429 **TWENTY-FIRST DISTRICT**

NORTH CAROLINA COURT OF APPEALS

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MICAH TERRELL, *Plaintiff-Appellee,*	)	
	)	From Forsyth County
v.	)	No. 15-CVS-3771
KERNERSVILLE CHRYSLER DODGE LLC, *Defendant-Appellant.*	)	

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BRIEF OF APPELLEE MICAH TERRELL

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BRIEF OF APPELLEE MICAH TERRELL

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INTRODUCTION

The case presents a straightforward question that has already been addressed by this Court on multiple occasions: Is an agreement formed where the agreement expressly requires the signature of a certain party to become binding, and that party has not signed it? This Court has consistently answered "no." *Parker v. Glosson*, 182 N.C. App. 229, 232, 641 S.E.2d 735, 737 (2007); *see Revels v. Miss America Organization*, 165 N.C. App. 181, 189, 599 S.E.2d 54, 59 (2004). It should do so again here. In this case, the agreement states that it is not binding on either party until signed by a representative of Kernersville Chrysler Dodge, LLC, and no

Kernersville representative ever signed it. Because of the lack of Kernersville's signature, the trial court correctly found that no agreement to arbitrate had been formed. That decision is in accord with years of this Court's precedent and therefore should be affirmed.

Kernersville, curiously, ignores the express finding of the trial court that Kernersville had not signed the agreement at issue, insisting throughout its brief that it had signed the agreement and that there was no dispute that it had done so. That premise is just wrong, and Kernersville's arguments are correspondingly off-base. Kernersville's only other argument—that Mr. Terrell is estopped from arguing that an agreement to arbitrate was never formed in the first place—was waived, and, in any case, it is baseless. As such, Kernersville has not offered any valid reason for overturning the trial court's holding that no agreement to arbitrate has been formed.

STATEMENT OF THE ISSUE

Whether an agreement to arbitrate is formed where the agreement expressly states that it is not binding until signed by the drafter, and the drafter has not signed the agreement.

STATEMENT OF THE CASE

Plaintiff-Appellee Micah Terrell brought this case on 25 June 2015. (R p 2). In his complaint, Mr. Terrell alleges that Defendant-Appellant Kernersville Chrysler Dodge, LLC, ("Kernersville" or "dealership") violated the North Carolina Unfair and Deceptive Practices Act, committed common-law fraud, and breached an express warranty by selling him a used truck that was deteriorating, unsafe to drive, and unable to pass state inspection after assuring Mr. Terrell the truck had been thoroughly inspected and was in good mechanical and physical condition. (R p 3-7). The dealership initially answered the complaint without the assistance of a lawyer, and the trial court struck the answer for that reason. (R pp 10-11, 19). The dealership, through an attorney, filed another answer to the complaint, admitting that it had assured Mr. Terrell that the truck had been inspected, was safe, and that it had no major structural or mechanical problems. (R pp 3, 20). The dealership raised arbitration as its only affirmative defense. (R p 21).

Two months later, the dealership moved to compel arbitration on the basis that, as part of his purchase of the truck, Mr. Terrell had signed documents requiring that disputes between the dealership and vehicle purchasers be arbitrated. (R pp 24-25). In support, the dealership attached documents that purported to reflect Mr. Terrell's signature on those documents—the "Governing Arbitration

Agreement" and the "Retail Purchase Agreement"—as well as the initials of one of the dealership employees on the Retail Purchase Agreement, which references the Governing Arbitration Agreement. (R pp 27-28).

There was no additional briefing on the arbitration motion; the trial court heard arguments for and against compelling arbitration at a hearing on 7 December 2015. *See generally* (T). At the hearing, Mr. Terrell argued that the dealership had never signed nor initialed the documents discussing arbitration, and, therefore, no agreement to arbitrate had been formed. (T p 12, line 11-p 14, line 2; T p 16, line 19-p 17, line 6; T p 18, line 5-p 19, line 16; T p 22, line 4-p 23, line 1). In support, Mr. Terrell presented the court with his own copy of the Retail Purchase Agreement, which did not contain any initials from any employee or representative of the dealership and did not contain the bottom-most signature of Mr. Terrell. (T p 22, line 4-p 22, line 12), (AR). Mr. Terrell went on to explain that the problem with enforcing an agreement signed by only him was that he would not be able to enforce the agreement against Kernersville; no mutual agreement to arbitrate had been formed where one party failed to sign the agreement. *See* (T p 18, line 5-p 19, line 16).[1]

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[1] Mr. Terrell's copy of the one-page Retail Purchase Agreement is contained in the addendum to the record on appeal, and it is cited here as "AR."

The trial court agreed and denied the motion to compel arbitration. (R p 29). In ruling in favor of Mr. Terrell, the trial court found that the agreement had not been signed by the dealership and reasoned that, "[i]t is the mutuality argument that [ ] ultimately persuaded me because I just don't think Mr. Terrell could enforce arbitration – whether the shoe is on the other foot or not, I don't think Mr. Terrell can compel arbitration and thus there is a vacuum in terms of mutuality." (T p 19, lines 17-20; T p 23, lines 4-10; T p 23, line 24-p 24, line 3). The dealership appealed.

STATEMENT OF THE FACTS

A. Mr. Terrell's purchase of the truck from Kernersville and his discovery that the truck is unsafe to drive.

Mr. Terrell contacted Kernersville by phone to inquire about purchasing a used Dodge Ram truck he had seen advertised. (R pp 2, 20). The salesperson he spoke with provided Mr. Terrell with photographs of minor cosmetic wear on the truck, and she agreed to pass along Mr. Terrell's questions about the condition of the truck to the service department. (R pp 3, 20). After speaking with the salesperson again regarding price, Mr. Terrell traveled to Kernersville from his home in Charlottesville, Virginia, on 25 April 2015 to view the truck in person and decide whether to purchase it. (R pp 3, 20).

Once at the dealership, Mr. Terrell test drove the truck and noticed a suspicious noise coming from the engine. (R pp 3, 20). The dealership's mechanics examined the truck while Mr. Terrell waited. (R pp 3, 20). They told Mr. Terrell that the noise was caused by the tensioner pulley and that they had gone ahead and replaced the part. (R pp 3, 20). The dealership "assured [Mr. Terrell] that the Vehicle had undergone a thorough inspection prior to sale, that it was a safe Vehicle, and that there were no major structural or mechanical problems." (R pp 3, 20). Based on those representations, Mr. Terrell purchased the truck and drove it home. (R pp 3, 20).[2]

During the drive home, Mr. Terrell alleges that he noticed some problems coming from the axle/joint areas of the truck. (R p 3). He immediately notified Kernersville of the problem and took the truck to his local mechanic to have it looked at. (R p 4). The Charlottesville mechanic told Mr. Terrell that the truck had significant frame rot, meaning that there was rust and decay over the entire underside of the truck frame and engine mount. (R p 4). The mechanic explained that there were holes all over the frame, that the engine was about to fall through

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[2] The facts in the preceding two paragraphs were admitted by Kernersville in its answer. (R p 20) (admitting to the allegations in ¶¶ 1-12 of the complaint). The facts described in the final paragraph in this section are based on the allegations in Mr. Terrell's complaint. *See* (R pp 3-5).

the frame, the truck would not pass the Virginia State Inspection, and that the truck was unsafe to drive. (R p 4). The mechanic also said that someone had painted over the frame and engine mount, apparently to conceal the level of frame rot from most observers. (R p 4).

B. The Kernersville Retail Purchase Agreement and Governing Arbitration Agreement.

In support of its motion to compel arbitration, Kernersville relies on the terms in its Retail Purchase Agreement (RPA) and Governing Arbitration Agreement (GAA). (R pp 12, 13). Among other things, the RPA identifies the truck and its selling price and lists Mr. Terrell as the purchaser. (R p 12, AR). Paragraph 4 of the document states, "I understand that any dispute arising from, or relating to this transaction, shall be settled by neutral arbitration pursuant to the GOVERNING ARBITRATION AGREEMENT signed by my hand and incorporated into this Agreement." (R p 12, AR). "I hereby accept the terms and conditions" comes a few lines below paragraph 4, and it is followed by two signature lines, each labeled "purchaser(s)." (R p 12, AR) (emphasis omitted). Mr. Terrell's signature appears on one of the "purchaser" lines in both copies of the agreement. (R p 12, AR). Several lines below that, and outside any boxes on the document, the RPA sates, "I acknowledge receipt of a copy of this agreement with the understanding this agreement is not binding upon the dealership or purchaser(s)

until signed by an authorized dealership representative." (R p 12, AR) (emphasis omitted). Once again, there are two "purchaser" signature lines. (R p 12, AR). On the copy submitted by Kernersville, there is a signature—purportedly Mr. Terrell's—on one of the purchaser lines, (R p 12), but on the copy submitted by Mr. Terrell, no such signature exists, (AR).

That is not the only difference between Kernersville's and Mr. Terrell's records. In the bottom right-hand corner of the RPA, there is a line with the name "Brandon P Widener" typed above it, (R p 12, AR); Mr. Widener was the sales clerk at the dealership with whom Mr. Terrell spoke with when he first arrived. (R pp 3, 20); Appellant's Br. 6 n.1. Below the typed name, there is a line labeled "accepted by authorized dealership representative." (R p 12, AR) (emphasis omitted). On Kernersville's copy, no signature appears, but the initials "RCM"—the initials of the dealership's Finance Manager, Appellant's Br. 6—have been written in toward the edge. (R p 12). On Mr. Terrell's copy, no such initials appear, nor is there any signature on the dealership representative line. (AR).

The GAA, submitted by Kernersville in support of arbitration, states that "any dispute arising from, or relating to this vehicle purchase/lease transaction or the alleged breach of any term or provision hereof, shall be settled by neutral arbitration." (R p 13). It goes on to outline the terms under which the parties would

arbitrate, including an exclusion from arbitration for "self-help remedies, such as repossession" and a provision requiring the losing party to pay all arbitration expenses. (R p 13). The bottom of the document states: "I/We acknowledge I have read and understand this Governing Arbitration Agreement and agree to be bound by its terms and conditions." (R p 13). That statement is followed by a line for the purchaser's signature, which purportedly has Mr. Terrell's signature on it, as well as a line for the signature of the "dealer representative," which is blank. (R p 13). Mr. Terrell's own records do not include a copy of the GAA. (T p 14, lines 10-13).[3]

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[3] Though unconscionability is not at issue in this appeal, self-help exclusions and loser-pays provisions similar to the ones contained in Kernersville's arbitration agreement are frequently held unconscionable and unenforceable. Self-help exclusions cut into the mutual nature of the agreement to arbitrate because they require consumers to bring their claims in arbitration but exempt from arbitration the actions that car sellers are most likely to bring. *See, e.g., Rivera v. Am. Gen. Fin. Servs., Inc.*, 259 P.3d 803, 818-19 (N.M. 2011); *Wisconsin Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 172 (Wis. 2006); *Taylor v. Butler*, 142 S.W.3d 277, 286-87 (Tenn. 2004). Loser-pays provisions make the risk of losing too expensive for most consumers to bear, meaning that, as a practical matter, they prevent consumers from bringing any claims. Further, where, as here, the consumer brings claims under a fee-shifting statute, loser-pays provisions take away the consumer's statutory rights and undermine the statute's policy. *See, e.g.*, *Ragone v. Atl. Video at the Manhattan Ctr.*, 595 F.3d 115, 125-26 (2d Cir. 2010); *Hall v. Treasure Bay Virgin Islands Corp.*, 371 Fed. App'x 311, 313 (3d Cir. 2010); *Newton v. Am. Debt Servs., Inc.*, 854 F. Supp. 2d 712, 725-26 (N.D. Cal. 2012); *Brown v. MHN Gov't Servs., Inc.*, 306 P.3d 948, 957-58 (Wash. 2013); *Small v. HCF of Perrysburg, Inc.*, 823 N.E.2d 19, 24 (Ohio Ct. App. 2004).

ARGUMENT

I. STANDARD OF REVIEW

Findings of fact made by the trial court "are conclusive on appeal if supported by competent evidence, even if there is evidence to the contrary." *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100-01, 655 S.E.2d 362, 369 (2008) (internal quotations and ellipses omitted). "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal," *id.* at 101, 369 (internal quotations omitted), and a trial court's decision to deny a motion to compel arbitration is a conclusion of law, *Carter v. TD Ameritrade Holding Corp.*, 218 N.C. App. 222, 226, 721 S.E.2d 256, 260 (2012).

II. THE SUPERIOR COURT CORRECTLY RULED THAT NO AGREEMENT TO ARBITRATE WAS FORMED AND, THEREFORE, DENIAL OF THE MOTION TO COMPEL ARBITRATION SHOULD BE AFFIRMED.

Arbitration is a creature of contract law, and, before arbitration is compelled, this Court must first determine whether, under general state-law principles of contract-law, "the parties had a valid agreement to arbitrate." *T.M.C.S., Inc. v. Marco Contractors, Inc.*, 780 S.E.2d 588, 593 (N.C. Ct. App. 2015) ("general principles of state contract law must be applied"); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (in "deciding whether the parties agreed to arbitrate," courts "apply ordinary state-law principles that govern the formation of

contracts"). "When, as here, one 'party claims a dispute is covered by an agreement to arbitrate and the other party denies the existence of an arbitration agreement, the trial court must determine whether an arbitration agreement actually exists.'" *T.M.C.S.*, 780 S.E.2d at 593 (quoting *Moose v. Versailles Condo. Ass'n*, 171 N.C. App. 377, 381, 614 S.E.2d 418, 422 (2005)).[4]

Kernersville's motion to compel arbitration was properly denied for the straightforward reason that, under ordinary principles of state contract law, no agreement to arbitrate was formed. Contrary to Kernersville's representations to this Court, at the hearing, the trial court found that the RPA had *not* been signed by the dealership. *Compare* (T p 25, line 2) ("it is not signed by your client"), (T p 21, line 3), *with* Appellant's Br. 6 (RPA "was electronically signed by Brandon P Widener, . . . and physically signed by Ronald Craig McCullough") (footnote omitted), 12, 21. And per the text of the RPA itself, the agreement is "not binding" on either party "until signed by an authorized dealership representative." (R p 12, AR) (emphasis omitted). Because "something remains to be done to establish

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[4] Mr. Terrell agrees with Kernersville that the Federal Arbitration Act governs here. *See* Appellant's Br. 24-25. As the United States Supreme Court has recognized, even under the FAA, whether an agreement to arbitrate has been formed is a question of state contract law, and "the FAA does not require parties to arbitrate when they have not agreed to do so." *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989); *see First Options*, 514 U.S. at 944.

contract relations," "no contract is formed." *Parker v. Glosson*, 182 N.C. App. 229, 232, 641 S.E.2d 735, 737 (2007). Since no contract to arbitrate was formed, Mr. Terrell cannot be compelled to arbitrate his claims. Further, because the dealership's lack of signature means that it cannot be forced into arbitration, there is no mutual agreement to arbitrate, no consideration for Mr. Terrell's agreement to arbitrate and, therefore, no agreement to arbitrate.[5]

A. On the Record, the Trial Court Made Findings that Kernersville Did Not Sign the RPA and that, Therefore, No Agreement to Arbitrate Was Formed.

In the rendition of its order in open court, the trial court made the necessary findings to support its denial of the motion to compel arbitration. It stated that the agreement "is not signed by [Kernersville]. All right. I am denying the motion to compel arbitration because I do not find – I find that there is no binding arbitration agreement between the parties." (T p 25, lines 2-5). Those conclusions—that the

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[5] The copy of the GAA submitted to the trial court by Kernersville does not contain any signature or initials purporting to belong to any representative of the dealership. (R p 13). There does not appear to be any dispute that the GAA is not a stand-alone agreement; rather that it is incorporated as part of the RPA. The language of both documents supports this view. The GAA states that it "shall be incorporated into the vehicle purchase/lease contract," (R p 13), and the RPA states that disputes "shall be settled by neutral arbitration pursuant to the Governing Arbitration Agreement signed by my hand and incorporated into this Agreement," (R p 12, AR) (emphasis omitted). Thus, the relevant question in determining whether the parties agreed to arbitrate is whether the RPA is an enforceable agreement between the parties.

court was not persuaded that the RPA was signed by the dealership and that, therefore, there was no arbitration agreement to enforce—were repeated by the trial court throughout the hearing. *See, e.g.*, (T p 21, line 3; T p 23, lines 4-10). Nevertheless, Kernersville argues that the trial court must be reversed because, in its written order, *see* (R p 29), it did not make the findings of fact or conclusions of law required to support a decision to deny a motion to compel arbitration. Appellant's Br. 15-16. That is incorrect.

Though the trial court was required to make findings to support its decision to deny the motion to compel, the North Carolina Supreme Court has made clear that "[a] written determination setting forth the findings and conclusions is not necessary," where the findings of fact and conclusions of law are evident from the trial court's oral rendition of its ruling; the required findings may be made "either orally or in writing." *State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015). And where the trial court's written order does not speak to the precise issue on appeal, this Court reviews the trial court's oral rendition of its order to determine the district court's rationale. In *Durham Hosiery Mill Ltd. Partnership v. Morris*, for example, the appellant contended that the trial court had applied the incorrect burden of persuasion, but the written order was silent as to what burden the court had used. 217 N.C. App. 590, 592, 720 S.E.2d 426, 427 (2011). This

Court nevertheless looked to the hearing transcript to ascertain what burden the trial court had applied and analyzed the issues on that basis. *Id.* at 593, 428. That approach makes sense here, where the purpose of the requirement that trial courts make findings supporting their rulings on arbitration is to enable appellate courts to review the trial courts' rationale—as long as the rationale is on the record, this Court can review it. *See United States Trust Co., N.A. v. Stanford Grp. Co.*, 199 N.C. App. 287, 291-92, 681 S.E.2d 512, 515 (2009) (discussing inability to review trial court's decision where reasoning was not ascertainable). Here, the trial court stated its finding, on the record, that the RPA was not signed by Kernersville and that, therefore, no arbitration agreement had been formed. That is sufficient for this Court to conduct review.[6]

B. No Dealership Representative Signed the RPA and, Therefore, There Is No Agreement to Arbitrate.

Contrary to the assertions in Kernersville's brief that the RPA was signed by all parties, there can be no question that the trial court made a finding that the RPA was *not* signed by the dealership. The trial court said as much both in response to

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[6] If this Court disagrees that the trial court made sufficient findings to support its denial of the motion to compel arbitration, then the proper course is for this Court to remand to the trial court to make such findings. *United States Trust*, 199 N.C. App. at 292, 681 S.E.2d at 515 (where trial court failed to make the findings needed to deny a motion to compel arbitration, remanded to the trial court with instructions to articulate findings to support its decision).

the dealership's argument that the initials "RCM" counted as a signature, and in response to the fact that Mr. Terrell's copy of the RPA contained no initials and no signature. *See* (T p 19, line 19) ("it is not signed"); (T p 21, line 3) ("I don't see where he signed it."); (T p 23, lines 2-10) (responding to argument that Mr. Terrell's copy contains no initials or signature and stating that dealership had failed to show that agreement was executed); (T p 25, line 2) ("it is not signed").[7]

Further, the conclusion that Mr. Terrell's copy of the RPA contains no signature by an "authorized dealership representative" is the type of factual finding that is conclusive on appeal if it is backed by competent evidence—backed here by Mr. Terrell's copy of the RPA, which contains no signature purporting to be that of a dealer representative. (AR); *see Tillman*, 362 N.C. at 100-01, 655 S.E.2d at 369.

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[7] Given the finding of the trial court that no dealership representative had signed the RPA and the fact that Mr. Terrell vigorously argued that there were not even any dealership initials on the copy he was given at the time of the sale—a document he presented to the court at the hearing—it is troubling that Kernersville represented to this Court that "the plaintiff does not dispute the arbitration clause was present in the contract signed by both parties," Appellant's Br. 12; that "[n]o evidence was presented or argued that the defendant failed to receive and sign the arbitration agreement," *id.* at 13; and that "agents of the defendant signed the Retail Purchase Agreement," *id.* at 21. To accept Kernersville's repeated assertions that the dealership undisputedly signed the RPA would be to ignore the findings of the trial court, ignore the arguments made by Mr. Terrell below, and ignore the un-signed copies of the RPA and the GAA in the record.

In addition to renewing its initials-as-signature assumption here, Kernersville contends (at 6) that typed name of "Brandon P Widener" on the line above the signature line on the RPA counts as an "electronic signature," but that argument—which appears in Kernersville's Statement of the Facts—is contrary to law. The Uniform Electronic Transactions Act makes clear that electronic signatures only have the binding effect of a physical signature where the "context and surrounding circumstances" indicate that the parties have "agreed to conduct transactions by electronic means." N.C.G.S.A. § 66-315(b); *see Powell v. City of Newton*, 364 N.C. 562, 567-68, 703 S.E.2d 723, 727-28 (2010) (no contract formed where only electronic signature and parties intended for the agreement to be physically signed). Here, Kernersville has offered no explanation whatsoever for how the parties could have possibly indicated an intent to transact electronically—and it is extremely unlikely that they did so, given that interaction took place in person, the copies of the RPA were carbon-copy forms, and Mr. Terrell's signature is a physical one. *See Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 271-72, 423 S.E.2d 791, 794 (1992) (burden to demonstrate that an agreement to arbitrate exists is on the party seeking to arbitrate); (T p 22, line 9-p 23, line 1) (discussing the triplicate nature of the RPA).

Because no dealership representative signed the RPA, by its own terms, it is not binding on either Mr. Terrell or the dealership. *See* (T p 23, lines 6-10) (explaining that dealership failed to sign agreement that required signature). The RPA states: "this agreement is not binding upon the dealership or purchaser(s) until signed by an authorized dealership representative." (R p 12, AR) (emphasis omitted). This Court has consistently held that, where, as here, a contract expressly requires the signatures of certain parties to become enforceable, "but one party has not signed the Agreement, . . . there is no valid contract." *Parker*, 182 N.C. App. at 230, 641 S.E.2d at 736; *Hilliard v. Thompson*, 81 N.C. App. 404, 409, 344 S.E.2d 589, 592 (1986) (Whichard, J., concurring but speaking for a panel majority) ("When the intent is manifested that the contract is to be executed by others than those who actually signed it, . . . it does not take effect as a binding contract[.]") (internal quotations omitted). In *Parker v. Glosson*, an agreement for the sale of real property required the signature of both individual sellers and stated that the agreement "shall *become an enforceable contract* when a *fully executed* copy has been communicated to both parties." *Parker*, 182 N.C. App. at 230, 641 S.E.2d at 736 (emphasis in decision). One of the sellers did not sign the agreement, and, therefore, the "condition precedent" imposed by the parties "on the effectiveness of their agreement" was not met, and no contract had been formed. *Id.* at 232, 737.

The facts of this case are no different: The RPA expressly requires the signature of the dealership representative to become effective on either party; as the trial court found, it was not signed, and, therefore, as in *Parker*, no contract has been formed.

This approach is not unique to North Carolina. For example, the Missouri Court of Appeals has held that there is no agreement to arbitrate under facts virtually identical to those here. *Bellemere v. Cable-Dahmer Chevrolet, Inc.*, 423 S.W.3d 267, 272 (Mo. Ct. App. 2013). In *Bellemere*, just like here, the vehicle purchase agreement, which included an arbitration agreement, expressly required the signature of a representative of the dealership for the agreement to be binding on either party. *Id.* at 273-74. No dealership representative signed the agreement. *Id.* at 274. When the purchaser sued over undisclosed defects in the used car, the Missouri court refused the dealership's request to compel arbitration, holding that because the dealership had not signed the agreement, as it expressly required, no agreement to arbitrate had been formed. *Id.* at 273 (endorsing the decision of the trial court).

Further, this Court has declined to enforce an unsigned agreement in the arbitration context. In *Revels v. Miss America Organization*, defendant Miss America Organization (MAO) sought to enforce the arbitration agreement in a document entitled "The Miss America Organization Application and Contract for

Participation in the National Finals of the Miss America Competition," which had been signed by the plaintiff, but not by MAO. 165 N.C. App. 181, 182-83, 599 S.E.2d 54, 55 (2004). In denying MAO's motion to compel arbitration, this Court reasoned that "there is competent evidence to support the trial court's findings" that MAO had not signed the application and contract and had not otherwise indicated that it had accepted the agreement, and, therefore, no agreement to arbitration had been formed. *Id.* at 189, 59.

Importantly, *Revels* declined to enforce the arbitration agreement even though, as here, the party seeking to avoid arbitration was the party who had signed the document containing the arbitration clause. *Id.* at 182, 55. Nor did *Revels* find it problematic that both parties had apparently acted in accordance with the application and contract immediately following the plaintiff's signature on it; it was MAO that, presumably on the basis of the application and contract's moral turpitude clause, initially decided to request the plaintiff to resign as Miss North Carolina 2002. *Id.* at 183, 56. Thus, under *Revels*, it does not matter that it is Mr. Terrell, the party who purportedly signed the RPA, who is seeking to avoid arbitration. Nor does it matter that Mr. Terrell and Kernersville exchanged money and a vehicle consistent with other provisions of the RPA. *See also Bellemere*, 423 S.W.3d at 271, 276 (no agreement to arbitrate though dealership and purchaser

exchanged money for vehicle consistent with other terms of the purchase agreement). What matters under *Revels*—and what matters here—is whether an agreement to arbitrate was formed in the first place.

Kernersville's attempt to distinguish *Revels* is based on a misreading of the facts and holding in that case. Kernersville states that "no party disagreed a binding arbitration agreement was signed by both the contestant and [the North Carolina MAO affiliate]," but that since MAO was not a party to that agreement, it and the plaintiff "lacked privity." Appellant's Br. 22-23. That is not correct. It is true that the plaintiff and the North Carolina MAO affiliate signed a document entitled "Miss North Carolina 2002 Contract," but there is no discussion in the decision indicating whether or not *that* agreement contained an arbitration clause, and it is not the agreement at issue in the case. *Revels*, 165 N.C. App at 182, 599 S.E.2d at 55. Rather, as explained above, the document that contained the arbitration clause MAO sought to enforce was the "The Miss America Organization Application and Contract for Participation in the National Finals of the Miss America Competition." *Id.* From its title and subject matter, it is apparent that this "application and contract" is an MAO document, not a North Carolina affiliate document, and there is no indication that it was signed by the North Carolina MAO affiliate. *See id.* Further, there's nothing in this Court's holding indicating that

MAO is some sort of third party to the application and contract. Rather, the holding is simply that no MAO representative signed it and no agreement to arbitrate was formed. *Id.* at 189, 59. As such, *Revels* is not distinguishable, and certainly not for the reasons that Kernersville claims.

C. Where There Is No Mutual Agreement to Arbitrate, There Is No Consideration and No Contract.

As the trial court explained, *Revels*'s conclusion—that there is no agreement to arbitrate where the party opposing arbitration signed the agreement and the party seeking to arbitrate did not—makes sense because, otherwise, the agreement to arbitrate would not be mutual. *See* (T p 20, lines 13-14) ("What is persuasive to me is the mutuality[.]"). Mr. Terrell would be forced to arbitrate, but it is unlikely that Kernersville could be forced to do so, given that it signed neither the RPA nor the GAA. *See* (T p 23, line 24-p 24, line 3).

This lack of mutuality is problematic here not because it is unconscionable—as Kernersville assumes in its brief (at 16-23)—but rather because it means no mutual consideration has been given and thus no contract has been formed; it is illusory. One of the black-letter requirements for a contract to be formed is consideration, and, in the context of arbitration, consideration for agreeing to arbitrate is the *mutual* agreement to arbitrate. *Martin v. Vance*, 133 N.C. App. 116, 122, 514 S.E.2d 306, 310 (1999) ("Where each party agrees to be

bound by an arbitration agreement, there is sufficient consideration to uphold the agreement."); *Collie v. Wehr Dissolution Corp.*, 345 F. Supp. 2d 555, 559 (M.D.N.C. 2004) (same); *see also Noohi v. Toll Bros., Inc.*, 708 F.3d 599, 612-13 (4th Cir. 2013) (holding similar Maryland contract-law rule not preempted by FAA). Therefore, if Kernersville is not bound by the arbitration agreement, then it has given no consideration for Mr. Terrell's agreement to arbitrate, and there is no enforceable arbitration agreement. That is exactly what the trial court held, and it is consistent with this Court's holdings.

It is for this reason that, even if the initials "RCM" could be considered an authorizing signature, Kernersville has not demonstrated that there is a mutual agreement to arbitrate. To explain: As found by the trial court, Mr. Terrell's copy of the triplicate agreement contains no initials or signature purportedly from the dealership. (AR), (T p 22, line 8). Thus, at the time that Mr. Terrell signed the upper signature line of the RPA—and walked away with his copy—there was no mutual agreement to arbitrate because, at the very least, the dealership would not have been bound to arbitrate. The dealership cannot, at some later time, perhaps even after a dispute has arisen, unilaterally decide whether it would like the arbitration agreement to be binding by choosing whether or not to sign. Mr. Terrell has no such option, and courts regularly hold that where the drafter can later

change the terms of the agreement, there is no mutual agreement to arbitrate, and arbitration cannot be compelled. *See Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 939 (4th Cir. 1999) (no enforceable agreement to arbitrate where drafter could cancel agreement to arbitrate at any time); *see also Morrison v. Amway Corp.*, 517 F.3d 248, 257 (5th Cir. 2008) (same); *Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219 (10th Cir. 2002) (same); *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 315-16 (6th Cir. 2000) (same); *Cheek v. United Healthcare of Mid-Atl., Inc.*, 835 A.2d 656, 661-62 (Md. 2003) (holding that an arbitration agreement that was not binding on both parties was not a valid agreement because it lacked consideration).[8]

III. KERNERSVILLE WAIVED ITS ARGUMENT THAT MR. TERRELL IS ESTOPPED FROM CHALLENGING THE EXISTENCE OF AN AGREEMENT TO ARBITRATE BY FAILING TO RAISE IT BELOW.

Kernersville's contention that Mr. Terrell is estopped from arguing that there is no agreement to arbitrate is waived because Kernersville did not raise it in the trial court. *See* (R pp 20-21, 24-25); *see generally* (T). Kernersville did not raise equitable estoppel in its answer, in its motion to compel arbitration, or at the

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[8] Though Mr. McCullough testified that he put his initials on the RPA, (T p 5, lines 10-13), Kernersville has presented no evidence as to *when* he initialed it, and the dealership destroyed the originals, (T p 14, lines 22-25). It is possible, then, that he initialed it only after the dispute arose.

hearing before the trial court, and it cannot raise it for the first time on appeal. (R pp 20-21, 24-25), (T). It "cannot swap horses between courts in order to obtain a better mount on appeal." *King v. Owen*, 166 N.C. App. 246, 250, 601 S.E.2d 326, 328 (2004). In *King*, as here, the trial court had held that no agreement to arbitrate had been formed, and the party seeking to compel arbitration argued for the first time on appeal that the other party was equitably estopped from arguing they were not contractually bound to arbitrate. *Id.* But because the equitable estoppel argument had not been raised below, this Court refused to entertain it, holding that it had been waived. *Id.*; *see also* N.C. R. Civ. P. 8(c) (requiring that certain defenses, including estoppel, be set forth affirmatively in the party's pleadings). Just as in *King*, Kernersville cannot swap horses on appeal here.

But even if Kernersville had not waived the argument, Mr. Terrell is not estopped from arguing that no agreement to arbitrate has been formed. Contrary to the dealership's argument, Mr. Terrell's claims do not "seek to enforce the benefits of the contract." Appellant's Br. 10. Mr. Terrell's claims do not rest on any warranty statement in the contract, *see* Appellant's Br. 9, but rather rest on the undisputed statements that Kernersville's employees made to him regarding the mechanical and physical condition of the truck—statements that induced him to purchase the truck. (R pp 3, 5-7, 20) (statutory, fraud, and warranty claims based

on admitted pre-sale verbal statements, not on contract terms). The duties that Kernersville's employees breached by making allegedly false statements about the truck's condition arise not out of the RPA, but rather out of state statutory and tort law. Where, as here, the plaintiffs' case "does not hinge on any asserted rights under the contract" and the plaintiff is "not seeking a direct benefit from" the contract, "equitable estoppel cannot be used to force plaintiffs to arbitrate their individual claims." *Ellen v. A.C. Schultes of Md., Inc.*, 172 N.C. App. 317, 322-23, 615 S.E.2d 729, 733 (2005) (internal quotations and alterations omitted).

This case stands in contrast to the cases primarily relied on by Kernersville, which involved claims that rested on the existence of the contract itself. First, in *American Bankers Insurance Group, Inc. v. Long*, the claims included interference with the contract at issue. 453 F.3d 623, 630 (4th Cir. 2006). Understandably, it is hard to both argue that there is no agreement to arbitrate and that that very agreement was tortuously interfered with. Likewise, in *Carter*, the plaintiffs, in fact, brought claims for breach of contract. 218 N.C. App. at 233, 721 S.E.2d at 264. Mr. Terrell brings no claims that seek to enforce or benefit from the terms of the contract, and his arguments regarding the formation of an agreement to arbitrate are not estopped.

CONCLUSION

For these reasons, the decision of the trial court denying Kernersville Chrysler Dodge's motion to compel arbitration should be affirmed.

Respectfully submitted,

August 8, 2016

PUBLIC JUSTICE, P.C.

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Pursuant to N.C. R. App. R. 33(b), I certify that the following attorney has authorized me to list his name on this document as if he had personally signed it:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Plaintiff-Appellee Micah Terrell certifies that the foregoing brief, which was prepared using proportionally spaced, 14-point font, contains fewer than 8,750 words, including footnotes and citations and excluding the parts of the brief exempted by Rule 28(j)(2)(B), as reported by the word -rocessing software.

Electronically Submitted
Leah M. Nicholls

August 8, 2016

CERTIFICATE OF SERVICE

I certify that on August 8, 2016, the foregoing Brief of Appellee Micah Terrell was served on the following via electronic mail at the following email address:

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CONTENTS OF APPENDIX

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF FORSYTH	FILE NO. 15-CVS-3771

MICAH TERRELL, Plaintiff vs. KERNERSVILLE CHRYSLER DODGE LLC, Defendants.	TRANSCRIPT, Volume I of I (Pages 1 - 26) Monday, December 7, 2015

Forsyth County Civil Superior Court

December 7, 2015 Session

The Honorable David L. Hall, Judge Presiding

Defendant's Motion to Compel Arbitration

A P P E A R A N C E S

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Reported by: Allyson Neal, CCR
Official Court Reporter
Office: (336)779-6647

December 7, 2015

11:29 a.m.

THE COURT: The next matter before the Court's is Micah Terrell versus Kernersville Chrysler Dodge. It appears to be the defendant's motion to compel arbitration. I've read the arbitration -- I had a moment, I read your arbitration agreement and I've read your affirmative defense. Yes, sir.

MR. HUTCHINS: Just briefly again, we are here for an issue over a car sale. I represent the defendant, Kernersville Chrysler Dodge LLC.

THE COURT: A 2001 Dodge Ram truck?

MR. HUTCHINS: That's correct, sir. We are here today because Mr. Norris and his client initiated this litigation. There was an answer, they struck it. We started litigation and then -- I initially did not think there was a binding arbitration agreement. We had a discussion about this because he had signed the actual -- the governing arbitration but later, after I examined -- or going through discovery, I found the retail purchase agreement. I discussed this with counsel and he still didn't want to proceed to arbitration. So as required by North Carolina General Statute 569.7, we are required to file a motion to ask this Court to place this dispute into arbitration.

I do have some very brief testimony, about 10 to 12 questions. So I would just briefly call the witness and make arguments for, Your Honor.

THE COURT: All right. You may call your witness then.

MR. NORRIS: I'm sorry, Your Honor. Just briefly. And I apologize for interrupting the Court.

THE COURT: Yes, sir.

MR. NORRIS: Just to be clear, I would like -- well, I'd like to launch a brief objection to this and ask the Court, based on whatever testimony Mr. Hutchins elicits from his witness, for possible lead to -- I don't know if I want to say continue the hearing, if that's going to be necessary based on the legal arguments. I think the legal arguments we have are sort of dispositive of the issue. I --

THE COURT: I would think so. I'm not sure what the testimony relates to but I will hear it. If you need additional time to respond since it was not proffered in the form of an affidavit, I will give you additional time.

MR. NORRIS: Very good. Thank you so much.

MR. HUTCHINS: And I do not object to that, Your Honor.

THE COURT: That's only fair. Normally it would be proffered in the form of an affidavit and the other party would have an opportunity to respond. All right. If you will identify and call your witness, please.

Mr. Norris, do you object if the witness testifies from where he is sitting?

MR. NORRIS: I have no objection to that, Your Honor.

THE COURT: If you'll identify yourself, please, sir.

THE WITNESS: My name is Ronald Craig McCullough. I, at the time, was a finance manager at Kernersville Chrysler Dodge.

THE COURT: All right. You may have a seat, sir.

Mr. Hutchins, you may propound your questions.

Direct Examination by Mr. Hutchins:

Q. Where are you currently employed?

A. Kernersville Chrysler Dodge Jeep Ram.

Q. Were you involved in the transaction between Kernersville Chrysler Dodge and Mr. Terrell on April 25, 2015?

A. Yes, as the finance manager.

Q. Can you describe your actions in that transaction.

A. To execute and administer and comply with the state rules and regulations for processing a transaction such as title work, bill of sale.

Q. So you were involved with drafting and dealing with paperwork of the sale; is that right?

A. Yes.

MR. HUTCHINS: Your Honor, at this time, I'm going to show him the retail purchase agreement, which is attached to my motion, which was previously provided to Mr. Norris.

THE COURT: Very well.

BY MR. HUTCHINS:

Q. Will you please describe what I'm showing you.

A. It is the retail purchase agreement.

Q. Did you -- when, if at all, did you provide this to

Mr. Terrell?

A. When he was in the finance office signing his documents.

Q. Did you witness Mr. Terrell sign this document?

A. Yes.

Q. Is his signature on there?

A. Yes, sir.

Q. Where is it?

A. It is located in two places under where the two acknowledgments are.

Q. Did you make any sort of signature at all on the paper?

A. My initials are on the right-hand side.

Q. What are your initials?

A. RCM.

Q. Are you aware of any acknowledgment of arbitration on the retail purchase agreement?

A. In line four, under where the lien holder is, states "I understand my dispute arising from this trans -- or from this transaction shall be settled under arbitration --

COURT REPORTER: Sir, I'm sorry I'm can't hear you clearly.

THE COURT: You need to speak loudly and clearly,sir, so our court reporter can take down what you are saying.

BY THE WITNESS:

A. "I understand that my dispute arising from or arbitrating to this transaction shall be settled under the

arbitration pursuant to governing arbitration agreements signed by -- my signature -- and incorporated into this agreement."

Q. To your knowledge, was a copy of this provided to Mr. Terrell?

A. Yes.

Q. I'm now showing you a second document. Can you tell the Court what it is.

A. This is the governing arbitration agreement.

Q. To your knowledge, do you know whether this was presented to Mr. Terrell?

A. It was present to Mr. Terrell.

Q. How do you know?

A. Because I circled the top of the form which I go over with every customer. When I go to explain the form, I circle the top of it every single time.

Q. Did you sign the governing arbitration agreement?

A. I did not.

MR. HUTCHINS: That's all the testimony I have to provide from him, Your Honor.

THE COURT: Any questions Mr. Norris?

MR. NORRIS: Yes, sir, Your Honor. I apologize, was the witness sworn, Your Honor?

THE COURT: I thought so. If not, sir, will you stand, please. Do you swear that the testimony -- Sheriff, if you can get a Bible.

Thank you, Mr. Norris, for catching that.

Sir, if you'll place your left hand on the Bible, raise your right. Do you swear that the testimony you just gave this Court was true so help you God?

THE WITNESS: Yes.

THE COURT: Very well. Thank you.

You may question him, Mr. Norris.

MR. NORRIS: Thank you, Your Honor.

Cross-examination by Mr. Norris:

Q. Mr. McCullough, were you responsible for providing certain discovery responses to Kernersville Dodge's -- to Mr. Hutchins earlier -- provide certain documents we have requested in this case to Mr. Hutchins?

A. It was not me. It was the owner of the company.

Q. Are you aware of the policies and procedures that your dealership has regarding retention of these documents?

A. Yes, to some degree.

Q. What are those policies and procedures that you know of, are aware of, regarding the retention of these documents?

A. That we -- the documents are stored for a stated period of time and after the period of time they are shredded in compliance to the rules of retention times. But I'm not -- that's not my responsibility.

Q. What is the stated period of time?

A. I have no idea.

THE COURT: Mr. Norris, if you would, could you bend that microphone down.

MR. NORRIS: Oh, yes, sir.

BY THE WITNESS:

A. I'm not sure of that stated time.

Q. Do you have an estimate of the time? Is it a year, less than a year --

MR. HUTCHINS: I would object, Your Honor. He said he doesn't know.

THE COURT: Overruled. You may answer if you know.

BY THE WITNESS:

A. I do not know.

Q. Do you -- what happens to those documents after you have finished with your portion of the transaction?

A. They are processed through the back office. They are scanned digitally into a digital format, which is called One-U and they are stored under lock-n-key for a stated period of time. Once that stated period of time is over, they are shredded by a professional shredding company. They come in and the documents are shredded.

Q. So do you keep track of -- is there any kind of form or any document that states when those documents were shredded?

A. I'm sure there is but I don't have access to that.

Q. Are you aware of the DMV requirements for document retention?

A. I am not.

Q. Are you aware of the DMV license and theft manual that is given to dealerships that shows regulations and so forth?

A. I believe so.

Q. Are you aware of General Statute 20-297 regarding retention and inspection of certain records by the DMV?

A. I am not.

Q. Have you undergone training from the DMV in regards to how to handle documents?

A. Not with the DMV per se. No DMV officer has come in and gone over any training with us.

Q. Okay. Have you --

A. I have superiors that are responsible for the transactions.

Q. Are you aware of 20-297, subsection A, that states "the owner must keep a record of all vehicles received by the dealer and all vehicles sold by the dealer; the records must contain the information that the division requires; a dealer may keep and maintain the records at the dealership facility where the vehicles were sold or other established office located within the state and it must be retained by the division -- must be available for inspection by the division within a reasonable period of time after being requested"?

A. I'm not per se, of that number that you are talking about. I know that we have to keep the documents for a certain

amount of time and that our offices must be locked at all times because the customer's records are in there. The retention part, the destruction of the documents, the digital format, that's not my responsibility so I do not know that.

Q. Who at the dealership would be most knowledgable about the document retention policy?

A. Scott Clements.

Q. Thank you very much.

THE COURT: Anything additional as evidence?

MR. HUTCHINS: No, Your Honor. I just want to be heard at the appropriate time.

THE COURT: Now is that time. Please do. These things appear before me with some regularity. The law is that if there is a valid arbitration agreement then, pursuant to statute, I must stay the matter and order the matter into arbitration. On its face there appears to be a valid agreement here but I may not have all the information before me. Yes, sir.

MR. HUTCHINS: That's exactly why -- normally I don't call witnesses for a motion like this, but to show that he was there, he was present, both parties were aware there was an arbitration agreement. He went so far as to -- you heard him -- recall him saying -- I know he didn't sign it but he circled it. He went over it with the client, with Mr. Norris' client.

We don't contend there is a dispute here. We don't contend that there are issues that need to be taken care of. We

just contend that we are in the wrong forum. Mr. Terrell signed his name literally less than an inch below number four, which states "I understand any disputes arising from or pertaining to this transaction will lead to the enforcement of the arbitration agreement." So that's essentially why we are here today.

THE COURT: Then there's the governing arbitration agreement itself. It has a stamp for the seller and unless this is fraudulent, what appears to be a signature of the plaintiff. I will certainly hear from Mr. Norris.

MR. HUTCHINS: And again, I'll give credit to Mr. Norris where, when we first started litigating this, he provided some case law to show he had a decent argument that this by itself might not be enough. That's why I proceed -- we proceeded in discovery and we started trading documents. It wasn't until I was fine -- you know, double checking myself that I came across the initials where I saw that and then we went forward with this because --

THE COURT: Okay. What I think I need to do is hear from Mr. Norris because your position is ostensibly demonstrated on the document. So let me hear from you Mr. Norris.

MR. NORRIS: Your Honor, if I could approach, I have some documents I'd like to hand up.

THE COURT: Yes, sir.

(Document handed to the Court.)

MR. NORRIS: If I could just ask you to hand the

documents back. This is regarding another case and there's just some client information that I handled in this county that was regarding the exact same issue. For confidentiality purposes I'd just ask Mr. Hutchins to return these also.

MR. HUTCHINS: That is fine.

THE COURT: Certainly.

MR. NORRIS: Your Honor, the case I just handed up is the case of Revels versus Miss America Organization, it is a 2004 Court of Appeals case. I will get to the other documents in just a moment.

As Your Honor is aware, the creation of an arbitration -- or the agreement to arbitrate -- well, actually let me back up a step further. In a motion to compel arbitration, the Court is required to look at two things: first, is whether there was -- the parties have a valid agreement to arbitrate and also whether the specific dispute falls within the scope of that agreement. We are not here to argue about point number two, Your Honor. The question is whether the parties had a valid agreement to arbitrate.

Just briefly on the facts of the Revels case, Your Honor. The Revels case involved a contract dispute essentially between Miss America -- actually it was Miss North Carolina 2002 -- but it was between her and defendant Miss America North Carolina -- I'm sorry, Miss North Carolina Pageant Organization -- And these are double printed, Your Honor, so on

page 2 it basically lists the contract and there was an arbitration provision within that contract. The contract was signed by the plaintiff but not by the defendant.

The Court looked at the contract and basically said unless -- because arbitration agreements, or the existence of arbitration agreements, are creatures of contract, that basic contract rules apply. In this case, agreement to arbitrate -- or in the Revels case, because the defendant did not sign the arbitration agreement or the contract that contained the arbitration agreement, there was no binding arbitration agreement. There's no dispute there was issue with the contract but there was a dispute about whether that dispute itself was subject to the arbitration agreement or provision that was contained within that contract. And that specific provision was located on page 2, on the reverse side, in the pagination on page 183 of that case.

If you will turn to the last page, Your Honor, page 6, the Court basically lists its findings or its holding. It basically says a dispute can only be settled by arbitration if a valid arbitration exists -- and I am referring to paragraph 2 of page 6 -- it says the Courts, in the present case, the review of the record indicates that there is -- that the obligation of contract does not bear the signature of an agent or representative of Miss America Organization showing that it was accepted as a contract, essentially, as an agreement to arbitrate. Because the arbitration clause within the application contract was the sole

basis for the motion, there was no written agreement to arbitrate. There was no signature by the defendant in that case.

The same thing applies here, Your Honor. There was no -- it was a separate arbitration agreement, which in itself is a separate contract. My client -- there is a dispute -- and the reason I was asking about the originals, shredding documents and so forth, the discovery responses in this case were provided on November 19. I had asked Mr. Hutchins the same day to request the originals of those documents to be provided to -- at the hearing today so that I can inspect them. My client has disputes as to whether that was in fact his signature, whether it was -- because he did not have a copy of being made aware of the arbitration agreement.

When Mr. Hutchins filed the answer, I was wanting to find the originals so that I could inspect the signature, scan that into my computer, provide that to my client and have that looked at. The defendant responded to that request on November 20th saying "let me get with my client." I didn't hear anything back from Mr. Hutchins until November 30th when he sent a couple of extra documents that had been requested -- or an extra document that had been requested, but there was no reference in that e-mail of the state of the originals from his client. I just found out shortly before the hearing today, or about an hour ago, that the practice now in Kernersville is to shred the original documents.

There's -- I have been doing this for eight years, Your Honor, and I've never come across a situation where a dealership shreds documents for a deal that it was less than a year old. They are supposed to keep the original documents on file for the DMV to inspect. I have called the DMV license and theft Bureau - which I don't know if you saw me go out of the room a couple of times.

THE COURT: Yes, sir.

MR. NORRIS: But I was on the phone with Lieutenant Rodden with the North Carolina Division of Motor Vehicles. I put in a call to Inspector Molina, who is a DMV license and theft inspector assigned --

THE COURT: I know both gentlemen quite well.

MR. NORRIS: I put in a call. Inspector Molina was out but he was assigned to Kernersville Chrysler Dodge's region until August. He has not gotten back to me. He's going to be out I think until 1:00 o'clock. But I did speak with inspector Day, who is currently involved with Kernersville Chrysler Dodge. I know this is not in testimony, Your Honor, but I will just represent to the Court that Inspector Day told me he just went out to Kernersville Chrysler Dodge and inspected a deal from November 2. Now, I'm aware that that is less than 30 days, but that that was -- that that was -- that he looked at the originals of these documents.

Typically they are kept in a folder that has, you know,

the bill of sale, the title agreement, the odometer disclosure statement, damages disclosure statements and so forth, basically that contain the original documents. And when things are shredded or scanned -- you know, I use PDF and there's all sorts of ways to manipulate these things and I'm not saying this has been manipulated but I'm just saying there is a question whenever the originals are not provided as to whether what was on the back of certain documents may not have been, you know, put in there so on and so forth.

So I say that just to say that I would like some lead just to be able to verify with Inspector Molina about the state of, you know, when -- I'm trying to find out at least what the policy is at this dealership about when these things are shredded. I think we have an issue -- one issue about the state of the signature. However, that being said, I don't think that it necessarily needs to be done today because I think the Revels case is dispositive of the issue about whether there was in fact a valid agreement to arbitrate.

The reason for that is under the -- what Mr. Hutchins would have the Court decide is that a dealer that prepares an arbitration agreement that has a signature block for both the dealership and the client, or the customer, to sign and then neglects to sign its portion can still be -- can still receive the benefit of its failure to create a binding arbitration. Anymore than if we said we signed the bill of sale -- you signed the bill

of sale but we're forcing you to sign -- you know, to sell a car, we couldn't go into a courtroom in good faith and say you know "look you promised us you'd sell us this car. Look we have our signature on it."

It doesn't work that way. You have to have both parties do the signature otherwise it's an illusory contract.

THE COURT: I would agree with you except that if the signatures are genuine -- it seems to me that I would be in a position, as the finder of fact, based upon what is before me, that the retail purchase agreement, if this is a genuine signature of the plaintiff, that the passage -- which actually is much more legible in the copy you provided -- it incorporates by reference the arbitration agreement, which your client did sign, relevant provision -- and more readable in the copy you provided -- number four, "I understand that any dispute arising from or relating to this transaction shall be settled by neutral arbitration pursuant to the governing arbitration agreement signed by my hand and incorporated into this agreement." And then purports to be the arbitration agreement signed by the purchaser, not signed by the company.

But it seems to me in fairness that those two things taken together would form the basis of a binding arbitration agreement. If you need lead to make sure that that is your client's signature, I will certainly allow that. I will forecast for you that I do not think that the Revels case is controlling

because I believe the law is that if the Court is satisfied that there is a binding arbitration agreement, even if there are some facts to the contrary, and the Court so finds that the Court must order the matter into arbitration.

MR. NORRIS: Your Honor, the reason I handed up the other two documents is because we had a case here in front of Judge Burke last year -- and I understand that Judge Burke's ruling is not binding on the Court, however it was -- and I've handed up the bill of sale and the arbitration agreement in that matter -- you know, the arbitration -- the Court denied defendant's motion to compel arbitration on much the same facts where the arbitration agreement was signed by the buyer but not signed at the dealer.

Essentially the arbitration agreement states, you know, that -- it states a two-sided right to arbitrate disputes, both the dealer's right to arbitrate a dispute against the client and the client -- or the customer and the customer's right to arbitrate a dispute against the dealer -- or I guess obligation to arbitrate against the dealer. Without the -- without the signature of the dealership on the arbitration agreement, it creates a one-sided obligation to arbitrate disputes. My client could not compel the defendant to arbitrate a dispute that it had against him if the defendant did not have a signature agreeing to arbitrate.

So we have -- that's the whole crux of the matter. It

creates an illusory agreement, or a one-sided lack of mutuality -- not illusory -- that lacks a mutuality in the term -- in the sense that one side of the transaction is required to do something that the other side of the transaction is not required to do. By not signing the arbitration agreement, there's no -- just basic contract principle, there's no agreement to arbitrate. Even if it incorporates the document, because it's not -- why even have the signature block on there.

You know, if we are talking about an arbitration agreement, why even have the signature block on there if it just says, you know -- you could just take out that line "signed by my hand" and have an arbitration agreement without even having a signature block on there if all we are going to require is a signature on the bill of sale itself. There is no way for my client to come in and compel the dealership to arbitrate a dispute if it's one-sided. It lacks mutuality.

THE COURT: That is in fact a good point because as I am looking at the retail purchase agreement, it may be initialed by Mr. McCullough but it is not signed, at least as so far as the copy I have is not signed by the dealership as well.

Mr. Hutchins, I think that's a fair point. I am not sure that the purchaser, Mr. Terrell -- if your client did not wish to arbitrate, which obviously it does, but if your client did not wish to arbitrate, I'm not sure that Mr. Terrell could enforce the agreement.

MR. HUTCHINS: If I may. I will answer your question but I first want to address a few things. First being, my client does not make any contentions -- well, he has alluded to that I guess his testimony is incorrect and this is a forged signature, he's alluded to that. The reason I say that is we provided this same document to him. If he claims there is a forgery he would have this same retail purchase and could show it without that signature.

THE COURT: I'm not even considering that unless Mr. Norris asks for additional time. If there is a genuine issue about it being a forgery, I'll allow additional time but that's not persuasive to me, and Judge Burke's ruling in the other matter is not persuasive to me. What is persuasive to me is the mutuality, which I think is a -- something that I had not thought of but may in fact be a fatal flaw here.

MR. HUTCHINS: To address that point Your Honor, that's why I brought Mr. McCullough because he was actually the individual that went over this same agreement with him. The contract here, albeit it's a pretty complicated one for a car, has all the information about consideration going back and forth: dealership gets large pot of money, Mr. Terrell gets a car. That is laid out here in great detail in the retail purchase agreement.

Not only has it been signed by -- I claim it to be signed by two individuals. We didn't bring in Brandon P. Weidner, he was the other name. He's got -- the salesman that typed it up.

It was just Mr. McCullough that actually signed it and went over it with Mr. Terrell.

THE COURT: I don't see where he signed it. I see where he initialed it.

MR. HUTCHINS: Your Honor, my understanding of signatures you can -- for those who are illiterate, you can literally make a mark and put an X. So I don't see how someone's initials, and an individual who testified that he actually put those down, is any different than an individual just making his mark.

And again, the documents provided by Mr. Terrell -- excuse me, Mr. Norris from this other case he's trying to rely on doesn't have --

THE COURT: I am not persuaded by that. But it looks to me like -- again, my initial thought was that it appeared clear that taking the two documents together that the parties had agreed to the arbitration provision. The copy attached to your motion to compel Mr. Hutchins is very difficult to read. The copy Mr. Norris passed up is more readable.

MR. NORRIS: And I just want to be clear, Your Honor, that is not the -- those are the documents that were related to the McGraff matter.

THE COURT: No, you handed up -- these are from the Terrell matter, the Terrell document.

MR. NORRIS: Oh, I'm sorry. Can I approach. I just

want to make sure. I may have stapled something wrong.

THE COURT: Yes.

(Appears to be reviewing.)

MR. NORRIS: Yeah, okay that is the copy that my client gave to me. If I could share that with Mr. Hutchins. I don't know that he has that.

(Pause.)

THE COURT: And there is no initial on it.

MR. NORRIS: There is no initial but there is -- and that was the whole reason for wanting the original because there's -- they basically come in triplicates, Your Honor. There's a gray copy, a pink copy and a white copy.

THE COURT: I understand. Perhaps the signature didn't make it through. Yes, sir.

MR. NORRIS: The thing is the yellow copy that my client has -- and I have it on my phone. I can show the Court -- that's the middle copy. The top one is white. The second -- the middle copy is yellow and the bottom copy is pink. So it is supposed to be the top -- unless I'm completely off base.

THE COURT: I understand.

MR. NORRIS: So the middle copy should have -- if anything came through it should have come through on the middle copy. You see what I mean? So there's no -- and that's not even the signature -- that's the signature -- that's not even -- that's RCN, that is not even the signature of Brandon Weidner. The issue

of timing comes in about when these things were signed.

THE COURT: Well, basic contract law is that the contract should be construed against the drafter. Here the drafter is the dealership. Given the totality of the submissions before me, I am unable to conclude that there is a binding arbitration agreement. The dealership almost had it sown up but the dealership needs to make sure, in my mind, that it executes the arbitration agreement and if it is relying on the cooperation clause contained in the retail purchase agreement that that needs to be signed. It is not clear to me that it was.

MR. HUTCHINS: If I may briefly, Your Honor.

THE COURT: Yes, sir.

MR. HUTCHINS: It incorporates the governing -- it says pursuant to this, "this" is the rules and regulations. It doesn't say that it needs to go this route. Parties can agree, depending on how you arbitrate, because arbitration can occur in many different ways. So it doesn't say -- as I understand it "any dispute arising from or relating to the action shall be settled by standard arbitration." It says "pursuant to this agreement."

THE COURT: Right.

MR. HUTCHINS: So it's not saying that this is the end-all, be-all, it just acknowledges that arbitration is going to occur.

THE COURT: I understand that. It is the mutuality argument that is ultimately persuaded me because I just don't

think Mr. Terrell could enforce arbitration -- whether the shoe is on the other foot or not, I don't think Mr. Terrell can compel arbitration and thus there is a vacuum in terms of mutuality.

MR. HUTCHINS: Your Honor, I don't have the case in front of me but the Supreme Court has ruled that boilerplate language is sufficient. If people -- cell phone contracts, dish network and all those --

THE COURT: Yes, sir, if they're signed.

MR. HUTCHINS: If they're signed -- by the federal law, not North Carolina law. I know North Carolina law is a little bit different than federal law. But it is saying that the language that is on there is sufficient to put them on notice.

And even that would apply because I don't think anyone -- Mr. Norris contends that my client didn't sign it. We presented testimony, we presented documentation showing that it has been signed. So the mutuality of those individuals that are agreeing to these documents understand that all that comes along with it -- and these are just two documents of I think it was 30-plus pages of the agreement that you are held to.

THE COURT: Are you contending there is another arbitration provision somewhere in the totality of these document?

MR. HUTCHINS: No, Your Honor. I am contending that the signatures state there is an arbitration between the parties and that everybody agreed to it and that these are the rules and regulations. Because if you read the governing arbitration it

breaks down where and when it would take place.

THE COURT: I did but it is not signed by your client.

All right. I am denying the motion to compel arbitration because I do not find -- I find that there is no binding arbitration agreement between the parties.

Mr. Norris, if you will prepare an order please. You can prepare it for my signature. You can get it -- I prefer an original -- to Ms. Menefee-Long, please. I will get a copy back to you all.

I wish the parties well. I think you did well with what you had. Again, the contract should be construed against the drafter and it is just not sufficient for this Court to find a binding, a mutual binding, arbitration agreement. I wish the parties well in resolving the matter.

(Proceedings concluded at 12:19 p.m.)

CERTIFICATE

STATE OF NORTH CAROLINA)

COUNTY OF FORSYTH)

I, Allyson Neal, Certified Court Reporter, certify that the foregoing transcript of the proceedings taken at the December 7, 2015 session of Forsyth County Superior Court is a true, correct and complete record of the said proceedings recorded by the Forsyth County Clerk of Superior Court, is contained in one volume and was transcribed by me to the best of my ability.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties; nor financially interested in the outcome of this action.

This 19th day of February, 2016.

Allyson Neal

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