Rel: 03/03/2017

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2016-2017

1150941

Timothy Bevel

v.

Marine Group, LLC, et al.

Appeal from Marshall Circuit Court
(CV-16-900022)

BRYAN, Justice.

Timothy Bevel appeals from an order granting a motion to compel arbitration. We reverse and remand.

In March 2015, Bevel financed the purchase of a used Bennington brand boat and a Yamaha brand boat motor from

Guntersville Boat Mart, Inc., and he rented a boat slip on Lake Guntersville to dock the boat. The sale and boat-slip rental are documented by a one-page bill of sale, which contains an arbitration provision. According to Bevel, the boat was seized several months after the transaction for allegedly defaulting on payments on the boat and boat-slip rental. Bevel disputes that he owed those payments.

Bevel sued Guntersville Boat Mart and related entities Marine Group, LLC, d/b/a Boat Mart, and JD & L Enterprises, Inc. In his complaint, Bevel asserted several claims, including breach of contract. The defendants filed a motion to compel arbitration, citing the arbitration provision in the bill of sale. Bevel argued that his claims were not subject to the arbitration provision in the bill of sale because, he said, he had not actually agreed to that provision. Bevel noted that he had not initialed a box directly below the arbitration provision, although he had signed or initialed the document in other places. Following a hearing, the trial court granted the motion to compel arbitration. Bevel appealed to this Court under Rule 4(d), Ala. R. App. P., which

authorizes an appeal from an order either granting or denying a motion to compel arbitration.

> "'This Court's review of an order granting or denying a motion to compel arbitration is de novo. ...'
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> "United Wisconsin Life Ins. Co. v. Tankersley, 880 So. 2d 385, 389 (Ala. 2003). Furthermore:
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> > "'"A motion to compel arbitration is analogous to a motion for summary judgment. TranSouth Fin. Corp. v. Bell, 739 So. 2d 1110, 1114 (Ala. 1999). The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration and proving that that contract evidences a transaction affecting interstate commerce. Id. 'After a motion to compel arbitration has been made and supported, the burden is on the non-movant to present evidence that the supposed arbitration agreement is not valid or does not apply to the dispute in question.'"
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> > "'Fleetwood Enters., Inc. v. Bruno, 784 So. 2d 277, 280 (Ala. 2000) (quoting Jim Burke Auto., Inc. v. Beavers, 674 So. 2d 1260, 1265 n. 1 (Ala. 1995) (emphasis omitted)).'
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> "Vann v. First Cmty. Credit Corp., 834 So. 2d 751, 753 (Ala. 2002)."

Cartwright v. Maitland, 30 So. 3d 405, 408-09 (Ala. 2009).

Bevel argues that the trial court erred in granting the motion to compel arbitration because, he says, he did not agree to the arbitration provision in the bill of sale. Thus, he argues, the arbitration provision never became part of the contract between the parties. Bevel's argument focuses on what he did and did not initial or sign on the one-page bill of sale.

Bevel signed or initialed the bill of sale in two places -- he initialed a box indicating that the boat was being sold "as is," and he signed on a line at the bottom of the document regarding his receipt of the boat and the acknowledgment of the boat's condition. He did not, however, initial the box under the arbitration provision, and he did not initial the box under the trade-in section (the sale did not involve a trade-in). The arbitration provision is on the bottom half of the bill of sale. Directly below the arbitration provision, on the left side of the document, is an indented box for the purchaser's initials. Bevel, however, did not initial that box. Also below the arbitration provision, on the right side of the document but slightly lower than the left-side box, is an indented box for the purchaser's initials labeled "BOAT

SOLD AS IS"; Bevel did initial that box. Directly below the two boxes is the following text concerning Bevel's receipt of the boat and the boat's condition:

> "I have received all of the above listed in good condition and accept final delivery.
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> "The purchaser herein acknowledges that this vehicle may have had mechanical and/or body repair. Said vehicle may have suffered damage during production, transit, while in the possession of a prior owner, or in the possession of the seller. The seller makes no representations as to former damage, if any, nor warranties as to repair of same."

Below that provision is a signature line, which Bevel signed.[1]

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[1]The defendants contend that both the box under the arbitration provision on the left side and the box under the arbitration provision on the right side labeled "BOAT SOLD AS IS" relate to the arbitration provision. That is, the defendants contend that one initialing the box on the right shows assent to the arbitration provision when the boat is "sold as is" and one initialing the box on the left shows assent to the arbitration provision when the boat is not "sold as is." We do not read the bill of sale this way. Rather, we read the box on the left as applying to the arbitration provision and the box on the right as indicating that the boat is "sold as is." The sold-as-is box, which is positioned slightly lower than the box on the left, actually seems to correspond in substance with the final three sentences above Bevel's signature, suggesting that the box may be misaligned. Further, the bill of sale is a single page that has text to the end of the page; it seems more likely that the sold-as-is box was placed in the open space under the arbitration provision to keep the bill of sale to a single page than it is that each box was intended to cover more than one issue, i.e., arbitration and the boat being sold as is.

Bevel argues that, because he did not initial the box directly below the arbitration provision, he did not agree to that provision. Thus, Bevel argues, the arbitration provision is not part of the contract, and, therefore, he says, he is not bound by it. "'[A]rbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" AT & T Techs., Inc. v. Communications Workers of America, 475 U.S. 643, 648 (1986) (quoting United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960)). The issue whether the parties agreed to arbitrate their disputes is determined by "ordinary state-law principles that govern the formation of contracts." Chicago v. Kaplan, 514 U.S. 938, 944 (1995).

Bevel relies primarily on Ex parte Pointer, 714 So. 2d 971 (Ala. 1997). Because this Court in Ex parte Pointer relied primarily on Crown Pontiac, Inc. v. McCarrell, 695 So. 2d 615 (Ala. 1997), we will discuss Crown Pontiac first. In Crown Pontiac, McCarrell purchased an automobile from a dealership. McCarrell signed the contract in four places -- under the trade-in section, in the disclaimer-of-warranties

box, under the merger clause, and at the bottom of the page. However, McCarrell did not sign the box accompanying the arbitration provision in the contract.

The Court in Crown Pontiac concluded that the unsigned arbitration provision had not become part of the contract between the parties. Thus, the Court concluded that McCarrell could not be compelled to arbitrate the disputes arising from the purchase. The Court reasoned:

> "The purpose of a signature is to show 'mutuality and assent,' which are required for a contract to be binding. Lawler Mobile Homes, Inc. v. Tarver, 492 So. 2d 297, 304 (Ala. 1986). Conversely, in this case the absence of a signature under the arbitration clause shows a lack of mutuality and assent, where the contract contains a signature line specifically for the arbitration clause, but where McCarrell did not sign on that line, although he signed on other lines that similarly indicated agreement to specific terms. Crown Pontiac argues that it told McCarrell of the arbitration agreement and that McCarrell did not object to it. However, his lack of objection is not the same as an acceptance of the term, and it does not override the fact that McCarrell did not sign the arbitration clause, but signed every other part of the contract."

Crown Pontiac, 695 So. 2d at 618-19.

Shortly after releasing Crown Pontiac, this Court decided Ex parte Pointer, a case very similar to Crown Pontiac. In Ex parte Pointer, Pointer purchased an automobile from a

dealership. The contract included numerous sections enclosed in boxes, and each section contained a space for Pointer's signature or initials. Pointer signed or initialed each section except the section containing an arbitration provision. Pointer later sued the dealership, asserting, among other claims, breach of contract. When the dealership sought to compel arbitration, Pointer resisted, arguing that the unsigned arbitration clause was not a binding term of the contract. This Court agreed, relying on Crown Pontiac. Because "[t]here was no mutual agreement to submit to arbitration" Pointer's claims, he could not be compelled to arbitrate those claims. 714 So. 2d at 972. The arbitration provision simply never became part of the contract.

In arguing that Bevel is bound by the arbitration provision, the defendants rely on America's Home Place, Inc. v. Rampey, 166 So. 3d 655 (Ala. 2014). In Rampey, Rampey and a homebuilder entered into a contract calling for the homebuilder to build Rampey a house. After the house was built, Rampey sued the homebuilder, alleging, among several other claims, breach of contract. The contract contained several provisions with a line beside the provision for

Rampey's initials. Rampey initialed all the applicable provisions -- including an arbitration provision. Rampey also initialed a provision indicating that each of the other applicable provisions had been explained and that he "'initial[ed] acceptance of same.'" 166 So. 3d at 657 (emphasis omitted). Rampey also signed the bottom of the contract under a provision stating that the contact would be binding on the parties thereto.

Rampey pinned his hopes of avoiding arbitration on his argument that he had not signed a signature line under the arbitration provision; this was a different line from the one he initialed beside the arbitration provision. That signature line under the arbitration provision bore a signature purporting to be Rampey's, but he claimed the signature was forged. Rampey argued that his failure to sign the signature line below the arbitration provision indicated that he had not agreed to that provision. This Court disagreed, stating:

> "The fact that Rampey's signature immediately beneath the arbitration provision was (allegedly) forged is of no consequence because his signature was not required immediately beneath the arbitration provision and, furthermore, Rampey assented to be bound by that provision when he admittedly wrote his initials on the line next to the arbitration provision."

166 So. 3d at 659.

In concluding that Rampey's signature beneath the arbitration provision was not required, the Court quoted from Stiles v. Home Cable Concepts, Inc., 994 F. Supp. 1410 (M.D. Ala. 1998):

> "'While written agreement is required for arbitration, however, there is no requirement that every single provision of a contract, including the arbitration clause, must be signed in order to form part of the agreement. Indeed, it is axiomatic that "parties may become bound by the terms of a contract, even though they do not sign it, where their assent is otherwise indicated." 17A Am. Jur. 2d § 185. ... The [Federal Arbitration Act] has no separate requirement of a signed arbitration clause. As noted by the Northern District of Alabama, "[i]t is well established that a written agreement to arbitrate need not be signed by the parties as a prerequisite to the enforcement of the agreement." Middlebrooks v. Merrill Lynch, Pierce, Fenner & Smith, Inc., [No. CV 89-HM-5015-NW, April 5, 1989] (N.D. Ala. 1989) [not reported in F. Supp.].'"

Rampey, 166 So. 3d at 659 (quoting Stiles, 994 F. Supp. at 1416 (emphasis added in Rampey)).

This Court in Rampey then stated:

> "Furthermore, it is well settled that
>
> > "'[a] plaintiff cannot seek the benefits of a contract but at the same time avoid the arbitration provision in the contract. Wolff Motor Co. [v. White], 869 So. 2d [1129,] 1136 [(Ala. 2003)]. Instead, "she must accept or reject the

> entire contract." Credit Sales, Inc. v. Crimm, 815 So. 2d 540, 546 (Ala. 2001). Britta's claims, including her breach-of-contract claim, rely on the contract to support her claims for damages. Therefore, she is bound by the arbitration provision in the contract. Infiniti of Mobile, Inc. v. Office, 727 So. 2d 42, 48 (Ala. 1999); Delta Constr. Corp. v. Gooden, 714 So. 2d 975, 981 (Ala. 1998).'
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> "Bowen v. Security Pest Control, Inc., 879 So. 2d 1139, 1143 (Ala. 2003) (emphasis added). See also Southern Energy Homes, Inc. v. Ard, 772 So. 2d 1131, 1134-35 (Ala. 2000) ('A plaintiff cannot simultaneously claim the benefits of a contract and repudiate its burdens and conditions.' (citing Value Auto Credit, Inc. v. Talley, 727 So. 2d 61 (Ala. 1999); Infiniti of Mobile, Inc. v. Office, 727 So. 2d 42 (Ala. 1999); Georgia Power Co. v. Partin, 727 So. 2d 2 (Ala. 1998); Delta Constr. Corp. v. Gooden, 714 So. 2d 975 (Ala. 1998); and Ex parte Dyess, 709 So. 2d 447 (Ala. 1997))).
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> "Here, Rampey, whose claims are all predicated on alleged breaches and violations of the contract, attempts to claim the benefits of the contract while repudiating one of its conditions, i.e., the binding arbitration provision. However, as noted, Rampey must '"accept or reject the entire contract."' Bowen, 879 So. 2d at 1143 (quoting Credit Sales, Inc. v. Crimm, 815 So. 2d 540, 546 (Ala. 2001)). As was the case in Bowen, Rampey's claims, including his breach-of-contract claim, rely on the contract for support. Thus, Rampey is bound by all the provisions of the contract, including the arbitration provision. Accordingly, we conclude that the trial court erred in denying AHP's motion to compel arbitration."

Rampey, 166 So. 3d at 660-61 (footnote omitted).

At first glance, there may appear to be tension between Crown Pontiac and Ex parte Pointer, on the one hand, which enforced arbitration provisions, and Rampey, on the other hand, which did not enforce an arbitration provision. However, the cases must be read in the context of their facts, and Rampey is factually distinguishable from the earlier two cases. In both Crown Pontiac and Ex parte Pointer, although the consumer signed the contract in various places, the consumer did not sign the designated place specifically corresponding to the arbitration provision. Thus, the consumers in those cases did not assent to the arbitration provisions in those contracts, and those provisions did not become part of the contracts. In Rampey, Rampey initialed a box by the arbitration provision and thus "assented to be bound by that provision." 166 So. 3d at 659. Rampey showed his consent to the arbitration provision by initialing the box, despite failing to additionally indicate assent by signing the signature line beneath the provision.

In Rampey, as noted, the Court also observed that parties "'may become bound by the terms of a contract, even though they do not sign it, where their assent is otherwise

indicated.'" 166 So. 3d at 659 (quoting 17A Am. Jur. 2d § 185 (emphasis omitted)). For instance, even if a contract is not signed at all, mutuality and assent may be shown by "accept[ing] and act[ing] upon" the contract. Lawler Mobile Homes, Inc. v. Tarver, 492 So. 2d 297, 304 (Ala. 1986). However, in Rampey, Rampey showed his assent to the various contract terms by both signing or initialing those terms and by accepting and acting on the contract. That is unlike the situation in Crown Pontiac and Ex parte Pointer, where the consumers did not sign a signature line specifically corresponding to the arbitration provision, but did sign lines corresponding to other provisions. In those cases, this Court concluded that, when some other contract provision is signed, the failure to sign the signature line corresponding to an arbitration provision is a compelling indication of failure to assent to that provision. That is the situation here.

The Court in Rampey also observed that a plaintiff cannot seek to enforce the contract but at the same time seek to avoid an arbitration provision in the contract; rather, a plaintiff must accept or reject the entire contract. However, for that principle to be applicable, the arbitration provision

must actually be a part of the contract sought to be enforced. For example, in Ex parte Pointer, the fact that Pointer alleged breach of contract did not thwart his challenge to the enforcement of the arbitration provision; that provision was not part of the contract because of his lack of assent. In Rampey, the arbitration provision was a part of the contract; Rampey assented to be bound by that provision by initialing the line next to the arbitration provision. 166 So. 3d at 659. However, in light of Crown Pontiac and Ex parte Pointer, the arbitration provision in this case was not part of the contract because Bevel did not initial the box corresponding to the arbitration provision despite signing and initialing other parts of the contract. In short, the above language from Rampey should not be read to conflict with the principle that, "[w]hen one party proposes a standard contract to another party, the parties may, of course, agree to be bound by certain of the clauses in the proposed contract and not to be bound by others." Ex parte McNaughton, 728 So. 2d 592, 595 (Ala. 1998) (citing Crown Pontiac as an example). As noted, only those disputes a party has agreed to arbitrate may be submitted to arbitration. AT & T Techs., 475 U.S. at 648.

This case is controlled by Crown Pontiac and Ex parte Pointer. Bevel did not initial the box corresponding to the arbitration provision despite initialing and signing the bill of sale in other places; under Crown Pontiac and Ex parte Pointer, that is a compelling indication that Bevel did not assent to the arbitration provision. The arbitration provision did not become part of the contract between the parties, and, thus, it cannot be enforced against Bevel. Accordingly, we reverse the trial court's order compelling arbitration, and we remand the case for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Stuart, Parker, Murdock, Shaw, Main, and Wise, JJ., concur.

Bolin, J., concurs in the result.

BOLIN, Justice (concurring in the result).

I concur in the result reached by the main opinion reversing the trial court's judgment granting the motion to compel arbitration filed by Marine Group, LLC, and remanding the case. However, I do not agree with the breadth of the rationale concerning the controlling precedent stated in the main opinion. The particular facts of this case limit its precedential value, because the patent ambiguity on the face of the portion of bill of sale attached as an appendix to this writing makes a decision as to exactly what the buyer, Timothy Bevel, was agreeing to less clear than the main opinion suggests. "'A patent ambiguity results when a document, on its face, contains unclear or unintelligible language or language that suggests multiple meanings.'" Kelmor, LLC v. Alabama Dynamics, Inc., 20 So. 3d 783, 790-91 (Ala. 2009) (quoting Smith v. Ledbetter, 961 So. 2d 141, 145 (Ala. Civ. App. 2006)). The wording of the actual arbitration provision is not atypical of such provisions. However, the positioning of the signature areas in relation to the arbitration provision on the bill of sale is clearly susceptible to different interpretations. Beneath the arbitration provision are two

"boxes" for a purchaser's initials -- unlike any other provision in the bill of sale requiring initials. The box on the left is simply beneath the arbitration provision set out above it. The box on the right, however, which Bevel initialed, is preceded by the words "BOAT SOLD AS IS" -- phraseology that generally pertains to warranties or, as perhaps the case here, to the lack of a warranty -- that is in no way related to the subject of arbitration. The box on the right is slightly lower on the page than the box on the left, and the phrase preceding the box -- "BOAT SOLD AS IS" -- is either a different font from the arbitration provision or may have been superimposed upon a form agreement. How to interpret the document is the valid subject of argument as asserted by Marine Group, the seller, but what is not subject to argument is that the peculiarly configured document is ambiguous, and it was drafted by Marine Group. Marine Group contends that a purchaser initialing the box on the right would be assenting to the immediately preceding arbitration provision when, as here, the boat is "sold as is," whereas a purchaser initialing the box on the left would be assenting to the arbitration provision when the boat is not "sold as is."

Stated differently, the two boxes beneath the arbitration provision could reasonably be construed to be arbitration alternatives, to be used depending on the new or used condition of the boat being purchased. Marine Group's interpretation could objectively explain the configuration of the portion of the bill of sale reproduced in the appendix just as easily as the interpretation ensconced in the main opinion. It is speculative to say, but such an interpretation as contended by Marine Group could have been the unstated rationale by which the trial court reached the decision to compel arbitration in this matter.

However, although not argued by the parties, "it is a familiar rule of contract construction that 'any ambiguity must be construed against the drafter of the contract.'" Ex parte Palm Harbor Homes, Inc., 798 So. 2d 656, 661 (Ala. 2001)(quoting Homes of Legend, Inc. v. McCollough, 776 So. 2d 741, 746 (Ala. 2000)). Despite this familiar rule of contract construction, the main opinion, in concluding that Bevel did not assent to the arbitration provision because he did not initial the box on the left "corresponding to the arbitration provision," ___ So. 3d at ___, finds controlling this Court's

decisions in Ex parte Pointer, 714 So. 2d 971 (Ala. 1997), and Crown Pontiac, Inc. v. McCarrell, 695 So. 2d 615 (Ala. 1997). I find these cases distinguishable in that they do not present circumstances where, as here, the document containing the arbitration provision is susceptible to multiple meanings. Specifically, in Ex parte Pointer, the printed contract form between the parties included numerous sections, all of which were set off in boxes; each box contained a boldface heading, as well as a location for the purchaser's signature and/or initials. Pointer signed and/or initialed all the sections except the one entitled "Arbitration Clause." The trial court compelled arbitration. Pointer argued on appeal that the unsigned arbitration clause was not a binding term of the contract. The defendants, an automobile dealership and a finance company, on the other hand, argued that the signature line in the section entitled "Arbitration Clause" did not apply to the arbitration terms. This Court rejected the defendants' argument, concluding:

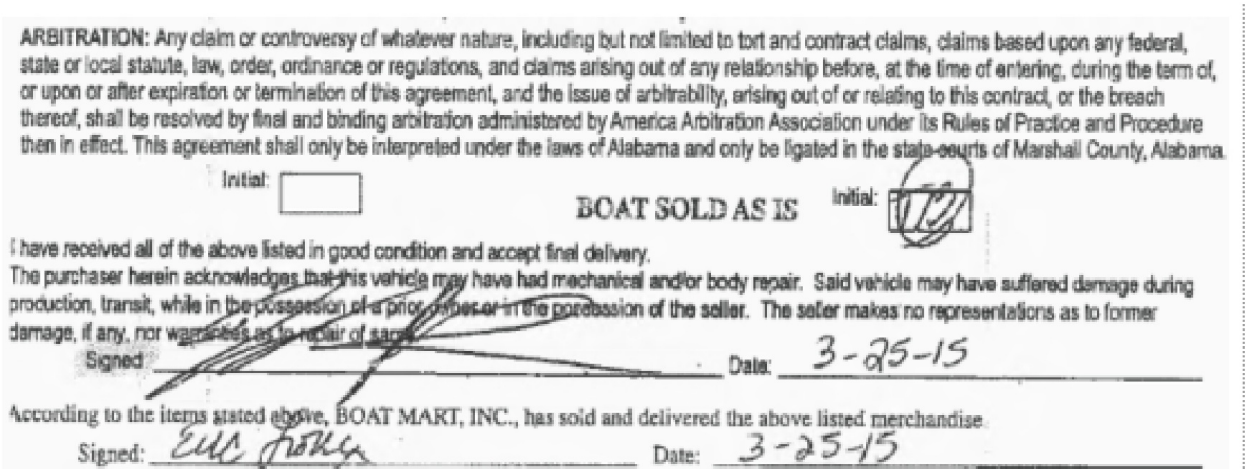
> "The different terms of the contract ['DESCRIPTION OF TRADE A,' 'ARBITRATION CLAUSE,' 'TOTAL CASH DELIVERY PRICE,' 'OPTIONAL EQUIPMENT TO BE INSTALLED OR DELETED,' 'VEHICLE CONDITION STATEMENT,' and 'CUSTOMER DISCLOSURE STATEMENT'] are divided into boxes, with each box containing a boldface heading.

> If the signature line that is included in the box entitled 'Arbitration Clause' was for some other term or clause of the contract, it would have been set off with a boldface heading, as was every other term or clause."

714 So. 2d at 972. Implicit in this Court's holding is the nonexistence of any ambiguity. The circumstances presented in Crown Pontiac are even more distinguishable insofar as the issue there involved a merger clause. Specifically, in Crown Pontiac, the purchaser of an automobile signed a preliminary retail-buyer's order form, which included an arbitration provision. The purchaser later executed a final version of the contract, signing in four places; however, he did not sign in the box accompanying the arbitration provision. The trial court denied Crown Pontiac's motion to compel arbitration. Crown Pontiac argued on appeal that the arbitration clause in the final executed contract was enforceable merely because it had been included in the preliminary retail-buyer's order form. This Court agreed with the purchaser that the preliminary retail-buyer's order form he signed containing the arbitration provision did not become part of the final executed contract because a merger clause in the final executed contract caused the terms in the preliminary retail-

buyer's order form to be superseded by the terms of final executed contract. This Court noted that "Crown Pontiac should have known that any terms contained in the [preliminary] retail buyer's order were nullified by the merger clause in the [final executed contract]." 695 So. 2d at 619. This Court further noted that Crown Pontiac "was the drafter of this retail buyer's order form, and it cannot escape from the terms that it drafted simply because it now finds those terms inconvenient." Id. at 618. In other words, there were no ambiguities in the documents signed by the purchaser in Crown Pontiac, whereas there are here. Accordingly, because the ambiguous bill of sale in this case was drafted by Marine Group, I believe the Court correctly decided the case, even though I concur only in the result, because the rationale of the main opinion, in my judgment, should be limited to the particular circumstances of this case.

APPENDIX



ARBITRATION: Any claim or controversy of whatever nature, including but not limited to tort and contract claims, claims based upon any federal, state or local statute, law, order, ordinance or regulations, and claims arising out of any relationship before, at the time of entering, during the term of, or upon or after expiration or termination of this agreement, and the issue of arbitrability, arising out of or relating to this contract, or the breach thereof, shall be resolved by final and binding arbitration administered by America Arbitration Association under its Rules of Practice and Procedure then in effect. This agreement shall only be interpreted under the laws of Alabama and only be ligated in the state courts of Marshall County, Alabama.

Initial: ☐

BOAT SOLD AS IS Initial: [illegible]

I have received all of the above listed in good condition and accept final delivery.

The purchaser herein acknowledges that this vehicle may have had mechanical and/or body repair. Said vehicle may have suffered damage during production, transit, while in the possession of a prior owner or in the possession of the seller. The seller makes no representations as to former damage, if any, nor warranties as to repair of same.

Signed: [illegible] Date: 3-25-15

According to the items stated above, BOAT MART, INC., has sold and delivered the above listed merchandise.

Signed: [illegible] Date: 3-25-15