2012 WL 2053331 (Ala.Civ.App.) (Appellate Brief)
Court of Civil Appeals of Alabama

D M C ENTERPRISES, et al., Appellants,
v.
Lucille HOPE, Appellee.

No. 2110452.
April 20, 2012.

Appeal from Circuit Court of Mobile County, Alabama Civil No. 02-CV-2011-001275.00

Reply Brief of Appellee Lucille Hope

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*2 STATEMENT REGARDING ORAL ARGUMENT

Because this appeal is premature, oral argument should not be required in the present posture of the case. A hearing is set April 25, 2012 in the trial court whether there was an agreement to arbitrate. Once that hearing is concluded, and once the trial court rules on a bond amount, also set on April 25, 2012, the case would be ripe for review, and for consideration of oral argument.

Appellee wishes to avoid the burden of piecemeal and duplicative appeals, and the potential for two oral arguments. The Court should defer consideration of the request for oral argument until all of the essential proceedings in the court below are concluded, and until the issue is resolved on appeal whether jury trial was required on the issue whether the parties agreed to arbitration. At this stage, oral argument should not be required. The situation may change, however, depending on the resolution of related issues in the trial court.

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*5 STATEMENT REGARDING JURISDICTION

Appeal was taken from an order to maintain the st*atus quo* pending determination whether the parties had an enforceable agreement to arbitrate. The order required Appellants to return a Mercedes automobile to Appellee, pending further rulings, as she is without a car.

The trial court has not decided arbitration, and there is a hearing set to decide the issue April 25, 2012. Appeal is likely on the denial of a jury trial demand as required by the Federal Arbitration Act 9 U.S.C. § 4, which provides for jury trial where "the making of the arbitration agreement" is in issue. This Court, therefore, lacks jurisdiction of the appeal insofar as it is mis-characterized as an appeal of an order denying an application to compel arbitration pursuant to Rule 4(d), Ala. R. App. P. Appeal of a ruling on arbitration must await determination by the trier of fact, before an appeal in that issue can be taken.

The court has jurisdiction to consider appeal of the order requiring return of a vehicle, to maintain the *status quo*. The appeal was timely filed within 14 days of that order. While jurisdiction *may* be based on ***6** Rule 4(a)(1), Ala. R. App. P. Appellee submits that this Court should nevertheless hold the appeal in abeyance, pursuant to Rule 4(a)(5), Ala. R. App. P., or sound exercise of discretion, in order to avoid piecemeal appeal, due to the fact that there are other pending motions in the trial court which are inextricably intertwined with the issue pertaining to return of the automobile, including bond amount, pending discovery, and review of the denial of the jury demand.

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STATEMENT OF THE CASE

Appellee, Lucille Hope, filed suit December 29, 2011 for fraud, and recission of a contract to purchase an automobile (C 8-10). Appellant is an retired school teacher, age 78 (C 81,83), who was taken advantage of by an automobile dealer in a series of transactions. From the outset, Ms. Hope requested information on the whereabouts of her Mercedes Benz (C 42-44), which had been subject of a rescinded trade, and to this day, Appellants have refused to disclose the location or disposition of the vehicle (C 151), or provide all documents requested.

In the initial Complaint, Appellee demanded "return of her 2008 Mercedes" (C 9). On December 28, 2011, Appellee filed an Instanter Motion for Return of Vehicle (C 19) based on the timely notice of recission, and the fact Ms. Hope had been denied credit [1] on the alleged purchase of the 2008 Volkswagen (C 19), which was a condition of the sale (Appendix A, B 5-6).

The Motion and the record evidence also confirmed there had been no payoff of the lien on the Mercedes (C 19 at ***12** 16), so that it could not have been sold, or title transferred. The fraudulent representation that the Mercedes had been sold (C 83), also established facts supporting rescission of the purchase of the 2012 Volkswagen, which was never titled.

The Complaint and initial discovery, including discovery concerning the disposition of the Mercedes, was served January 4, 2012 (C 17-18). Appellants never answered the lawsuit. Instead, Appellant filed a Motion to Stay Action and Require Arbitration on January 26, 2012 (C 22) attaching sales documents.

The documents filed with the Motion for Stay should establish there was no agreement to arbitrate. The Buyer's order for the 2008 Volkswagen was not signed and accepted by the dealer in the space provided (C 31). The Buyer's order for the 2008 Volkswagen referenced Dean McCrary Imports (C 31), but the alleged arbitration agreement was with another entity, not the seller. Dean McCrary Mazda (C 32), and was not signed by the seller in the space provided. The credit letter (Appendix A, H-l) and an affidavit filed by Appellant with respect to the 2008 Volkswagen indicates the seller was yet another entity,

***13** Victoria Enterprises LLC (C 30), who was not identified as a party to the purported agreement to arbitrate. Arbitration is not required with Victoria Enterprises or other nonparty to the agreement.

Appellee continued to pursue initial discovery, including discovery regarding whereabouts of her Mercedes. On January 28, 2012 Ms. Hope filed a Motion to Compel Discovery (C 42) encompassing the initial discovery filed with the Complaint concerning all transactions and again seeking information on the Mercedes (C 44), including any additional documents regarding alleged "resale" of the Mercedes (C 42). On January 28, 2012 Ms. Hope also filed a Motion for Sanctions and Request for Bond (C 45), which also addressed the Mercedes, offering proof that the Mercedes had not been paid off and traded, as Ms. Hope was in fact still paying substantial notes and insurance on the Mercedes (C 45).

On February 2, 2012 the court granted the instanter order for return of the Mercedes (Docket entry, C 5, Order C 67) and set for hearing on February 10, 2012 the Appellee's Motion for Sanctions and Bond, and the Appellant's Motion for Stay or Arbitration (Docket entry, C ***14** 5). The instanter order rendered moot [2] the related Motion to Compel or for sanctions (C 113, 114). Rather than risk a determination in the February 10th hearing on related issues as to bond amount, if required (C 45), or risk further sanctions due to ongoing refusal to fully respond to discovery, including whether there was agreement to arbitrate, and disposition of the Mercedes, instead, Appellants filed notice of appeal as to the instanter order for return of the Mercedes on February 9, 2012 (C 92-93). By doing so. Appellant improperly seeks an initial ruling on arbitration in the Court of Appeals, bypassing the then imminent hearing date on the trial court.

The Brief of Appellant was filed March 30, 2012. For initial response, Appellee filed a motion to dismiss the appeal, as premature, March 30, 2012. A motion to supplement the record filed April 4, 2012, is pending, [3] aswell ***15** as an April *2b*, 2012 hearing [4] on the issue whether an agreement for arbitration was made (Exhibit C to Motion to Dismiss Premature Appeal). The parties are also completing essential discovery in the trial court on the issue whether agreement for arbitration was made, pursuant to the Order from this Court to complete the discovery on or before April 26, 2012.

Depositions of Appellee and two experts were conducted by Defendant on April 10, 2012. Depositions of Appellant's representatives and employees are currently set for April 23, 2012. Various objections to the scope of requested discovery from Appellants were argued on April 20, 2012 and are likely to be taken up during the depositions and at the April 25, 2012 hearing. By any standard, this appeal of arbitration is premature.

***16 STATEMENT OF THE ISSUES**

The sole issue properly before this Court on limited *ore tenus* review is whether the instanter order to maintain the *sta*tus *quo* was a proper exercise of discretion by the trial court, based on sufficient evidence.

***17 STATEMENT OF THE FACTS**,

Two disputed sales are involved, the first concerning a used 2008 Volkswagen, and the second a new 2012 Volkswagen. Trade of a 2008 Mercedes is also involved.

The facts may be determined from allegations in the Complaint, as amended, sales documents contained in the record, the Agreed Statement and supplemental record. The trial court had sufficient facts from interrogation of counsel and presence of Appellee to enter the temporary. relief in the instanter order.

Appellee gave notice of rescission of a trade for a 2008 Volkswagen due to the condition of the vehicle, the fact that the **financing** condition was never met, and fact there was never a payoff or trade of her 2008 Mercedes (C 81-83). The dollar amounts in the sales agreement were also different than the figures that had been represented (C 83).

The next day, on December 1, 2011 Appellant agreed to the rescission, but misrepresented to Appellee that her Mercedes had been sold and could not be returned (C 83). After consulting counsel, Appellee initialed formal, written rescission of the second, disputed purchase of a ***18** 2012 Volkswagen because it was based on the belief in the fraudulent misrepresentation that Appellee's Mercedes had been sold (C 81-83), The formal notice from counsel confirmed recission of both sales (C 82).

The First transaction occurred on November 30, 2011 when Plaintiff responded to an ad for a “free gift” (C 81) and, after spending several hours at the facility, signed a buyer's order for a used 2008 Volkswagen. The transaction also required trade-in and payoff of her 2008 Mercedes Benz, (Appendix A, Bl-2). The buyer's order for the 2008 Volkswagen was not signed by the seller (Appendix A, B-1), and Plaintiff returned to the dealership the next day December 1, 2011 to rescind the contract (C 81-83). Rescission was requested based on the fact the 2008 Volkswagen was not as represented, exhibited numerous problems, [5] and had been involved in a wreck. **Financing** was not approved for the sale of the 2008 Volkswagen, which was a condition to the contract (C 83, Appendix A, B-5). The fraud claim for the 2008 Volkswagen included the fact it ***19** was contemporaneously advertised for $16,900 (Appendix A, A-l) but marked up to $21,545 (C 31).

Appellants agreed to the rescission, but misrepresented to Appellee Ms. Hope that her Mercedes Benz had been “sold.” (C 82-83). Appellants have since stipulated the Mercedes was sold after the date of this second transaction. [6] Based on this misrepresentation, Ms. Hope was led down the path for a second transaction, and induced to sign a buyer's order for purchase of a 2012 Volkswagen on December 1, 2011 (Appendix A, F 1-5). The Mercedes Benz had not been sold, as Defendant continued to advertise it for sale (Appendix A, I 1-2). Title to the Mercedes had not been transferred, and could not have been transferred,

because the lender with the balance on the Mercedes refused to accept payoff of the vehicle (C 19 at 16). Transfer or sale was simply not possible. In the second transaction. Appellant valued the "trade" of the 2008 Volkswagen at $12,500 (Appendix A, F-l) which had been valued at $20,995 the day before (Appendix A, B-1).

***20** Appellee sought advice of counsel, and returned to the dealer on December 3, 2011 to demand recission. A written demand for rescission, prepared by counsel, was delivered later on or about December 5, 2011 (C 82).

Discovery remains pending in the trial court whether there was agreement to arbitrate and hearing is set April 25, 2012 on the issue of agreement to arbitrate,

*21 STANDARD OF REVIEW

The ore *tenus* rule is applicable to preliminary injunction proceedings. *Davis v. Alabama Educ. Ass'n*, _____ So. 3d _____, 2012 WL 975492 (Ala. 2012). Application of the ore *tenus* rule requires that facts are presumed correct and may be overturned only upon an extraordinary showing that "judgment is so unsupported by the evidence as to be plainly and palpably wrong." *Fuller v. Fuller*, _____ So. _____, 2012 WL 1237758 (Ala. APP. 2012). Review of legal issues involved in a preliminary injunction is *de novo*, and review of the decision to issue the injunction is based on **abuse** of discretion, *Davis v. Alabama Educ. Ass'n, supra*.

*22 SUMMARY OF ARGUMENT

There has been no ruling on arbitration. The trial "Court did not implicitly' deny the Defendant's motion for arbitration, rather the Court set the motion for arbitration for a hearing." (C 113). Appellant sought to divest the trial court of jurisdiction of the then, imminent February 10, 2012 hearing on arbitration by filing notice of appeal on February 9, 2012 contending a st*atus quo* order was, in effect, a ruling denying arbitration.

The trial court considered this appeal as to the arbitration issue to be frivolous (C 113), as should this Court.

Otherwise, there is ample authority supporting affirmance on *ore tenus* review of an instanter order to maintain the *status quo* by requiring return of an' **elderly** Plaintiff's automobile, pending hearing on arbitration and resolution of related issues concerning fraud, rescission, and existence of an agreement. The instanter order was granted February 2, 2012 and the hearing on arbitration was set for February 10, 2012. The instanter order was justified on numerous grounds including Appellants' refusal at the instanter hearing to respond to the questions from ***23** the Court concerning location or disposition of the vehicle, and the determination is justifiable in the nature of contempt citation or discovery sanction, [7] that the instanter order was essential to "prevent the car from being 'old' further" (C 115). The reference to "sold" is an adverse finding on Appellants credibility with respect to its contention that the car in question had been "sold" merely one day after a disputed trade.

Appellant did not specifically preserve objection that the instanter order required security, as the Agreed Statement asserted only that "sworn evidence" was required by the Rules of Civil Procedure (C 151). Affidavits were not required in any event because the matter had been set for hearing.

While the instanter order was not a based on detinue or pre-judgment attachment statutes, the court had plenary power to require return of the vehicle to prevent fraudulent disposal under Alabama law, power to maintain the status quo under the Federal Arbitration Act, and was justified in entering the order to enforce respect for the ***24** Court based on contempt powers or as a discovery sanction, in view of refusal of Appellant to respond to the questions from the bench concerning whereabouts of the Plaintiff's automobile (C 151), To the extent necessary, this court should recognize existent circumstances justifying waiver of a requirement of security from Appellee, if applicable. Alternatively, this Court should grant a pending motion to clarify that the trial court may, yet, determine supersedeas bond requirements applicable to Appellant, or whether nominal security (if any) may be required from Appellee.

***24 ARGUMENT**

I. Appellant is estopped to challange the instanter order based on failure to require bond or security.

As a threshold issue, Appellant has no standing to challenge the instanter order to return the Mercedes, and should be *estoppdd* to challenge lack of ruling on bond requirement,, if any, in the trial court because Appellant filed notice of appeal February 9, 2012, before the trial court could act, i.e. before the February 10, 2012 hearing on Bond could be conducted. The Rule relied on by Appellant for appeal of the instanter order provided 14 days for appeal. Rule 4(a)(1), Ala. R. App. P. The instanter order was dated February 2, and there was sufficient time to go forward with the February 10 hearing before the 14 deadline for timely appeal of the order which expired February 16.

It is disingenuous for Appellants to challenge the instanter order for failure to require security where Appellant attempted to terminate jurisdiction in the trial court by filing notice of appeal *one day before* the scheduled date to consider bond or security requirements. There is opportunity for **abuse** of the judicial system if Appellant is allowed to oust the Circuit Court of ***26** jurisdiction to decide arbitration or security by filing a premature appeal. *See, Foster v. Green and Sons Inc.*, 446 So. 2d 605, 610 (Ala. 1987) (Shores J,, dissenting). Scheduling hearing, generally, on the issue to determine bond amount, although requested by Plaintiff below, would not preclude the Court from requiring bond in appropriate amount for any party, It is a good analogy that on filing of a motion for summary judgment, the court may enter judgment and dispose of claims of any party, and is not limited to relief in favor of the filing party,[8] The same holds true with respect to the bond hearing, which Appellant has, thus far, successfully evaded.

II. It is disputed whether there was a valid arbitration agreemnet for any of the transactions and the issue must be resolved by jury in the trial court.

The asserted agreement for the 2008 Volkswagen was not between buyer and the seller. The Appellant contents Ms. ***27** Hope purchased the 2008 Volkswagen from Victoria Enterprises as seller (Appellant Brief, p. 4). The purported arbitration agreement is not with Victoria Enterprises, but refers to Dean McCrary Imports (C 31). The agreement is not signed by all parties as it has only a signature of Ms. Hope. The agreement refers to BBB arbitration rules which require the agreement to be signed by the parties to be bound.

These Rules apply to any dispute that the parties are required to arbitrate under a written agreement, signed by the parties prior to the time that the dispute arose, in which the parties have agreed to arbitrate future disputes through BBB or under BBB binding rules.

BBB Rules of Arbitration (Binding), 12 Scope of BBB Arbitration (Appendix "B"), published at *http://mobile.bbb.org/Dispute-Resolution-Services/Guide/*. In *Holiday Isle, supra*, the Alabama Supreme Court recognized that the requirements in the designated arbitration rules may be considered as a matter of contract law in defining limits on arbitration. Consequently, applying the BBB Rules designated by Appellant, there is no binding agreement because it was not signed by all parties as required by the BBB Rules. Alabama law also recognizes ***28** that "arbitration agreements are limited to the signing parties." *Jim Burke Automotive v. McGrue*, 826 So. 2d 122, 131 (2002). Neither buyer's order for the 2008 or 2012 were signed by the dealer, and a similar, buyer's order not signed by the dealer was held unenforceblee in *Ex parte Payne*, 741 So. 2d 398 (Ala. 1999)(credit term also failed). Since no payments were made on either vehicle, this is not a situation in which Appellant may contend the agreement was ratified by other means, such as acceptance by performance. *American Family Life Assur. v. Parker*, _____ So. 2d _____, 2012 WL 887496 (Ala. 2012). Consequently there is no agreement to arbitrate with Victoria Enterprises who is not a party to the document.

The arbitration agreement for the 2012 Volkswagen is not enforceable because it was based on a fraudulent representation that Ms. Hope's Mercedes had already been sold. As Appellant has stipulated, the Mercedes, in fact, had not been sold the next day. A claim of fraud in the *factum* challenging the very existence of the contract is not subject to arbitration.

[T]his court [has] recognized that a challenge to avoid or rescind a contract is subject to arbitration but a challenge to the very existence ***29** to a contract is not subject to arbitration. A claim of fraud in the factum is a challenge to the very existence of the contract ... [B]ecause this Court has adopted the rationale of Three Valleys [Municipal Water District vs. E.F. Hutton & Co., 925 F. 2d 1136 (9 Cir. 1991)] a claim of fraud in the factum is to be decided by trial court or a jury.

Anderson v. Ashby, 873 So. 2d 168, (Ala. 2003). The Federal Arbitration Act also makes clear that such a challenge to the existence of the contract requires a jury trial if requested, which is exactly what Appellee has done. The governing language in § 4 of the Federal Act provides in part:

If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue.

9 U.S.C. § 4. Jury was demanded in the initial Complaint, and the request was renewed on the issue of making of the arbitration agreement in issue (Exhibit "C" to Motion to Dismiss Appeal). Denial of the jury demand may result in further appeal.

Nor is arbitration applicable to "intentional torts of the parties separate and distinct from the dealings that ***30** gave rise to the signing of the document containing the arbitration provision in the first place," *Ex parte Discount Foods*, 711 So. 2d 992, 994 (Ala. 1998)(antitrust, interference with business relations). Consequently, the causes of action for intentional tort in the Complaint as amended, such as intentional fraud (Complaint, C 9); exploitation of the **elderly** including verbal **abuse** and bullying, in violation of the Adult Protective Services Act § 38-9-1, *at seq.*, Ala. Code (1975)(Amended Complaint, C 36 - 37); later conversion and interference with possession of the Mercedes (Amended Complaint, C 40 - 41); are not encompassed within the arbitration agreement. It bears repeating, as well, that arbitration cannot encompass any of the causes of action against non-signatories to the agreement. *Jim Burke Automotive, supra*. At a minimum, the foregoing tort claims should, therefore, go forward against Victoria Enterprises who was not a party to any arbitration agreement relied on by Appellant (C 32, 35).

The **financing** condition to either agreements for the 2008 or 2012 vehicles was not met. This failure of condition also goes to the issue whether the agreement was entered. Where credit was not approved for a similar ***31** automobile transaction involving a lease, failure of this condition precedent indicated no binding contract was created and the arbitration agreement was unenforceable in *Ex parte Cobb*, 781 So. 2d 208 (Ala. 2000). Another failure of condition is the fact Appellee never made the cash down payment (C 83). The record evidence is also that the contract for both vehicles were also rescinded (C 81-84), consequently there was no agreement.

The agreements were also unconscionable. "The issue of unconscionability of an arbitration clause is a question for the Court and not the Arbitrator." *First Family* ***Financial*** *Services v Jackson*, 786 So. 2d 1121, 1130 (Ala, 2000). The broad language attempting to deprive a Plaintiff of meaningful access to court has been held unconscionable in *American General* ***Finance*** *v. Branch*, 730 So. 2d 738 (Ala. 2000), Similar language argued by Appellant for the proposition that an arbitrator as opposed to the courts must decide if the agreement is unconscionable is, itself, unconscionable and therefore unenforceable. *Anderson v. Ashby*, 873 So. 2d 168, 173 (Ala. 2003), The record evidence that the agreements were unconscionable also includes the type of proof required by the Alabama Supreme ***32** Court that most if not all area dealers will simply not sell or obtain **financing** for an automobile transaction without an arbitration provision (Kelly Affidavit, C 85, Little Affidavit, C 86). In *First Family* ***Financial*** *Services v. Jackson, supra*, the Court discussed "the kind of record that might support a finding that an arbitration clause is unconscionable" which included "a compilation of information regarding the number of **finance** companies that will not make consumer loans without the borrower's signing an arbitration clause or agreement." *Id.*. 786 So, 2d at 1130. Arbitration agreements are also unconscionable that limit meaningful redress of the grievance, or limit remedies, *American Gen.* ***Finance***

v. Branch, 730 So. 2d 738 (Ala. 2000), The BBB Rules which indicate "the arbitrator is not bound to apply any legal principles" in making his decision should be deemed such an unconscionable limitation. (Appendix B, BBB Rule 29A, Scope of Decision).

III. Injuction relief to maintain the status quo is consistent with the Federal Arbitration Act and is recognised by the Alabama Supreme Court, Former Fifth Circuit and Eleventh Circuit.

***33** Injunctions to maintain the *status quo* pending arbitration are routinely allowed. See, e.g., *Connecticut Resources Recovery Auth. v. Occidental Petroleum Corp.*, 705 F.2d 31 (2 Cir. 1983); *Guinness-Harp Corp. v. Joseph Schlitz Brewing Co.*, 613 F.2d 468 (2 Cir. 1980); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2 Cir. 1972); *Aggarao v. MOL Ship Management Co., Ltd.*, 675 F. 3d 355 2012 WL 887595 (4 Cir., March 16, 2012); *Sauer-Getriebe KG V. White Hydraulics, Inc.*, 715 F.2d 348 (7 Cir. 1983).

The better view, stated in the *Aggarao* decision, is that a preliminary injunction should, in fact, be issued to maintain the *status quo* if failure to do so would render the arbitration process a "hollow formality."

We have recognized that the "hollow-formality" test may be applicable in such circumstances, explaining that, where a dispute is subject to mandatory arbitration under the [FAA], a district court has the discretion to grant a preliminary injunction to preserve the status quo pending the arbitration of the parties' dispute if the enjoined conduct would render that process a "hollow formality" The arbitration process would be a hollow formality where "the arbitral award when rendered could not return the parties substantially to the status quo ante" *Merril Lynch Pierce Fenner & Smith v Bradley* 756 F.2d 1048, 1053-54 (4th Cir. 1985)(quotina *Lever Bros Co v. Int'l Chem. Workers Union Local 211* 554 F.2d 115 123 (4th.Cir1976))

***34** *Aggarao, supra*, 2012 WL 887595 at *15. In other words, arbitration would be a hollow formality if the arbitral award could not return the parties to the *status quo*. The arbitrator in the case *sub judice* would be unable to return Appellee to the *status quo* by ordering return of her Mercedes without the instanter relief from the trial court to return the Mercedes pending resolution of arbitration *and other issues*.

Appellant seeks just the opposite, to completely upset the *status quo,* and permanently separate Ms. Hope from any chance of recovery of her Mercedes. Where a party seeks to undermine the *status quo to* such an extent, the Court may exercise discretion to conclude that there has been a waiver of arbitration. For example, in *Rath v. Network Marketing L,C.*, 790 So. 2d 461 (Fla. App. 2001), a preliminary injunction pending arbitration was entered requiring a scientist to surrender clinical study documents to Rexall, pending arbitration. The court concluded that "Rexall upset rather than preserved the status quo. Under either rationale, we hold Rexall waived its right to arbitrate." *Id*,, 790 So. 2d at 466,

***35** The Alabama Supreme Court has also recognized the majority view that a binding arbitration clause does not bar a plaintiff from seeking injunctive relief where an arbitral award would not adequately return the parties to the status quo. A preliminary injunction by the trial court was, therefore, upheld in *Holiday Isle LLC v. Adkins*, 12 So. 3d 1173 (Ala. 2008). In doing so, the Alabama court indicated decided preference for the majority view permitting injunctive relief in proper cases.

The purchasers also note that in *Drago v. Holiday Isle, L.L.C., b31* F.Supp.2d 1219 (S.D.Ala.2007), Holiday Isle also relied upon *Nagin* to argue that the federal district court lacked jurisdiction to issue an injunction because the case had been stayed pending arbitration. The court in *Drago* found that *Nagin* reflected a minority view and noted that the "majority of federal courts have concluded that in limited situations a binding arbitration clause does not bar a plaintiff from seeking emergency injunctive relief or other provisional remedies in court" 537 F. Supp. 2d at 1221. The court in *Drago* specifically adopted the reasoning of the Fourth Circuit Court of Appeals in *Merrill Lynch, Pierce Fenner & Smith Inc v Bradley*, 756 F.2d 1048, 1052 (4th Cir. 1985), as a basis for concluding that it may could not return the parties substantially to the status quo." 537 F. Supp. 2d at 1222. Here, if the trial court's preliminary injunction was appropriately issued, it could be said that an arbitral award would not return the parties to the status quo where the proceeds of the letters of ***36** credit had previously been disbursed to the beneficiary.

Holiday Isle, supra, 12 So. 3d at 1177.

The Eleventh Circuit has also implicitly recognized power of a trial court to grant equitable, injunctive relief in a case subject to arbitration. In *Sterling v. Hammer*, 393 F. 3d 1223, 1225 (11 Cir. 2004), a trial court order was affirmed which enjoined arbitration in the wrong venue. The former Fifth Circuit has also recognized "power of the trial court to restore the *status quo* pending determination of the parties rights" in *Yeargin Const. Co. V. Parsons & Whittemore Ala. Machinery Service Corp,*, 609 F. 2d 829, 831 (5 Cir. 1980). In *Yeargin*, Defendant was required to return to Plaintiff "all records, plans and other documents" pending arbitration. *Id.*, 609 F. 2d at 831, which is a perfect analogy for a requirement that Appellants not only turn over Appellee's Mercedes, but the long overdue discovery of all related documents and whereabouts of the Mercedes as well.

Further, the power to enter an order staying litigation, necessarily encompasses to power to enter additional orders to stay or prevent material changes in ***37** the *status quo*. The language of § 3 of the Federal Arbitration Act speaks only to staying "trial," and does not provide any other limitations on judicial power. It is a matter of statutory construction that the reference to staying "trial" does not limit other injunctive relief which may be provided by the trial court.

Nevertheless, for the reasons that follow, we decline to follow *Hovey* and *Scott* and instead hold that, under certain circumstacess, a district court has the discretion to grant one party a preliminary injunction to preserve the status quo pending the arbitration of the parties' dispute.

The starting point for our inquiry, of course, is the language of § 3:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration *the court in which such suit is pending*, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement *shall on application of one of the parties stay the trial of the action* until such arbitration has been had in accordance with the terms of the agreement providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (emphasis added). Section 3 does not contain a clear command abrogating the equitable power of district courts to enter preliminary injunctions to preserve the *status quo* pending arbitration. Instead, § 3 states only that the ***38** court shall stay the "trial of the action"; it does not mention preliminary injunctions or other pre-trial proceedings.

Certainly Congress knows how to draft a statute which addresses all actions within the judicial power. Furthermore, nothing in the statute's legislative history suggests that the word "trial" should be given a meaning other than its common and ordinary usage: the ultimate resolution of the dispute on the merits *See* Senate Rep. No. 536, 68th Cong 1st Sess. (1924); H.R.Rep. No. 96, 68th Cong, 1st Sess. (1924).

Merrill Lynch v. Bradley, 756 F. 2d 1048, 1052 - 1053 (4 Cir. 1985). The Federal Act therefore provides a substantive law basis to maintain the *status quo* based on equitable powers of the Court. By its terms, there is no bond requirement for a stay based on § 3 of the Act, which should eliminate a requirement for security for an order to maintain the status quo.

IV. The record evidence is sufficient to sustain the security, or should be estopped against taking inconsistent positions.

The argument should be rejected that the trial court had "no evidence" upon which relief can be granted (Appellant Brief, p. 9) or that the record does not have ***39** sufficient evidence to support the instanter order. Appellant argues an affidavit was required for prejudgment seizure (Appellant Brief, p. 18). Here Appellant seeks to mislead the court into error because there is no requirement for affidavit where the court sets the matter for hearing as opposed to an attachment based on writ of seizure without hearing. *See*, Rule 64(b)(2)(B). Similar argument based on Rule 65 should also be rejected because Rule 65(b), Ala. R. Civ, P., requires an affidavit *only* where the order is entered "without written or oral notice to the adverse party," Here, the matter was set for hearing with notice to all parties (C 5), thus eliminating the affidavit requirements in the foregoing Rules.

Alternatively, the Affidavit of Counsel (C 140) and Agreed Statement (C 151) document what was considered by the trial court in connection with temporary relief prior to the February 10th hearing on arbitration. There is also a detailed Affidavit from Appellee (C 81 - 84) in the record which supports the relief entered, as amended by two subsequent orders (C 67, 113, 115).

The record also contains sufficient facts to support the temporary instanter remedy based on continuing ***40** advertising for sale of the Mercedes (C 83, Appendix A, A 1-2), evidence that it had not been paid off, and the detailed facts set out in the Affidavit in support of claim dated February 7, 2012 (C 81 - 84) which was filed February 7, 2012 as an attachment to a Response to the Motion to Compel Arbitration (C 72). The Affidavit (C 81 - 84) states the nature of problems with the 2008 Volkswagen, "it shocked and shimmed and almost stalled out" on the first drive home, which was a basis for rescission. The Affidavit confirms Appellants' agreement, by the Dealer's Mr. Shaw, that Appellee did not purchase the 2008 Volkswagen (C 82). The Affidavit also documents the fraudulent representation the next day concerning Dealer claims "they had already sold the 2008 Mercedes." (C 82). Finally, the Affidavit documents that the dates for the documents on the 2012 Volkswagen were not accurate (C 83), and that the values put on various vehicles were inconsistent with what Appellee had been led to believe, (C 83-84), and additional documents show the 2008 Volkswagen was sold to Ms. Hope for $4,645 more than its advertised price (Appendix A, A-l, C 31), which is further evidence of fraud,

***40** Appellant also contends the instanter order should be reversed for failure to require security pursuant to Rule 65(c), Ala. R. Civ. P., or statutes dealing with pre-judgment attachment. Initially, the temporary order could also be justified as a discovery sanction, or contempt order, which does not require a bond or security, It is significant, and should be dispositive, that at the hearing on the instanter motion for return of the Mercedes, Appellant refused to respond to the direct question from the Court regarding whereabouts of the Mercedes (C 151), and continued its refusal to provide the date of sale or alleged buyer of the Mercedes (C 151).

Alternatively, Appellant should be *estopped* from asserting any deficiency with respect to requirement of security. The Appellant filed notice of appeal on February 9, 2012 in order to avoid the hearing on bond requirement which had been set the very next day on February 10, 2012. There was ample time to appeal the instanter order before February 16, 2012, i.e., within 14 days of entry, after the bond hearing set for February 10, 2012. Appellant should not be permitted to oust the trial court jurisdiction for the February 10th bond hearing by filing premature notice of ***41** appeal. *See* discussion, *supra*, *Foster v. Green and Sons Inc*., 446 So. 2d 605, 610 (Ala. 1987) (Shores, J. dissenting),

As an alternative argument. Appellant has waived the argument concerning failure to require security because the agreed record is devoid of a request for security by Appellant in the trial court (C 151)) *See*, *Consumers Roofing Co. v. Littlejohn*, 228 Ala. 59 (1933) (waiver of objection requiring security for costs). There are numerous authorities that relief may be barred by failure to make "timely request." *Ex parte Ala. Mobile Homes Inc.*, 468 So. 2d 156 (Ala, 1985)(failure of timely request for dissolution of writ); *Turner v. State*, 924 So, 2d 737 (Ala. Crim. Ap. 2004)failure of timely request for jury charge); *Clarkson Co. v. Shaheen*, 544 F. 2d 624, 632 (2 Cir. 1976) ("no request for bond was ever made in the district [trial] court...")

The only technical issue preserved by Appellant in the Agreed Statement of Proceedings (C 151) was "lack of sworn evidence before the Court." (C 151)) Having failed to preserve the objection as to security. Appellant may not assert the issue for the first time on appeal. *Hooie v.* ***42** *Barksdale* _____ So. 3d _____, 2012 WL 8878475 at *4 n. 1 (Ala. App, 2012) ("where party failed to object ... party could not raise issue for first time on appeal.") As a further alternative, Appellant may not properly contend the order is deficient for failure to require security because the trial court jurisdiction to determine security, either from Plaintiff or Defendant, should not be affected by the notice of appeal. The provisions of Rule 62(c), Ala. R. Civ. P. make clear that the power of the Circuit Court to impose "such terms as to bond or otherwise ... is not terminated by the taking of the appeal" from the interlocutory order granting injunctive relief as to disposition of the vehicle. The stay of proceedings by the Court of Appeals is limited by the quoted provisions of Rule 62(c), As a precaution, a motion to clarify the situation is pending at the present time to confirm authorization for rulings on requirements for security in the trial court.

The must narrow basis on which the trial Court could be affirmed is that the requirement of security "does not apply to permanent injunctive relief." ***44** *Sycamore Management Group Inc. v. Coosa Cable Co., Inc.*, _____ So. 2d _____, 2011 WL 4507360 at *3 (Ala., September 30, 2011); *Dobbins v. Getz Exterminators*, 382 So. 2d 1135 (Ala. App. 1980). The instanter order, fairly construed, prohibited the Defendants from *disposing* of the vehicle as well as requiring them to return it. The prohibitory relief merely maintained the *status quo* and imposed little, if any, burden on Defendant. It should be treated as a permanent injunction without requiring security.

The Court had the power to impose pre-judgment attachment on a temporary basis pending the February 10* hearing, where there was a risk that the Defendant was about to fraudulently dispose of the property, § 6-6-42(6) Ala. Code (1975), or had already disposed of it. § 6-6-42(7), Ala. Code (1975). There was no attendant bond requirement until five (5) days after service of the attachment, § 6-6-45, Ala, Code (1975). The Appellant did not surrender the vehicle before filing notice of Appeal, so the five (5) day bond requirement was not triggered. Because Appellants refused to disclose the purported transferee of the Mercedes, it is also possible bond could be waived if the potential additional Defendant transferee was a non-resident. § 6-6-45, Ala. Code (1975),

***45** As a final alternative, the court may also consider exigent circumstances exist, to dispense with a bond requirement from plaintiff, or require only nominal bond. The analogous Federal Rules on which the Alabama Rules are based recognize there is no "absolute" requirement for security on preliminary injunctive relief. There are necessary exceptions to such an absolute holding, *e.g.*, where there is remote likelihood of harm. *Doctor's Assoc. Inc. V. Dista,o*, 107 F. 3d 126, 136 (2 Cir. 1997); limited means of plaintiff to post bond, Wright & Miller, *Federal Practice and Procedu,e*, Civil, § 2954, p. 529 ("impecunious"); and the court has discretion as to the amount of bond, if any, including a nominal bond requirement. "[T]he amount of any bond to be given upon the issuance of a preliminary injunction rests with the sound discretion of the trial court the district court may dispense with the filing of a bond." *Clarkson Co. V. Shaheen*, 544 F. 2d 624, 632 (2 Cir. 1976).

There are conflicting decisions on the issue whether the Alabama Supreme Court treats the bond requirement as mandatory, *Compare*, *Spinks v. Automation Personnel Services, Inc.*, 49 So. 3d 186 (Ala. 2010) (mandatory) and ***46** *Anders v. Fowler*, 423 So. 2d 838 (Ala. 1992)(discussing exceptions). It is submitted the better view is provided in *Fowler* in which the Alabama Supreme Court recognized "necessary exceptions" should be required.

Plaintiffs argue, nevertheless, that this is not an appropriate case in which to require security. They may be correct:

We are aware that there are necessary exceptions to such an absolute holding in all cases under Rule 65(c), such as requiring only a nominal security, or where the litigant is impecunious or the issue is one of overriding public concern. Wright & Miller, Federal Practice and Procedure, Civil, § 2954, p. 529.

Lightsey, 294 Ala. at 285, 315 So.2d at 434. However, we express no opinion on that question.

Andrews v. Fowler, 423 So. 2d 838, 840 (Ala. 1992). The facts of this case should justify waiver of a bond requiremet.

Appellant specifically requested the trial court to defer ruling pending determination whether the arbitration agreements were enforceable (C 151). It was inconsistent for Appellant to avoid the very hearing it insisted on by filing the premature notice of appeal and contending the matter had already been decided. To the extent Appellant now argues the trial court was divested of jurisdiction for ***47** the very hearing Appellant sought on arbitration, the situation should require judicial *estoppel* against the argument that the instanter order was, in effect, a ruling on arbitration, By insisting on a hearing. Appellant admitted the instanter order was not a ruling on arbitration. Appellant filed notice of appeal to avoid such a fact finding on arbitration.

As the trial Court observed, this appeal is frivolous because there was no ruling on arbitration (C. 113). This Court should consider award of attorney fees in favor of Appellee for defense of a frivolous appeal pursuant to Rule 38, Ala. R. App. P. The Appellant and its counsel should plainly recognize "The Court did not implicitly' deny the Defendant's motion for

arbitration." (C. 113). Damages for frivolous appeal as to that issue are warranted by *RMP Inc. V. Arledge, 417* So. 2d 158 (Ala. 1982).

Alabama recognizes the doctrine of judicial *estoppel* which precludes a party from assuming positions in a legal proceeding inconsistent with one previously asserted. "That doctrine only 'applies to preclude a party from assuming a position in a legal proceeding inconsistent with one previously asserted."' *Ex parte* ***48** *First Alabama Bank,* 883 So.2d 1236, 1241 (Ala.2003) (*quoting Jinright v. Paulk,* 758 So.2d 553, 555 (Ala,2000), *quoting Selma Foundry & SSpply Co. V. Peoples Bank & Trust Co.,* 598 So.2d 844, 846 (Ala.1992), *quoting Oneida Motor Freight, Inc. v. United Jersey Bank,* 848 F.2d 414 (3d Cir.1988)).

The trial court made it quite clear that "[t]he Court's order regarding the return of the car is to preserve the *status quo* and prevent the car from being 'sold' further. It is not an adjudication on the merits of the plaintiff's claim." (C _____). The factual determination that relief was justified to prevent the car from being "sold" further is governed by the *ore tenus* rule. The ore *tenus* rule is applicable to preliminary injunction proceedings. *Davis v. Alabama Educ. Ass'n,* _____ So. 3d _____, 2012 WL 975492 (Ala. 2012). The foregoing fact findings are therefore presumed correct and may be overturned only upon an extraordinary showing as "plainly and palpably wrong." *Fuller v. Fuller,* _____ So. _____, 2012 WL 1237758 (Ala. App. 2012). There is nothing in the Agreed Statement or record requiring the findings to be overturned.

Finally, the instanter order was based on the court's plenary power. Temporary relief is routinely granted on ***49** instanter motions in family law matters without discussion of bond or security requirements. See., e.g., *Pierce v. Pie* rce, 884 So. 2d 855 (Ala. App. 2003), The instanter order should also be upheld based on the Courts contempt power,[9] or as a discovery sanction,[10] for refusal to answer the Court concerning location of the automobile (C 151).

CONCLUSION

Based on the foregoing, the Court should dismiss the appeal, or hold it in abeyance pending completion of essential rulings in the trial court. Alternatively, the Court should affirm the instanter order which was properly entered as a temporary measure to maintain the *status quo* by returning the vehicle, following refusal of Appellant to ***50** disclose its location, pending resolution of remaining issues.
<<Signature>>

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Footnotes

1 After she received a conditional approval of credit (Appendix A, H-1) requiring further information, Ms. Hope did not complete the process (C 833)

2 The instanter order may be characterized as a Rule 37 order because the court stated the Motion to Compel was "MOOT." (C 114, all caps in original).

3 References to documents in the pending supplement are filed at Appendix "A," and identified by exhibit numbers on the initial filing.

4 A jury demand was requested based on mandatory provisions of 9 U.S.C. § 4, but denied on April 20, 2012.

5 The car "shocked and shimmed and almost stalled" several times (C 81).

6 This stipulation will formally appear in the record of the April 25, 2012 hearing, and is not disputed.

7 As noted the instanter order rendered moot the related discovery motion (C 114).

8 The analogous Federal Rule 56 permits entry of summary judgment in favor of nonmoving defendant,, *Harvey v. Town of Merrillville*, 649 F. 2d 526 (7 Cir. 2011), or in favor of any party, *Scott v. Harris Interactive Inc.*, F. Supp., 2012 WL 928193 (S.D.N.Y. 2012).

9 The Court may use contempt powers to respond to "disrespectful, contemptuous or insolent behavior in court, lending in any way to diminish or impair the respect due to judicial tribunals." § 12-1-8, Ala. Code (1975).

10 Failure to answer a question "after being directed to do so by a circuit judge" or to produce documents or inspection "may be considered a contempt of court." Rule 37(b)(1), Ala. R. Civ. P. Available discovery sanctions for failure to comply, include injunctive relief, *e.g.* "staying further proceedings," Rule 37(b)(2)(C), and prohibitive relief striking certain claims or defenses Rule 37(b)(2)(B) This could justify waiver of any requirement for security.