No. SC 95066

IN THE SUPREME COURT OF MISSOURI

LASHIYA ELLIS,

Plaintiff/Respondent,

v.

JF ENTERPRISES, LLC D/B/A JEREMY FRANKLIN'S SUZUKI OF KANSAS CITY,

Defendant/Appellant.

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT INDEPENDENCE
THE HONORABLE JACK GRATE
DIVISION 17

RESPONDENT'S SUBSTITUTE BRIEF

Douglass F. Noland, No. 28635
Jennifer N. Wettstein, No. 65268
Noland Law Firm, LLC
34 Westwoods Drive
Liberty, MO 64068
Telephone: 816-781-5055
Fax: 816-781-5216
Email: doug@nolandlawfirm.com
Email: jennifer@nolandlawfirm.com
ATTORNEYS FOR RESPONDENT

Kate E. Noland, No. 61081
34 Westwoods Drive
Liberty, MO 6406
Telephone: 816-781-5055
Fax: 816-781-5216
Email: KateNoland.attorney@gmail.com
ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

JURISDICTIONAL STATEMENT

The Supreme Court has jurisdiction to hear Appellant's appeal of a denial of a motion to compel arbitration after accepting transfer from the Western District Court of Appeals. Section 435.440;[1] Rule 83.04; Mo. Con. Art. V, Section 10. The appeal comes from the Circuit Court of Jackson County, within the jurisdiction of the Western District. Section 477.070.

[1] All references are to RSMo Supp. 2013 unless otherwise noted.

STATEMENT OF FACTS

On November 4, 2013, Respondent purchased a 2012 Hyundai Sonata (Sonata) from Appellant. LF 9, 52. Respondent signed a retail buyer's order with Appellant. LF 9, 52-53. Respondent also signed a retail installment contract, paid $21,104.95 for the Sonata, and financed the entire amount. LF 9; 52-56. Respondent also traded in her 2003 Chevrolet Tahoe as part of the sale. LF 9, 52. The financing was provided by Condor Capital Corporation, a co-defendant in this case. LF 9.

While purchasing the vehicle, Appellant had Respondent sign an arbitration provision.[2] LF 58; App. 3. Respondent contemporaneously signed the retail buyer's order, retail installment contract, and arbitration provision on November 4, 2013. LF 52-56, 58; App. 3.

Appellant never executed an Assignment of Title nor delivered the title to Respondent, as required by section 301.210. LF 9-10, 77. Appellant refused to rescind the sale, despite not passing title to Respondent. LF 10. Co-defendant Condor, who provided the financing, told Respondent to continue making the payments. LF 10. Since November 2013, Respondent has made monthly payments of $414.56 despite not having

[2] The trial court's order uses "arbitration provision" to describe the document, not "arbitration agreement" as the document is labeled. LF 58, 104-105; App. 1-3. "Arbitration provision" will be used to describe the arbitration document before this Court.

a valid title. LF 11. Appellant and co-defendant Condor were aware that the title had not passed to Respondent, but continued to demand payment and refused to rescind the sale. LF 10-11.

On July 11, 2014, Respondent filed a five count lawsuit in the Circuit Court of Jackson County. LF 7-20. Appellant filed an Answer on August 20, 2014. LF 22-32. Appellant also filed a Motion to Stay Proceedings and Compel Arbitration on August 20, 2014. LF 33-37. In the Suggestions in Support, Appellant argued the scope of the arbitration provision, the arbitration provision was not unconscionable, and the arbitration provision was not subject to contract defenses. LF 61-67. Respondent filed a Response to the Motion to Stay and Compel Arbitration and Statement of Uncontroverted Material Facts on September 12, 2014. LF 69-76, 79-86. Respondent argued the arbitration provision is construed with the other contractual documents and as a result the arbitration provision was void as the title was not passed at the time of sale. LF 72-75. Appellant filed a Reply on September 25, 2014. LF 89-98. Appellant's argued in the Reply that the arbitration provision was severable and enforceable. LF 89-98. Respondent then filed a Sur-Reply on October 3, 2014. LF 99-103. Respondent argued in the Sur-Reply that the contract lacked consideration and was void, and by construing the arbitration provision with the other contractual documents, the arbitration provision lacks consideration and is void. LF 99-103.

On October 20, 2014, the trial court entered an order denying Appellant's Motion to Stay Proceedings and Compel Arbitration. LF 104-105; App. 1-2. The trial court

found the contract between Appellant and Respondent "is fraudulent and void and not enforceable as no title was given to [Respondent] as required by Section 301.210, RSMo." LF 105; App. 2. The trial court also found that the arbitration provision "which is to be construed with the other contract documents is subject to the [Respondent's] contract defenses of fraud and lack of consideration and is void, and therefore, not enforceable." LF 104; App. 1. The trial court also found the arbitration provision "lacks consideration, is fraudulent, and void and not enforceable." LF 105; App. 2. Appellant filed a notice of appeal on October 29, 2014. LF 106.

ARGUMENT

I. The trial court correctly determined that the arbitration provision and contractual documents were to be construed together, and the arbitration provision lacked consideration and was void pursuant to section 301.210, therefore, the arbitration provision was not formed and it cannot be severable or separately enforceable. (Response to Appellant's Point Relied On I).

A. Standard of Review

This Court reviews *de novo* the legal questions of whether arbitration can be compelled, *Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15, 21 (Mo. App. W.D. 2008), and whether the trial court should have granted a motion to compel arbitration, *Bellemere v. Cable-Dahmer Chevrolet, Inc.*, 423 S.W.3d 267, 272 (Mo. App. W.D. 2013). Deference is given to the trial court's findings of factual matters, including "issues relating to the existence of an arbitration agreement." *Id.* If the trial court's decision is based on factual findings, the decision will be affirmed if the factual findings are "supported by substantial evidence, and are not against the weight of evidence." *Whitworth v. McBride & Son Homes, Inc.*, 344 S.W.3d 730, 736 (Mo. App. W.D. 2011). The appellate court focuses on the "correctness of the trial court's results," not on how the decision was reached. *Ruhl v. Lee's Summit Honda*, 322 S.W.3d 136, 138-139 (Mo. banc 2010).

In considering a motion to compel, the courts first look to "whether a valid arbitration agreement exists." *Bellemere*, 423 S.W.3d at 272. In determining if a valid arbitration provision exists, the courts apply Missouri contact law. *Baker v. Bristol Care Inc.*, 450 S.W.3d 770, 774 (Mo. banc 2014). Appellant bears the burden of proving "the existence of a valid and enforceable contract to arbitrate." *Bellemere*, 423 S.W.3d at 273.

B. Point Relied On I is not in proper form and is not preserved for appeal. (Response to Appellant's Point Relied On I).

Rule 84.04(d)(1) provides the point relied on "shall (A) identify the trial court ruling or action that the appellant challenges; (B) state concisely the legal reasons for the appellant's claim of reversible error; and (C) explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error." App. 9. Another way to describe the elements an appellant must assert are (1) the trial court's ruling is concisely stated; (2) the rule of law the court should have applied is stated; and (3) "the evidentiary basis" for the rule of law is applied. *Thummel v. King*, 570 S.W.2d 679, 686 (Mo. banc 1978). "A point relied on which does not state 'wherein and why' the trial court erred does not comply with Rule 84.04(d) and preserves nothing for appellate review." *Storey v. State*, 175 S.W.3d 116, 126 (Mo. banc 2005).

Appellant's Point Relied On I is:

> The trial court erred in denying Appellant Jeremy Franklin's Motion to Stay Proceedings and Compel Arbitration because

> an arbitration agreement is severable and separately enforceable from the underlying contract documents in that the trial court held that the arbitration agreement should be construed with the underlying contract documents and applied the state law defense of voidability to invalidate the arbitration agreement.

App. Sub. Brief at 15. For the last clause, Appellant asserts the trial court's decision but fails to explain why the legal reasons support a reversible error. Appellant's failure to comply with Rule 84.04(d), specifically by failing to explain why the legal reasons support its claim of reversible error, does not preserve the point for appeal. Appellant's Point Relied On I should be struck as it is not preserved for appeal.

C. The arbitration provision is to be construed with the retail buyer's order and retail installment contract. (Response to Appellant's Point Relied On I(B)). [3]

When documents related to a transaction are contemporaneously signed, the documents are construed together. *Johnson ex rel. Johnson v. JF Enterprises, LLC*, 400 S.W.3d 763, 764, 768 (Mo. banc 2013). The documents are construed together, even

[3] The subsections in Appellant's table of contents and argument are not in the same order and not worded identically. To avoid confusion, Respondent will refer to the subsections listed in the argument section.

without an incorporation clause, "unless 'the realities of the situation' indicate that the parties did not so intend." *Id.* at 767. Courts will "consider the instruments together to determine the parties' intent" to treat the documents as a single contract or multiple contracts. *Id.* Contemporaneously signed documents will be harmonized if possible. *Id.* at 764.[4]

[4] The courts have historically found the entire contract invalid if part of the contract is invalid. For example, in *Public Finance Corp. of Kansas City, Mo., No. 1 v. Shemwell*, the appellate court found the sale of a vehicle was void pursuant to section 301.210 as title was not delivered and therefore the entire contract was invalid. 345 S.W.2d 494, 498 (Mo. App. K.C. 1961). The appellate court reasoned that "the very essence of the contract was the sale of the automobile" and additional money provided for repairs was incidental to the contract and not sufficient consideration. *Id.* The appellate court cited *Hagler v. City of Salem*, 62 S.W.2d 751 (Mo. 1933) for the proposition that "if it appears from all the evidence and the manifest intention of the parties that a contract would not have been made independently of the invalid part, the contract as a whole must be held invalid." *Public Finance*, 345 S.W.3d at 498.

Here, the sale of the Sonata is invalid because Appellant failed to pass title pursuant to section 301.210. The entire contract, including the arbitration provision, is invalid. There would not have been a contract, specifically an arbitration provision, if

In *Baker v. Bristol Care, Inc.*, this Court applied *Johnson*, 440 S.W.3d 763, to construe the employment agreement and arbitration agreement together to find the employee was an at-will employee. 450 S.W.3d at 776. In the employment agreement, the description of the employee's duration was "consistent with at-will employment." *Id.* at 775. The arbitration agreement stated the employee was an at-will employee. *Id.* The employer attempted to argue that the employee was not an at-will employee so there was sufficient consideration, and argued the employee's at-will classification in the arbitration agreement does not govern because the arbitration agreement is a dispute resolution agreement. *Id.* at 774, 776. By finding the employment agreement and arbitration

---

there was no sale of the Sonata. Therefore, the contract as a whole, including the arbitration provision, is invalid since the sale is invalid.

The courts have routinely read the terms of a contract as a whole. *Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426, 434 (Mo. banc 2015). When determining if an arbitration provision is supported by consideration, Missouri follows the position that "mutuality is satisfied if there is consideration as to the whole agreement." *Id.* This illustrates that the courts construe the arbitration provision with the contractual documents to determine if consideration exists. Here, whether there was consideration for the arbitration provision is determined by looking to the whole contract. The whole contract, and the arbitration provision, lacks consideration as title was not passed pursuant to section 301.210. App. 4.

agreement were contemporaneously signed and considered as one document, this Court rejected the employer's attempt to reclassify the employee's classification in the arbitration agreement by looking to the employment agreement. *Id.* at 776. This Court found the arbitration agreement did not have sufficient consideration and no arbitration agreement was entered into between the parties. *Id.* at 777. The dissent in *Baker* focused on other consideration offered by both parties. *Id.* at 784-785. This is distinguishable from the present matter as the only consideration was the payment of the Sonata and passing title. LF 52-56. In *Baker*, this Court applied the principle of *Johnson* that contemporaneously signed documents are construed together, to determine if there was valid consideration and in turn whether an arbitration agreement was formed. *Baker*, 450 S.W.3d at 776-777.

Here, the arbitration provision, retail buyer's order, and retail installment contract were contemporaneously signed on November 4, 2013. LF 52-56, 58; App. 3. All of the documents concerned the sale of the Sonata. LF 52-56, 58; App. 3. The trial court found the arbitration provision is to be construed with the contract documents. LF 104; App. 1. The trial court used "arbitration provision" to describe the arbitration document, which demonstrates the trial court's position that the arbitration document was part of the entire contract, not a separate contract. LF 104-105; App. 1-2. The trial court found the arbitration provision "lacks consideration, is fraudulent and void and is not enforceable." LF 105; App. 2. This is because Appellant failed to pass title to Respondent. LF 104-105; App. 1-2; *see also*, section 301.210, App. 4; *Peel v. Credit Acceptance Corp.*, 408

S.W.3d 191, 203 (Mo. App. W.D. 2013). As the arbitration provision lacks consideration, a valid arbitration provision does not exist. *See Baker*, 450 S.W.3d at 777. The trial court's ruling was factually based on the specific circumstances presented to the trial court, therefore deference is given to the trial court's factual finding that the arbitration provision "lacks consideration, is fraudulent and void and not enforceable." LF 105, App. 2; *Bellemere*, 423 S.W.3d at 272. Substantial evidence supports the trial court's finding that the arbitration provision was not formed.

The parties' intent is whether multiple documents will be construed as one document or multiple documents. *Johnson*, 400 S.W.3d. at 767. Whether the parties intended to enter into an arbitration provision is the issue, because a party cannot be compelled to arbitrate if they did not agree to arbitrate the matter. *Morrow*, 273 S.W.3d at 18. This is contrary to Appellant assertion that "this Court is not charged with determining the parties' intent with respect to arbitration." App. Sub. Brief at 28. In *Johnson*, the issue was whether the arbitration provision would be construed with the installment contract's merger clause. 400 S.W.3d at 764.[5] This Court found that the

[5] Appellant (JF Enterprises), is the same entity that sought to compel arbitration in *Johnson*. 400 S.W.3d 763. In *Johnson*, JF Enterprises benefited when this Court construed the arbitration agreement with the contractual documents to compel arbitration. *Id.* at 764. Here, Appellant (JF Enterprises) does not want the arbitration provision and contractual documents construed together. App. Sub. Brief at 27-29. Appellant (JF

installment contract concerned financing and the arbitration provision concerned dispute resolution; therefore the documents could be construed together. *Id.* at 764. This Court reversed the trial court's findings that the later signed installment contract overrode the arbitration agreement signed minutes before the installment contract. *Id.* at 764-765.

Here, the parties' intent was to treat all the documents as a single document. There is no conflict between the arbitration provision, retail installment contract, or retail buyer's order, and therefore the documents can be harmonized. The record does not support any "realities of the situation" indicating Appellant and Respondent intended for the arbitration provision and contractual documents to be treated as separate and distinct documents. Therefore, the documents are construed together and represent the total contract between the parties.

Deference should be given to the trial court's findings that the arbitration provision lacked consideration and was void. The trial court's finding that the arbitration provision was void means that the arbitration provision was not entered into and therefore it was not formed or concluded. LF 104-105; App. 1-2. The trial court found the

---

Enterprises) cannot have arbitration provisions and contractual documents construed different ways to achieve the result it wants. If construing the arbitration provision with the contractual documents to compel arbitration was the right result in *Johnson*, construing the arbitration provision with the contractual documents to deny arbitration as to the issue of formation of the arbitration provision must occur here.

arbitration provision is to be construed with the contractual documents, which the contractual documents were also void and therefore not formed or concluded. LF 104-105; App. 1-2. The trial court's findings are supported by substantial evidence.

D. A valid arbitration provision was not formed. (Response to Appellant's Point Relied On I(C)).

1. Point Relied On I(C) is not preserved for appeal.

Appellant's Point Relied On I(C) is not preserved for appeal for the following reasons. First, the existence of an enforceable arbitration agreement is not encompassed under the point relied on. "An argument not set out in the point relied on but merely referred to in the argument portion of the brief does not comply with the requirements of Rule 84.04(d) and the point is considered abandoned in this Court." *Brizendine v. Conrad*, 71 S.W.3d 587, 593 (Mo. banc 2002); *see also* Rule 84.04(e), App. 9 ("the argument shall be limited to those errors included in the 'Point Relied On'"). As the existence of the arbitration agreement is not included in the point relied on concerning severability, the argument is abandoned. *Brizendine*, 71 S.W.3d at 593.

Second, Appellant's argument is not directed at a trial court error, but instead is directed at the argument Respondent made before the trial court. Appellant argues that Respondent has not contested the validity of the arbitration agreement. App. Sub. Brief at 30. Appellant fails to mention a trial court finding in the argument. App. Sub. Brief at 30-35. "Appellate courts are merely courts of review for trial errors." *Barkley v.*

McKeever Enterprises, Inc., 456 S.W.3d 829, 839 (Mo. banc 2015). Appellant does not challenge the trial court's ruling and therefore the argument is not preserved for appeal.

Third, Appellant's argument is asserting a claim of reversible error that was not presented to the court of appeals. Rule 83.08(b) provides that the substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief." App. 7. "Claim" in Rule 83.08(b) is "synonymous with the phrases 'claim of reversible error' in Rule 84.04(d)." *Garland v. Ruhl*, 455 S.W.3d 442, 450 n.7 (Mo. banc 2015).[6] An appellant is prohibited by Rule 83.08(b) from "asserting claims of reversible error in this Court that were not asserted in the court of appeals." *Id.*

Appellant is arguing it established the existence of an enforceable arbitration agreement, an argument not presented to the court of appeals. App. Sub. Brief at 30-35. Appellant's argument at the court of appeals presupposed that a valid arbitration agreement was entered into and presented no evidence or argument on the existence of the arbitration agreement. App. Brief at 12. Rule 83.08(b) prohibits Appellant from raising claims at the Supreme Court that were not raised at the court of appeals, therefore

---

[6] In *Garland*, footnote seven refers to Rule 83.03 and Rule 83.08. The opinion refers to Rule 83.03 when discussing "claim" and how an appellant cannot raise a claim not presented to the court of appeals. *Garland*, 455 S.W.3d at 450 n.7. The only time "claim" appears in Rule 83 is in Rule 83.08(b). App. 7. It can therefore be assumed that the Court was discussing Rule 83.08(b), not Rule 83.03. App. 6.

Point Relied On I(C) is a new claim and not preserved. Rule 83.08(b); App. 7; *see also Barkley*, 456 S.W.3d at 839-840.

For all these reasons, Appellant's Point Relied On I(C) is not preserved for appeal and the argument should be struck or considered abandoned.

2. A valid arbitration provision does not exist.[7]

The formation of a contract is to be determined by the courts. *Baker*, 450 S.W.3d at 774. In determining if a valid arbitration provision exists, the courts apply Missouri contact law. *Id.* "State law defenses to the formation of the particular contract" is permitted. *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 492 (Mo. banc 2012); *Baker*, 450 S.W.3d at 774. Appellant, as the party seeking to compel arbitration, bears the burden of proving a valid arbitration provision exists.[8] *Bellemere*, 423 S.W.3d at 273.

---

[7] This argument is one raised by Respondent pursuant to Rule 84.04(f); App. 10. Should the Court consider Appellant's Point Relied On I(C), this also serves as Respondent's response.

[8] Appellant failed to meet its burden that a valid arbitration provision exists. Appellant's argument is that Respondent never challenged the validity of the arbitration provision. App. Sub. Brief at 30. This argument improperly shifts the burden to Respondent, a burden Respondent does not carry. *Bellemere*, 423 S.W.3d at 273. It is also not accurate as Respondent has continuously argued that the sale was in violation of section 301.210 as title was not passed, and as the documents are construed together the contract,

Missouri contract law requires "offer, acceptance, and bargained for consideration." *Baker*, 450 S.W.3d at 774. Missouri courts have held that "a contract or transaction prohibited by law is void" as "such contracts are based upon illegal consideration and cannot be enforced either at law or in equity." *King v. Moorehead*, 495 S.W.2d 65, 77 (Mo. App. K.C. 1973); *see also Twiehaus v. Rosner*, 245 S.W.2d 107, 111 (Mo. 1952). When a vehicle sale is void pursuant to section 301.210, "there is no consideration for the note representing the sale price." *Public Finance Corp. of Kansas City, Mo., No. 1 v. Shemwell*, 345 S.W.2d 494, 498 (Mo. App. K.C. 1961).

Section 301.210.4 provides that the sale of a vehicle "shall be fraudulent and void" if the certificate of ownership does not pass upon delivery of the vehicle. App. 4. Section 301.210 is mandatory "to protect the innocent and guileless from the machinations and wiles of the wicked." *State v. Glenn*, 423 S.W.2d 770, 774 (Mo. 1968). The statute requires "absolute technical compliance," the provisions are "rigidly enforced," and there is "no exceptions to conform to intentions." *Public Finance*, 345 S.W.2d at 498.

A void contact "is a nullity, not even subject to ratification." *Ellis v. Williams*, 312 S.W.2d 97, 105 (Mo. 1958). Void is defined as "of no legal effect; null." Black's Law Dictionary, 9th edition, page 1709. In applying section 301.210, Missouri courts have held "payments cannot be collected on void vehicle sales." *Peel*, 408 S.W.3d at 203.

---

including the arbitration provision, is void. LF 84-85. Appellant has failed to prove the existence of a valid arbitration provision.

Formation of the arbitration provision, construed with the contractual documents, is the issue before this Court. Appellant is required to pass title to Respondent for the sale of the Sonata to be valid. Section 301.210; App. 4. Appellant's consideration is the title to the Sonata, and failing to pass title means that Appellant did not provide any consideration. The non-delivered title amounts to no consideration, because the failure to provide title is a specific violation of section 301.210. When Appellant failed to pass title, Appellant provided no consideration for the sale of the Sonata; therefore the arbitration provision and contractual documents were never formed for lack of consideration.

Furthermore, the formation of the contractual documents is subject to the state law defenses. *Baker*, 450 S.W.3d at 774. By statute, failure to deliver title is fraudulent. Section 301.210; App. 4. Appellant's failure to deliver title pursuant to section 301.210 makes the sale fraudulent and void. As the arbitration provision is construed with the contractual documents, *Johnson*, 400 S.W.3d at 764, the formation of the arbitration provision is subject to the same defense of fraud for the failure to deliver title pursuant to section 301.210. The arbitration provision is fraudulent and void, making the arbitration provision never entered into between the parties.

Appellant's failure to deliver title resulted in Appellant offering no consideration and as a result no valid arbitration provision was formed. A fraudulent and void sale has no legal effect and was therefore never entered into. As a result of Appellant failing to pass title, there was no sale entered into and no arbitration provision was formed.

The trial court's finding that the arbitration provision is construed with the contractual documents and "lacks consideration, is fraudulent and void" is supported by substantial evidence. LF 104-105; App. 1-2. The trial court's finding that the contractual documents are "fraudulent and void and not enforceable as no title" was passed is also supported by substantial evidence. LF 104-105; App. 1-2. As the finding of the formation of the arbitration provision and contractual documents are based upon the factual findings, deference is given to the trial court's ruling. *Bellemere,* 423 S.W.3d at 272. The arbitration provision and contractual documents are to be construed together as one document.

E. The arbitration provision is not severable and separately enforceable because the issue is contract formation. (Response to Appellant's Point Relied On I(B)).

The arbitration provision is not severable because the courts determine the formation of the arbitration provision. It is for judicial determination when "the dispute at issue concerns contract formation." *Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287, 296 (2010). The courts can determine "issues relating to the making and performance of the agreement to arbitrate." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

The United States' Supreme Court reiterated the framework for deciding if a dispute is subject to arbitration in *Granite Rock*, 561 U.S. at 297. Arbitration is compelled when there is an agreement to arbitrate, meaning "the court must resolve any

issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce." *Id.* These issues "may include when the agreement was formed." *Id.* Arbitration can be ordered "only where the court is satisfied that the parties agreed to arbitrate *that dispute*." *Id.* (emphasis in original). An arbitration provision can be severed pursuant to the Federal Arbitration Act "unless the party resisting arbitration specifically challenges the enforceability of the arbitration clause itself … or claims the agreement to arbitrate was never concluded." *Id.* at 301 (international quotations omitted) (citing *Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443-445 (2006)*; *Prima Paint*, 388 U.S. at 402-404; and *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 70-70 n.2 (2010)).

Whether an arbitration provision was formed is a matter for the courts, not the arbitrator. *Baker*, 450 S.W.3d at 774. "It is counterintuitive to suggest" that whether a contract to arbitrate has been formed can be determined by an arbitrator. *Bellemere*, 423 S.W.3d at 274. When the formation of the arbitration provision and contract is at issue, "state courts are permitted to apply state law defenses to the formation of the particular contract at issue." *Baker*, 450 S.W.3d at 774.

Here, the issue before the Court is the formation of the arbitration provision or whether the arbitration provision was concluded, by construing the contractual documents with the arbitration provision. Respondent's position has been that no arbitration provision was formed when construing the contractual documents with the arbitration provision, as title was not passed in accordance with section 301.210. The

authority Appellant relies on does not address formation of the arbitration provision. The authority Appellant relies on does not address construing the arbitration provision with the underlying contractual documents to determine the parties' intent, which *Johnson*, 400 S.W.3d at 767, addresses.

Construing the arbitration provision with the contractual documents is necessary to determine the formation of the arbitration provision for two reasons. First, the record does not support any "realities of the situation" indicating Appellant and Respondent intended for the arbitration provision to be treated as separate and distinct documents rather than a single document. *See Johnson*, 400 S.W.3d at 767. Thus, the parties intended for the arbitration provision to be part of the total contract. Second, whether there is consideration for the arbitration provision is dependent on whether there is consideration for the contract as a whole. This is consistent with existing authority in Missouri. *See Eaton v. CMH Homes, Inc.*, 461 S.W.3d 426, 433 (Mo. banc 2015).

Missouri courts have also declined to compel arbitration upon finding an arbitration provision was not entered into. In *Bellemere*, the court of appeals affirmed the trial court overruling of a motion to compel arbitration. 423 S.W.3d at 269. The court of appeals found the purchase agreement, which included an arbitration provision, did not have the required manager's signature and was not a validly formed contract. *Id.* at 271, 273. The court of appeals found that a valid arbitration provision was not formed and enforceability was not an issue before the court. *Id.* at 273. In an *ex gratia* explanation,

the court of appeals reference five other cases where an arbitration provision was not entered into. *Id.* at 273-274.

The authority Appellant cites is not persuasive. *Buckeye Check Cashing, 546 U.S. 440* and *Prima Paint,* 388 U.S. at 402-04, focus on the "enforceability of the contract" and "presuppose[s] that a validly formed contract may be subject to a defense to its enforceability." *Bellemere*, 423 S.W.3d at 274. In *Buckeye,* the formation of the contract was not an issue as the party resisting arbitration argued the interest provision invalided the contract as a whole and there was no evidence of consent to arbitrate. *Granite Rock,* 561 U.S. at 300-301(citing *Buckeye,* 546 U.S. at 444-443). The issue here is contract formation, as there is no consideration for the arbitration provision and contractual documents, not enforceability. In *Prima Paint,* the issue was fraud in the inducement of the contract, 388 U.S. at 403-404. This is distinguishable because the present arbitration provision goes to lack of consideration which is a formation of the arbitration provision. *Nitro-Lift Technologies, LLC v. Howard,* concerned a valid arbitration agreement and the lower court ruled the non-compete agreement was void on state law public policy grounds. 133 S.Ct. 500, 502 (2012). This is distinguishable because here the arbitration provision lacks consideration. Additional, this is not a public policy matter in which federal law prevails over state laws "that invalidate arbitration agreements on public policy grounds," *Baker*, 450 S.W.3d at 774.

Appellant's authority is not persuasive to find the arbitration provision is severable and enforceable, because the formation of the arbitration provision must first be resolved

by the courts. If the arbitration provision is not formed, it cannot be enforced. As the arbitration provision lacked consideration and was void, the arbitration provision was not formed and therefore the arbitration provision cannot be separately enforced. The Court cannot compel Respondent to arbitrate because it cannot be satisfied that the parties agreed to arbitrate when no arbitration provision was formed. *Granite Rock*, 561 U.S. at 297.

The trial court did not address severability because the trial court found the arbitration provision was not formed when it found the arbitration provision lacked consideration and was fraudulent and void. LF 104-105; App. 1-2. The arbitration provision is not severable and separately enforceable because the arbitration provision was not formed as there was no consideration by Appellant.

F. There was no mutuality of agreement to arbitrate. (Response to Appellant's Point Relied On I(D)).

1. Point Relied On I(D) is not preserved for appeal.

Appellant's Point Relied On I(D) is not preserved for appeal for the following reasons. First, mutuality of an agreement to arbitrate as consideration is not encompassed under the point relied on. "An argument not set out in the point relied on but merely referred to in the argument portion of the brief does not comply with the requirements of Rule 84.04(d) and the point is considered abandoned in this Court." *Brizendine*, 71 S.W.3d at 593; *see also* Rule 84.04(e), App. 9 ("the argument shall be limited to those errors included in the 'Point Relied On'"). Mutuality of agreement to arbitrate as

consideration is not included in the point relied on concerning severability, the argument is abandoned. *Brizendine*, 71 S.W.3d at 593.

Second, Appellant's argument regarding mutuality of an agreement to arbitrate was not presented to the trial court. LF 33-37; 59-68; 89-98. An issue not presented to the trial court, but presented to the appellate court is not preserved for appellate review. *Barkley*, 456 S.W.3d at 839. The trial court could not have erred if the argument was not raised before it.

Third, Appellant's argument is asserting a claim of reversible error that was not presented to the court of appeals. Rule 83.08(b) provides that the substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief." App. 7. "Claim" in Rule 83.08(b) is "synonymous with the phrases 'claim of reversible error' in Rule 84.04(d)." *Garland*, 455 S.W.3d at 450 n.7. An appellant is prohibited by Rule 83.08(b) from "asserting claims of reversible error in this Court that were not asserted in the court of appeals." *Id.*

Appellant's argument asserts a different claim for reversible error that was not presented to the court of appeals. Appellant is arguing consideration, specifically mutuality of agreement to arbitrate. App. Sub. Brief at 36-37. Appellant did not raise this argument as a claim of reversible error at the court of appeals. App. Brief at 11-24. Appellant is prohibited under Rule 83.08(b) from asserting a new claim before this Court that was not presented to the court of appeals. Rule 83.08(b); App. 7; *see also Barkley*, 456 S.W.3d at 839-840.

For all these reasons, Appellant's Point Relied On I(D) is not preserved for appeal and the argument should be struck or considered abandoned.

2. Plain error review

If considered, Respondent's argument is limited to plain error review as the arguments were not preserved. Rule 84.13(c); App. 12. Under a plain error review, the error must affect a substantial right and a manifest injustice or a miscarriage of justice resulted. Rule 84.13(c); App. 12. Plain error is rarely applied. *Mayes v. Saint Luke's Hospital of Kansas City*, 430 S.W.3d 260, 269 (Mo. banc 2014). Plain error review is granted when there are "substantial grounds for believing that the trial court committed error that is evident, obvious, and clear." *Id.* The trial court did not err in denying the motion to compel because the arbitration provision lacked consideration and was void as Appellant failed to pass title to Respondent. LF 104-105; App. 1-2. Appellant's substantial rights were not affected by the trial court's ruling. No manifest injustice or miscarriage of justice resulted. The parties may continue to litigate the case through means other than arbitration. Under a plain error review, Appellant's Point Relied On I(D) should be denied.

3. There is no mutuality of agreement to arbitrate.

If considered on the merits, there is no mutuality of agreement to arbitrate. "Mutuality of contract means that an obligation rests upon each party to do or permit to be done something in consideration of the act or promise of the other, that is, neither party is bound unless both are bound." *Eaton*, 461 S.W.3d at 433. However, "a promise

is illusory when one party retrains the unilateral right to amend the agreement and avoid its obligations." *Baker*, 450 S.W.3d at 776. A contract that allows for an "unilateral, retroactive amendment are deemed illusory and do not constitute consideration to create an enforceable contract." *Id.* at 777.

Here, Appellant's obligation pursuant to section 301.210 was to deliver title to Respondent, and Respondent's obligation was to pay for the Sonata. Appellant failed to deliver title. Pursuant to section 301.210, Appellant has the unilateral right to avoid its obligation by not passing title. App. 4. Section 301.210 does not render the sale fraudulent and void if the buyer does not make a payment. App. 4. The failure to deliver title, results in a void sale. Therefore, Appellant's promise is illusory as it is the only party that by statute can avoid the contract and offer no consideration by not passing title.

There is no mutuality of agreement because the arbitration provision provides "either you or we **may** choose to have any dispute between us decided by arbitration" and any claim "shall, **at your or our election**, be resolved by a neutral, binding arbitration." LF at 58; App. 3 (emphasis added). Neither party is bound to arbitration by the terms of the arbitration provision. The mutuality of agreement argument lacks merit as the consideration is in the delivery of title and payment of the vehicle, not in the agreement to arbitrate.

In a bilateral contract, where the only consideration is the mutual promise to arbitrate, the promises must be mutual binding. *Jimenez v. Cintas Corp.*, 2015 WL 160451, *5 (Mo. App. E.D. January 13, 2015). "Missouri courts scrutinize whether the

obligations are, in fact, mutual."[9] *Id.* This is not a bilateral contract, as there is other consideration rather than the promise to arbitrate, specifically passing title and payment for the Sonata. If this is considered a bilateral contract, the Court should scrutinize this promise to arbitrate, as the arbitration provision specifically notes that the promise is not binding on either party. LF 58; App. 3. By the terms of the arbitration provision, neither party is bond to arbitrate, as it is an election that either may choose. LF 58; App. 3. Therefore, there is no mutual promise to arbitrate.

The mutuality of agreement argument is not persuasive as the consideration is the delivery of title and payment for the vehicle. There is no sufficient mutuality of agreement to arbitrate.

G. Consideration goes to formation of the contract. (Response to Appellant's Point Relied On I(E)).

1. Point Relied On I(E) is not preserved for appeal.

Appellant's Point Relied On I(E) is not preserved for appeal for the following reasons. First, the issue that the underlying contract does not lack consideration because delivery of title concerns enforcement not formation, is not encompassed under the point relied on. "An argument not set out in the point relied on but merely referred to in the

[9] Appellant's reference to *Ragan v. Schreffler*, 306 S.W.2d 494, 496-499 (Mo. 1957) is not persuasive because the case addressed an option contract. Section 301.210 provides that title must pass for a vehicle sale to occur, so a promise to sell is not sufficient.

argument portion of the brief does not comply with the requirements of Rule 84.04(d) and the point is considered abandoned in this Court." *Brizendine*, 71 S.W.3d at 593. *See also* Rule 84.04(e), App. 9 ("the argument shall be limited to those errors included in the 'Point Relied On'"). As the consideration issue is not included in the point relied on concerning severability, the argument is abandoned. *Brizendine*, 71 S.W.3d at 593.

Second, Appellant's argument is not directed at a trial court error, but instead is directed at the arguments Appellant anticipants Respondent will make. App. Sub. Brief at 37-38. "Appellate courts are merely courts of review for trial errors." *Barkley*, 456 S.W.3d at 839. Appellant does not challenge the trial court's ruling and therefore the argument is not preserved for appeal.

Third, Appellant's argument is asserting a claim of reversible error that was not presented to the court of appeals. Rule 83.08(b) provides that the substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief." App. 7. "Claim" in Rule 83.08(b) is "synonymous with the phrases 'claim of reversible error' in Rule 84.04(d)." *Garland*, 455 S.W.3d at 450 n.7. An appellant is prohibited by Rule 83.08(b) from "asserting claims of reversible error in this Court that were not asserted in the court of appeals." *Id.*

Appellant's argument asserts a different claim for reversible error that was not presented to the court of appeals. Rule 83.08(b); App. 7. Appellant is arguing that consideration goes to enforcement, App. Sub. Brief at 37-38; however, that argument was never raised as a claim of reversible error at the court of appeals. App. Brief at 11-24.

Appellant is prohibited under Rule 83.08(b) from asserting a new claim before this Court that was not presented to the court of appeals. Rule 83.08(b); App. 7; *see also Barkley*, 456 S.W.3d at 839-840.

For all these reasons, Appellant's Point Relied On I(E) is not preserved for appeal and the argument should be struck or considered abandoned.

2. Plain error review.

If considered, Respondent's argument is limited to plain error review as the argument was not preserved. Rule 84.13(c); App. 12. Under a plain error review, the error must affect a substantial right and a manifest injustice or a miscarriage of justice resulted. Rule 84.13(c); App. 12. Plain error is rarely applied. *Mayes*, 430 S.W.3d at 269. Plain error review is granted when there are "substantial grounds for believing that the trial court committed error that is evident, obvious, and clear." *Id.* The trial court did not error in denying the motion to compel because the arbitration provision lacked consideration and was void as Appellant failed to provide Respondent with the title to the Sonata. LF 104-105; App. 1-2. Appellant's substantial rights were not affected by the trial court's ruling. No manifest injustice or miscarriage of justice resulted. The parties may continue to litigate the case through means other than arbitration. Under a plain error review, Point Relied On I(E) should be denied.

3. Consideration goes to formation of the contract.

If considered on the merits, Appellant's argument that lack of consideration goes to the enforcement of the contract is not persuasive. Appellant fails to cite any binding authority in support of its position, because this Court has specifically found that lack of consideration is a contract formation issue. *Baker*, 450 S.W.3d at 774, 777. The formation of a contract is to be determined by the courts. *Id.* at 774.

Here, an arbitration provision was not formed because Appellant did not pass title to Respondent in violation of section 301.210, which means Appellant provided no consideration. The lack of consideration goes to the formation of the arbitration provision and contractual documents, as no consideration means no arbitration provision and no contract as a whole were formed. The lack of consideration means the arbitration provision and other contractual documents are void pursuant to section 301.210.

H. Conclusion

The issue before the Court is contract formation, specifically whether an arbitration provision was ever concluded. When Appellant failed to pass title to Respondent, the sale became fraudulent and void pursuant to section 301.210 Appellant provided no consideration because title was not passed. When there is no consideration, no contract is formed or was concluded.

When documents contemptuously signed are construed together, it is necessary to look at the contractual documents with the arbitration provision to determine if a valid arbitration provision was entered into. The consideration for the sale of the Sonata is the

consideration for the arbitration provision. When no consideration was provided for the Sonata as title was not passed, there was no consideration for the arbitration provision for the same reason. Both the contractual document and arbitration provision were deemed fraudulent and void pursuant to section 301.210 as title was not passed.

The formation of a contract is to be determined by the courts. *Baker*, 450 S.W.3d at 774. *Johnson's* holds that documents contemporaneously signed are to be construed together. 400 S.W.3d at 764. This means the formation of the contractual documents affects the formation of the arbitration provision, and a challenge to the formation of the contract as a whole is a challenge to the arbitration provision, which the court must determine.

The trial court did not err in denying Appellant's motion to compel arbitration. The arbitration provision is not severable from the retail installment contract and retail buyer's order, because the documents were contemporaneously signed and construed together. The arbitration provision, along with the retail installment contract and retail buyer's order, was not formed as Appellant provided no consideration when Appellant failed to pass title pursuant to section 301.210. Therefore, the arbitration provision, along with the retail installment contract and retail buyer's order, was not formed as Appellant provided no consideration, and were fraudulent and void pursuant to section 301.210.

II. The trial court correctly denied Appellant's Motion to Compel because the trial court had jurisdiction to determine whether a valid arbitration provision was formed. (Response to Appellant's Point Relied On II).

A. Appellant's Point Relied On II is not preserved for appeal. (Response to Appellant's Point Relied On II).

1. Point Relied On II violates Rule 83.08(b)

Rule 83.08(b) provides that the substitute brief "shall not alter the basis of any claim that was raised in the court of appeals brief." App. 7. "Claim" in Rule 83.08(b) is "synonymous with the phrases 'claim of reversible error' in Rule 84.04(d)." *Garland*, 455 S.W.3d at 450 n.7. An appellant is prohibited by Rule 83.08(b) from "asserting claims of reversible error in this Court that were not asserted in the court of appeals." *Id.*; App. 7.

Here, Appellant altered Point Relied On II. In the court of appeals, Appellant's Point Relied On II was:

> The trial court erred in denying Appellant Jeremey Franklin's Motion to Stay Proceedings and Compel Arbitration because an arbitration agreement can properly delegate the interpretation and scope of the arbitration agreement and the arbitrability of the claim or dispute to the arbitrator under the FAA in that the arbitration agreement in this case properly delegated the interpretation and scope of the arbitration agreement and the arbitrability of the claim or dispute to the arbitrator.

App. Brief at 24. In the substitute brief, Appellant's point relied on is:

> The trial court erred in denying Appellant Jeremy Franklin's Motion to Stay Proceedings and Compel Arbitration because under the arbitration agreement, the arbitrator should determine whether respondent's claim is arbitrable and whether the contract in the present action is void in that the trial court assumed the arbitrator's role and determined the merits of the case in holding that the underlying contract was void.

App. Sub. Brief at 38-39.

Appellant altered the basis of its claim by altering the reversible error it seeks this Court to rule on. In its original brief, Appellant's point relied on concerned delegation of the interpretation, scope, and arbitrability of the claim, App. Brief at 24; while in the substitute brief Appellant's point relied on concerns whether the arbitrator can determine if a claim is arbitrable and contract is void, App. Sub. Brief at 38-39. The alteration of the point relied on alters the basis of the claim and presents an entirely new claim of reversible error.

This is significant because the delegation argument was not presented to the trial court. LF 33-37, 59-68, 89-98. Appellant is simply trying to make their claim preserved by rewording the point relied on. However, Appellant's argument section and authority relied upon is the exact same at the court of appeals and at the Supreme Court. Appellant is attempting to rephrase the point relied on to make it preserved, but keep the same argument.

This Court should not consider Point Relied On II as it was not presented to the court of appeals, violates Rules 83.08(b), and should be struck. Rule 83.08(b), App. 7; *see also Barkley*, 456 S.W.3d at 839-840.

2. Point Relied On II is not in proper form.

Rule 84.04(d)(1) provides the point relied on "shall (A) identify the trial court ruling or action that the appellant challenges; (B) state concisely the legal reasons for the appellant's claim of reversible error; and (C) explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error." App. 9. Another way to describe the elements an appellant must assert are (1) the trial court's ruling is concisely stated; (2) the rule of law the court should have applied is stated; and (3) "the evidentiary basis upon which it is contended that the asserted rule is applicable is specified." *Thummel*, 570 S.W.2d at 686. "A point relied on which does not state 'wherein and why' the trial court erred does not comply with Rule 84.04(d) and preserves nothing for appellate review." *Storey*, 175 S.W.3d at 126.

Appellant's Point Relied On II does not provide any legal reason to support its claim of reversible error. The second clause focuses on the facts of the specific arbitration provision at issue, and does not cite to a legal reason or rule of law to be applied. The third clause does not explain why the legal reasons support the error, but instead focuses on what the trial court did.

Appellant's Point Relied On II violates Rule 84.04(d) and should be struck as the point relied on is not properly preserved.

3. Appellant's arguments are not encompassed in point relied on.

The argument following Point Relied On II concerns delegation, which is not included in the point relied on. The basis of Appellant's argument is a portion of the arbitration provision which Appellant labels "delegation provision." App. Sub. Brief. at 40. "The argument shall be limited to those errors included in the 'Point Relied On.'" Rule 84.04(e); App. 9. As the delegation argument is not included in the point relied on, the argument is not preserved. *Bellemere*, 423 S.W.3d at 273. The delegation argument should be struck as it is not properly preserved.

Furthermore, in Point Relied On II(B), Appellant asserts the trial court failed to address multiple issues, such as whether the claims are arbitrable and the terms of the arbitration provision. App. Sub. Brief at 41. These grounds are also not raised in the point relied on and therefore not preserved. *Bellemere*, 423 S.W.3d at 273.

4. Appellant's argument was not presented to the trial court

Appellant's arguments, that the arbitrator should determine the arbitrability of the claim or the parties can delegate arbitrability to the arbitrator, were not presented to the trial court. At the trial court, Appellant's general statements about the arbitrator determining if the underlying contract was void were in reference to the severability

argument and prepossess that an arbitration provision was formed. LF 94, 96.[10] Appellant's arguments at the trial court do not mention delegation, the scope or interpretation of the arbitration provision, or that the arbitrator has authority to determine these issue. LF 33-37, 59-68, 89-98. At the trial court, Appellant does not cite to the arbitration provision in context to the arbitrator determining if the issue is arbitrable or the issue is delegated to the arbitrator. LF 33-37, 59-68, 89-98. At no point does Appellant rely on *Rent-A-Center West, Inc. v. Jackson*, 561 U.S. 63 (2010) as an authority. LF 33-37, 59-68, 89-98. From the context of Appellant's motions, it is not clear that Appellant made the same argument before the trial court that Appellant is making before this Court. LF 33-37, 59-68, 89-98. The appellate court "may not review a case upon a theory different from that which was presented to the trial court." *City of University City v. AT&T Wireless Services*, 371 S.W.3d 14, 22 (Mo. App. E.D. 2012).

To date, four opinions in Missouri have addressed delegation and *Rent-A-Center*. In *Dotson v. Dillard's Inc.*, and *Baker v. Bristol Care, Inc.* the party seeking to compel arbitration specifically presented the delegation clause to the trial court's attention.

[10] In the substitute brief, Appellant reiterates its position that the focus is on severability and presupposes that an arbitration provision was formed by arguing "consequently, if the trial court had determined that the Arbitration Agreement was severable, the claim would have been sent to the arbitrator for consideration consistent with the terms of the Arbitration Agreement." App. Sub. Brief at 42-43.

Dotson, 2015 WL 4623997 at *1 (Mo. App. W.D. August 4, 2015); *Baker*, 450 S.W.3d 770 (*see* Legal File in SC 93451, page 41). In *Jimenez*, the delegation issue was not raised at the trial court and not considered by the appellate court as the issue was contract formation. *Jimenez*, 2015 WL 160451, *3 n.1. In *50 Plus Pharmacy v. Choice Pharmacy Systems, LLC*, 463 S.W.3d 457, 461 (Mo. App. W.D. 2015), the appellate court found no delegation provision existed. In *Rent-A-Center*, the defendant argued at the trail court that arbitration was the exclusive grounds to resolve the enforceability of the agreement. 561 U.S. at 65.

Here, Appellant failed to raise the delegation issue at the trial court by not addressing the issue in the Motion to Compel Arbitration, Suggestions in Support, or Reply. LF 33-37, 59-68, 89-98. Appellant did not cite to the arbitration provision clause in relation to this argument. LF 33-37, 59-68, 89-98. In the Suggestions in Support, Appellant only argued that the claim "arises out of" or "are related to" the contract for the sale of the Sonata. LF 64-65. In the Reply, Appellant does not mention the arbitrability or delegation but focuses on severability. LF 89-97. In Appellant's Substitute Brief, the focus is on arbitrability of the claim, not whether the claims "arise out of" or "relate to" the contract. App. Sub. Brief at 40. An issue not presented to the trial court, but presented to the appellate court is not preserved for appellate review. *McCullough v. Commerce Bank*, 349 S.W.3d 389, 395 (Mo. App. W.D. 2011). The trial court could not have erred when the issue is not clearly before it. Appellant's Point Relied On II is not preserved for appeal and should be struck.

Furthermore, in Point Relied On II(B) Appellant asserts the trial court failed to address multiple issues, such as whether the claims are arbitrable and the terms of the arbitration provision. App. Sub. Brief at 41. Appellant failed to put these issues before the trial court. The trial court cannot rule upon issues not presented before the trial court. *McCullough*, 349 S.W.3d at 395.

5. Conclusion

Appellant's Point Relied On II should be struck for the reasons stated above.

B. Plain error review

If the Court does not strike Appellant's Point Relied On II, it should be given a plain error review as it was not preserved. Rule 84.13(c); App. 12. Under a plain error review, the error must affect a substantial right and a manifest injustice or a miscarriage of justice resulted. Rule 84.13(c); App. 12. Plain error is rarely applied. *Mayes*, 430 S.W.3d at 269. Plain error review is granted when there are "substantial grounds for believing that the trial court committed error that is evident, obvious, and clear." *Id.*

The trial court did not err in denying the Motion to Compel because the arbitration provision was void as Appellant failed to pass title to Respondent. LF 104-105; App. 1-2. The arbitration provision was not entered into because it lacked consideration. LF 105; App. 2. Therefore, the arbitration provision, along with the contractual documents, was not formed.

Appellant's substantial rights were not affected by the trial court's ruling. No manifest injustice or miscarriage of justice resulted by not compelling arbitration. The

parties may continue to litigate the case through means other than arbitration. Under a plain error review, Appellant's Point Relied On II should be denied.

C. Standard of Review

Should the Court find Appellant's Point Relied On II is properly preserved and not subject to plain error, the Court reviews *de novo* "whether a dispute is subject to arbitration." *Ruhl*, 322 S.W.3d at 138. The appellate court focuses on the "correctness of the trial court's result," not how the decision was reached. *Id.* at 138-139. The trial court's decision will be affirmed if "it is supported by substantial evidence, is not against the weight of the evidence, and does not erroneously declare or apply the law." *Id.* at 138. In determining if a valid arbitration provision exists, the courts apply Missouri contact law. *Baker*, 450 S.W.3d at 774.

This Court also reviews *de novo* the legal questions of whether arbitration can be compelled, *Morrow*, 273 S.W.3d at 21, and whether the trial court should have granted a motion to compel arbitration, *Bellemere,* 423 S.W.3d at 272. Whether an arbitration provision exists is a factual determination and deference is given to the trial court. *Id.* In considering a motion to compel, the court first looks to "whether a valid arbitration agreement exists." *Id.*

D. The formation of arbitration provision is for the Court. (Response to Appellant's Point Relied On II(B)).

If the Court finds Appellant's arguments that the arbitrator is to determine the arbitrability of the claim and whether the underlying contract is void are preserved, this argument prepossess a valid arbitration provision was formed.

The issue before this Court is the formation of the arbitration provision, construed with the contractual documents. The trial court found the arbitration provision "lacked consideration, is fraudulent and void and not enforceable." LF 105; App. 2. Thus, the trial court found the arbitration provision was not entered into. The formation of a contract is for the court to decide applying Missouri law. *Baker*, 450 S.W.3d at 774.

The arbitration provision, construed with the underlying contractual documents, was not formed as Appellant did not pass title to Respondent. LF 104-105; App. 1-2. By failing to pass title there was no consideration, and the sale was fraudulent and void pursuant to section 301.210. Appellant's argument that Respondent "does not contest that a valid arbitration agreement was reached," App. Sub. Brief at 41, is inaccurate as Respondent has continuously argued that a valid arbitration provision does not exist because construing the arbitration provision with the contractual documents, the contract as a whole is fraudulent and void as Appellant did not pass title to Respondent. LF 72-76, 79-86, 99-102. The arbitration provision was not entered into; therefore, the arbitrator cannot determine the arbitrability of the claim.

Appellant relies on the provision that "or otherwise (including interpretation and scope of this Arbitration Agreement, and the arbitrability of the claim or dispute) … shall, at your or our election, be resolved by a neutral, binding arbitration and not by court action." LF 58; App. 3. This provision specifically mentions some legal grounds concerning the arbitration agreement, without specifying if the list is exclusive or not exclusive. Formation of the arbitration provision, construed with the formation of the underlying contractual documents, is not specifically included in this list of issues to be submitted to the arbitrator. By the terms of the arbitration provision, formation of the contract is not included as a matter for the arbitrator.

The formation of the arbitration provision and the formation of the other contractual documents are matters for the courts, not an arbitrability issue for the arbitrator. The matter is not subject to arbitration if an arbitration provision does not exist.

E. The formation of the arbitration provision is not delegated to the arbitrator. (Response to Appellant's Point Relied On II(B)).

If the Court finds Appellant's delegation argument preserved, the dispute of the formation of the arbitration provision is not subject to arbitration.[11]

[11] Appellant jumps to the conclusion that a valid arbitration provision exists. Respondent has always denied the existence of a valid arbitration provision on the basis that the sale of the vehicle is void and the arbitration provision and contractual documents are to be

The arbitration provision does not delegate contract formation to the arbitrator, the arbitration provision does not provide arbitration is mandatory, nor does the arbitration provision provide the arbitrator has "exclusive authority." LF 58; App. 3.

In *Baker*, the Missouri Supreme Court found the arbitration provision provided the arbitrator "exclusive authority to resolve any dispute relating to the applicability or enforcement of this Agreement." 450 S.W.3d at 773-774. The issue before this Court was the contract formation, specifically there was "no consideration to create a valid agreement," and contract formation was "subject to resolution by Missouri state courts." *Id*. at 774. In *Jimenez*, the Eastern District only addressed "whether the contract contained valid consideration, a question regarding contract formation under Missouri law." 2015 WL 160451 at *3 n.1 (citing *Rent-A-Center*, 561 U.S. at 70-72). The court of appeals found there was no consideration for the at-will employment agreement. *Id.* at 3. Therefore, the court of appeals did not need to address enforceability of the contract because "enforceability presupposes the existence of a validly formed contract." *Id.* at 3 n.1.

Rent-A-Center, 561 U.S. 63, is also distinguishable. In *Rent-A-Center*, the arbitration agreement provided "the Arbitrator, and not any federal, state, or local court or

---

construed together; therefore the arbitration provision is void, as no consideration was given when Appellant failed to pass title pursuant to section 301.210. LF 72-76, 79-86, 99-102.

agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforcement or formation of this Agreement, including, but not limited to any claim that all or any part of this Agreement is void or voidable." 561 U.S. at 66. *Rent-A-Center* addressed the arbitrator having exclusive authority and specifically delegated the formation of a contract to the arbitrator. *Id.* at 71.

Here, the arbitration provision does not state that arbitration is the sole or exclusive remedy or that arbitration is mandatory. LF 58; App. 3. The arbitration provision provides "**either you or we <u>may</u> choose** to have any dispute between us decided by arbitration and not in court or by jury trial." LF 58; App. 3 (emphasis added). The arbitration provision goes on to provide either party with an election to seek arbitration. LF 58; App. 3. The arbitration provision states the claim or dispute "shall, **<u>at your or our election</u>**, be resolved by neutral, binding arbitration and not by a court action." LF 58; App. 3 (emphasis added). The arbitration provision here is distinguishable from *Baker*, *Jimenez*, and *Rent-A-Center*, because those cases have an exclusive arbitration provision. *Baker*, 450 S.W.3d at 773-774; *Jimenez*, 2015 WL 160451 at *1; *Rent-A-Center*, 561 U.S. at 66. Here, arbitration is not the sole or exclusive remedy, but an election that either party may seek.

Additionally, the arbitration provision does not delegate contract formation to the arbitrator. In *Baker* and *Jimenez*, the arbitration provision gave exclusive authority of application and/or enforceability to the arbitrator. *Baker*, 450 S.W.3d at 773-774; *Jimenez*, 2015 WL 160451 at *1. In *Rent-A-Center*, the arbitration provision delegated

exclusive authority to the arbitrator for contract formation. 561 U.S. at 66. Here, there is no exclusive authority delegated to the arbitrator. LF 58; App. 3. The arbitration provision only mentions the interpretation, scope, and arbitrability of the dispute. LF 58; App. 3. This does not address contract formation. LF 58; App. 3. The interpretation, scope, and arbitrability of the dispute presupposes that a valid arbitration provision exists. Thus, the Court must first determine whether a valid arbitration provision exists.

In determining the arbitrability of a dispute, "Missouri contract law applies to determine whether the parties have entered a valid agreement to arbitrate. *Woods v. QC Financial Services, Inc.*, 280 S.W.3d 90, 94 (Mo. App. E.D. 2008). As applied here, Missouri contract law would first be used to determine if a valid arbitration provision was entered into before it can be determined if the claim is subject to arbitration. Under Missouri contract law, this arbitration provision lacks consideration as title was not passed and the arbitration provision is fraudulent and void pursuant to section 301.210; LF 77, 104-105, App. 1-2; therefore, no arbitration provision was entered into.

F. Formation of underlying contract is for the court. (Response to Appellant's Point Relied On II(C)).

Appellant argues the arbitrator should determine the "alleged violability of the underlying contract." App. Sub. Brief at 43. The trial court found the contract is "fraudulent and void and not enforceable as no title was given to [Respondent] as required by section 301.210, RSMo." LF 105; App. 2. The formation of the underlying contract was properly before the trial court. The formation of a contract is to be

determined by the courts. *Baker*, 450 S.W.3d at 774. As the trial court found no arbitration provision was formed, arbitration cannot be compelled to determine whether the underlying contract is void, because there is no agreement to arbitrate.

G. Conclusion

Appellant's arbitrability issue is not preserved and should not be considered by the Court. However, if the Court considers the issue, contract formation is a matter specifically reserved for the courts. Appellant's delegation argument is not preserved and should not be considered. However, if the delegation argument is considered, the arbitration provision does not provide the arbitrator with the exclusive authority to resolve the dispute and does not delegate contract formation. It is for this Court to determine if a valid arbitration provision was formed before a claim can be subject to arbitration.

CONCLUSION

The trial court did not err in denying Appellant's Motion to Compel arbitration. The Court should affirm the trial court's decision. The Court should deny Appellant's Motion to Compel Arbitration.

Respectfully submitted,

NOLAND LAW FIRM, LLC
34 Westwoods Drive
Liberty, Missouri 64068
Telephone: 816-781-5055
Fax: 816-781-5216
Email: doug@nolandlawfirm.com
Email: jennifer@nolandlawfirm.com

By: /s/ Douglass F. Noland
Douglass F. Noland #28635
Jennifer N. Wettstein #65268

Kate E. Noland, No. 61081
34 Westwoods Drive
Liberty, MO 64068
Telephone: 816-781-5055
Fax: 816-781-5216
Email: KateNoland.attorney@gmail.com

By:/s/ Kate E. Noland
Kate E. Noland #61081

ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief complies with Rule 84.06(c). The Brief contains the information required by Rule 55.03. The Brief complies with the limitations of Rule 84.06(b). By relying upon the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this Brief is **11,499** words, not including the cover, signature block, certificate of service, certificate required by Rule 84.06(c), and appendix. The Brief has been prepared using Microsoft Word in 13 pt. Times New Roman font in accordance with Rule 84.06(a)(6).

/s/ Douglass F. Noland
DOUGLASS F. NOLAND

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 2015, I electronically filed the foregoing Respondent's Substitute Brief and Substitute Appendix to the Clerk of the Court using the E-Filing system, which sent notification of such filing to the following:

Gary J. Willnauer, Esq.
Deborah F. O'Connor, Esq.
Morrow Willnauer Klosterman Church, L.L.C.
8330 Ward Parkway, Suite 300
Kansas City, MO 64114
Email: gwillnauer@mwklaw.com
Email: doconnor@mwklaw.com
Attorneys for Defendant JF Enterprises, LLC d/b/a
Jeremy Franklin's Suzuki of Kansas City

Leland M. Shurin, Esq.
Shaffer Lombardo Shurin
2001 Wyandotte Street
Kansas City, MO 64108
Email: lshurin@sls-law.com
Attorney for Defendant Condor Capital Corp.

/s/ Douglass F. Noland
DOUGLASS F. NOLAND