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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable Jocelyn Newman, Circuit Court Judge

Stivers Brothers Automotive, Inc. ..... Appellant,

v.

W. Warner Peacock and Peacock Automotive, LLC ..... Respondents.

Case No. 2020-CP-40-01934
Appellate Case No. 2021-001489

FINAL BRIEF OF RESPONDENTS

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INTRODUCTION

There are two critical errors in Appellant's Brief. First, Appellant fails to address the relevant statute in question until page 11 of its Brief: S.C. Code §56-15-80 clearly states the Chapter does not apply to agreements between Dealers. Second, Appellant's motion to serve a Second Amended Complaint is interlocutory, but nevertheless, properly denied. What follows is Respondents' response to each issue.

STATEMENT OF THE CASE

Rule 208(a)(1), SCACR allows Appellant to file a Brief. Rule 208(b) sets forth what the Brief shall contain. Rule 208(b(1)(C) requires the Statement of the Case to include a concise history of the proceedings "insofar as necessary to an understanding of the appeal." It further requires that "[t]he statement shall not contain contested matters." Appellant's Statement is filled with contested and unnecessary matters.[1] Many examples follow.

[1] "[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this state." *Henning v. Kaye,* 307 S.C. 736, 416 S.E.2d 794 (1992).

First, Respondents contest that they "sabotaged the transactions by failing to pursue approval by the manufacturers." (Appellant's Brief, p. 2). Respondents denied these allegations in their answer and counterclaims to Appellant's amended complaint (R. 88, ¶ 50) and alleged Appellant did not "keep its word regarding its financial position, net profitability, goodwill value, ongoing management and operations of the dealerships in the ordinary course, and best efforts to maintain the goodwill value of the dealerships prior to closing." (R. 83, ¶ 8).

Next, Appellant claims "Peacock sent notice of termination of the agreements ("the termination letter") for pretextual reasons." (Appellant's Brief pp. 2-3). Peacock contests this assertion and alleges it sent the letters due to Stivers' failure to provide its financial statements, misrepresentation of its financial condition, its failure to preserve the net profitability and goodwill of the business, along with the impact of the pandemic (R. 84, ¶¶ 11 and 12). There was no pretext involved.

Next, the amended complaint was not "substantially the same as the original complaint." (Appellant's Brief, p. 4). Appellant's Brief itself admits five changes, including deleting parties and adding a cause of action. Finally, Appellant's Statement contains references to parties it voluntarily dropped (Appellant's Brief p. 3). This does not assist this Court "insofar as necessary to an understanding of the appeal." Rule 208(b)(1)(C), SCACR. What is necessary for this Court to understand this appeal follows.

Appellant filed its complaint on April 13, 2020 (R. 25) and an amended complaint on July 2, 2020 (R. 67) alleging Respondents breached the Asset Purchase Agreements (APAs). Respondents filed an answer and counterclaims on June 5, 2020 (R. 38) and to the amended complaint on July 17, 2020 (R. 82). Appellant filed replies to the respective counterclaims on July 1, 2020 (R. 62) and July 29, 2020 (R. 106).

Respondents filed a motion and memorandum for judgment on the pleadings on December 9, 2020 (R. 111) requesting the dismissal of Appellant's cause of action based on the Dealers Act and a reply memorandum in support on March 17, 2021 (R. 193). Appellant filed its own motion and memorandum for judgment on the pleadings basically on the same grounds and memorandum in opposition to Respondents' motion for judgment on the pleadings on February 5, 2021 (R. 116). Appellant filed a supplemental memorandum on March 12, 2021 and in opposition to Respondent's motion on the pleadings (R. 189).

Appellant also filed a motion to serve a second amended and supplemental complaint on February 5, 2021 (R. 132) and a memorandum in support on March 4, 2021 (R. 165). Respondents filed a memorandum in opposition on March 17, 2021, (R. 204)[2] along with a reply in support of its motion for judgment on the pleadings (R. 193).

Appellant filed a third memorandum in support of its motion for judgment on the pleadings and in opposition to Respondent's motion late[3] on March 19, 2021. (R. 228). Appellant then sent a four-page letter (a fourth response) to the court the day before the hearing, which included, among other things, copies of three circuit court orders that Appellant's counsel submitted to "throw light upon the issues before the Court" with respect to the motions for judgment on the Pleadings (R. 275).

A hearing was held before the Honorable Jocelyn Newman the next day on March 23, 2021 on a number of motions, including Appellant's and Respondents' motions for judgment on the pleadings and Appellant's motion to serve a second amended and supplemental complaint. The

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[2] Respondent respectfully asserts that the interlocutory order on Appellant's motion to serve a second amended and supplemental complaint, is not properly on appeal. This issue is more fully argued in Section IV. below.

[3] Judge Newman required all memoranda to be filed by March 17, 2021, the Wednesday before the week of the hearing (R. 261).

lower court issued a Form 4 Order on March 24, 2021 (R. 7), denying Appellant's motion for judgment on the pleadings and motion to amend (R. 7), and an amended Form 4 order on March 25, 2021 (R. 10) granting Respondents' motion for judgment on the pleadings (R. 10).

Appellant filed a motion to alter or amend on April 2, 2021 (R. 232). A formal order granting Respondents' motion for judgment on the pleadings was issued by Judge Newman on November 12, 2021 (R. 13). Appellant served its Notice of Appeal on December 10, 2021.

STATEMENT OF THE FACTS

Peacock Automotive ("Peacock") explored the potential purchase of two ongoing dealerships from Appellant, one a Chevrolet dealership and the other a Hyundai/Genesis dealership. Critical to any purchase is the honest and fair disclosure of the financial condition and net profit of the businesses for sale. Equally critical is the continued operation of the dealerships with best efforts and in good faith until closing without any loss in goodwill or an unexpected intervening event. Trusting Appellant, Peacock signed two APAs on January 7, 2020 for the potential purchase of the Chevrolet and Hyundai/Genesis dealerships. (R. 83, ¶ 4).

The APAs themselves provided that Appellant would give Peacock full access to its books and records and would operate the dealerships in the ordinary course until the closing, using its best efforts to maintain the goodwill value of the dealerships. (R. 83, ¶ 7).

Appellant never provided the November financial records and did not provide the December financial records until February after the APAs were signed. (R. 84, ¶¶ 9-10). The January financial records only came at the end of the month of February. (R. 84, ¶ 10). Peacock's review of the financials indicated that Appellant was not operating in the ordinary course or preserving the net profitability and represented goodwill of the dealerships. (R. 84, ¶ 10).

Peacock requested the February financials numerous times which Appellant promised to

give; however it never honored its word prior to the termination of the APAs. (R. 84, ¶ 11). When Appellant continued to break its word, Peacock had no alternative but to terminate the APAs on March 27, 2020. (R. 84-85, ¶ 13).

Appellant immediately brought suit alleging several causes of action against Warner Peacock and the Dealership arising from the termination of the APAs.

ARGUMENTS

I. STANDARD OF REVIEW

A. Judgment on the Pleadings

A judgment on the pleadings is proper where there is no issue of fact raised by the complaint that would entitle plaintiff to judgment if resolved in its favor. *Sapp v. Ford Motor Co.*, 386 S.C. 143, 687 S.E.2d 47, 49 (2009). It is also " . . . proper where the pleadings entitle a party to judgment without proof, by disclosure of all facts. . ." *Rosenthal v. Unarco Indus. Inc.*, 278 S.C. 420, 422, 297 S.E. 2d 638, 640, (1982). "Where the pleadings are factually deficient in substance or fail to state a good cause of action in favor of the plaintiff and against the defendant, judgment on the pleadings is proper." *Id.*

B. Second Amendment to Complaint

Rule 15(a), SCRCP, sets forth the standard for granting motions to amend a pleading. It provides:

> A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served . . . Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party.

Rule 15(d) provides:

> Upon motion of the party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading . . .

The grant or denial of a motion to amend is within the Court's discretion. *See Skydive Myrtle Beach, Inc. v. Horry Cty.*, 426 S.C. 175, 182, 826 S.E.2d 585, 588 (2019. ("A trial court has discretion to deny a motion to amend if the party opposing the amendment can show a valid reason for denying the motion."). ". . . [W]e have consistently held that a circuit court's ruling on a Rule 15 motion to amend is within its discretion. . ." *Patton v. Miller*, 420 S.C. 471, 490, 804 S.E.2d 252, 262 (2017). The circuit court's finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred. *Sullivan v. Hawker Beechcraft, Corp.*, 397 S.C. 143, 153, 723 S.E.2d 835, 840 (Ct. App. 2012).

II. THE LOWER COURT PROPERLY GRANTED JUDGMENT ON THE PLEADINGS AS TO THE DEALERS ACT

The South Carolina Dealers Act (South Carolina Code § 56-15-10 et. seq.) has been found to apply to two types of relationships: those between a dealer and a manufacturer, distributor, or wholesaler; and those between a customer and a dealer, manufacturer, or distributor. The action brought by Appellant dealer involves neither of these relationships but rather a contractual relationship with two dealers. The lower court properly applied the rules of statutory construction to find that the Dealers Act does not apply to a contractual relationship with two dealers.

The Act contains provisions to protect dealers from manufacturers, wholesalers, and distributors, due to the unequal bargaining power between the parties. The Act also contains general provisions to protect consumers from dealers. The parties in this case are dealers who have sophisticated businesses and were engaged in arms-length transactions with one another. They do not need the added protection provided by the Dealers Act in this factual scenario.

Appellant dealer sued Respondent dealer (and part owner) for specific performance of each of "two separate Asset Purchase Agreements (APAs)" for the purchase of its Chevrolet and Hyundai/Genesis dealerships in Columbia, South Carolina. (R. 76-77). Appellant's claims regarding the Dealers Act arise from the alleged breach of the APAs. (R. 34-35, ¶¶ 68-76; R. 77-78, ¶¶ 82-90). Appellant cannot avoid the limitations of the Dealers Act by alleging that the breach of the APAs was made in bad faith.

A. The Terms of the Dealers Act are Clear and Unambiguous on Their Face, and There is No Room for Statutory Construction

The South Carolina Dealers Act makes clear that it does not apply to an alleged breach of an Asset Purchase Agreement by one dealer against another. S.C. Code § 56-15-80 is headed "Agreements to which chapter applies." It states:

> The provisions of this chapter shall apply to all written or oral agreements between a manufacturer, wholesaler or distributor with a motor vehicle dealer . . . and all other such agreements in which the manufacturer, wholesaler or distributor has any direct or indirect interest.

S.C. Code § 56-15-80.

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston Co. Sch. Dist. v. State Budget and Control Bd.,* 313 S.C. 1, 437 S.E.2d 6 (1993). Under the plain meaning rule, it is not the Court's place to change the meaning of a clear and unambiguous statute. *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning. *Id.* at 233, 509 S.E.2d at 262.

The language of § 56-15-80 is unambiguous and evidences the General Assembly's intent to apply the Dealers Act to all written or oral agreements between only a "manufacturer,

wholesaler, or distributor with a motor vehicle dealer. . ." If the General Assembly wanted to include written and oral agreements between dealers, it simply would have added "motor vehicle dealer" to "manufacturer, wholesaler, or distributor." The plain meaning rule makes it clear that such contracts are not included.

The canon of construction "expressio unius est exclusio alterius" or "inclusio unius est exclusio alterius" holds that "to express or include one thing implies the exclusion of another, or of the alternative." *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578 (2000) citing Black's Law Dictionary 602 (7th ed. 1999). *See also Brown v. State*, 343 S.C. 342, 349, 540 S.E.2d 846, 850 (2001) ("Thus, the maxim of expressio unius est exclusio alterius ... applies to exclude day care centers from falling within the statute since day care centers are not expressly included."). The Legislature intended to exclude contractual relationships between dealers when it did not expressly include such contracts in § 56-15-80.

This is not the first time the General Assembly employed this statutory construct. In *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000), South Carolina Code §1-3-240(C) provided a list of agencies where the Governor's power to remove board members was limited. However, the Santee Cooper Board was not included. Therefore, the Governor had the power to remove. Likewise, a contract between dealers is not included in §56-15-80.

In *Heffner v. Destiny, Inc.*, 321 S.C. 536, 417 S.E.2d 135 (1995), §15-48-200(a) provided that immediate appeal may be taken from six listed arbitration orders. By application of the rule of "expressio unius est exclusio alterius" the Supreme Court held all other orders related to arbitration were not covered, and therefore not immediately appealable. *Id.* at 537-38-471, S.E.2d at 136. Likewise, all other contracts related to the Dealers Act not covered by §56-15-80 are not included.

In *Nelson v. Ozmint,* 390 S.C. 432, 702 S.E.2d 369 (2010), the South Carolina Supreme Court held that the legislature intended §16-25-20(B)(3) to require inmates convicted of criminal domestic violence, third offense, to be imprisoned for the mandatory one-year minimum. The legislature provided an inmate convicted of a second offense was eligible for early release, but not for a third offense. Relying on the canon of construction "expressio unius est exclusio alterius" the Supreme Court found that the statute did not include eligibility for early release. Likewise, the General Assembly did not provide for coverage of the Dealers Act for a contract between dealers.

When the statute's terms are clear and unambiguous on their face, there is no room for statutory construction and this Court must apply the statute according to its literal meaning, *Sloan v. Hardee*, 371 S. C. 495, 498, 640 S.E. 2d 457, 459 (2007). Plaintiff cannot avoid § 56-15-80 by not alleging a violation of this Section.

B. The Definition of "Person" Under the Act Does Not Expand the Application of the Act

The Dealers Act is not an omnibus Act meant to cover any and all wrongs that may be committed by a motor vehicle dealer. Appellant focuses solely on whether dealers are "persons" subject to the Act and ignores the required analysis of whether the acts complained of are within the scope of the Act.

It is not disputed that motor vehicle dealers are "persons" subject to the Act. However, contract disputes between two dealers are not subject matter covered by the Act. In the same way, if a dealer failed to pay its employee wages that were owed, this omission would not be covered by the Dealers Act. The inclusion of legal entities in the definition of "person" under § 56-15-10 does not expand the Act to include a contract dispute between two dealers. It merely reflects the fact that an entity can be a legal "person." Likewise, although § 56-15-20 makes a motor vehicle

dealer doing business in South Carolina generally subject to the Act,[4] it does not expand § 56-15-80 to include contract disputes between two dealers.[5]

Appellant favorably cites *Ritter v. Buchanan Volkswagen, Inc.*, 405 S.C. 643, 748 S.E.2d 801 (Ct. App. 2015) but fails to mention two important facts: 1) the Court of Appeals held the Dealers Act did not apply; and 2) the case was between a wholesaler (Ritter) and a motor vehicle dealer (Buchanan Volkswagen). The Court of Appeals first held that the Florida wholesaler, Ritter, did not have sufficient contacts with South Carolina to meet the requirements of §56-15-20. *Id.* 405 S.C. at 654, 748 S.E.2d at 807. Second, the case was between a wholesaler, Ritter, and a motor vehicle dealer, Buchanan Volkswagen, *Id.* 405 S.C. at 647, 748 S.E.2d 803. §56-15-80 expressly states it applies to all written or oral agreements between a wholesaler and a motor vehicle dealer. Appellant's appeal does not involve a wholesaler.

C. The Dealers Act Does Not Apply to Contract Disputes Between Dealers When Read as a Whole

The consistent interpretation that has been given to the Act is that consumers are protected from dealers and dealers are protected from manufacturers, wholesalers, and distributors. South Carolina courts have made clear that the purpose of the Act is consumer protection. See *Herron v. Century BMW*, 378 S.C. 525, 693 S.E.2d 394, 399 (2010). Dealers, in contrast, are sophisticated businesses engaged in arms-length transactions with one another.

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[4] § 56-15-20 provides:
Any person who engages directly or indirectly in purposeful contacts within this State in connection with the offering or advertising for sale or has business dealings with respect to a motor vehicle within this State shall be subject to the provisions of this chapter and shall be subject to the jurisdiction of the courts of this State upon service of process in accordance with the provisions of Chapter 9 of Title 15.

[5] Appellant impermissibly attempts to raise an equal protection argument for the first time in its Brief, p. 12. "More simply put, appellate courts in this state, like well behaved children, do not speak unless spoken to and do not answer questions they are not asked." *Langley v. Boyter*, 284 S.C. 162, 181, 325 S.E.2d, 550, 561 (1984) rev'd on other grounds, 286 S.C. 85, 332 S.E.2d 550 (1985).

The Dealers Act must be read as a whole and sections that are part of the same general statutory law must be construed together and each one given effect. *SC States Ports Author. v. Jasper County,* 368 S.C. 388, 398, 629 S.E. 2d. 624, 629 (2006). § 56-15-80 applies to the entire Dealers Act Chapter by its clear language: "The provisions of this chapter shall apply to all written or oral agreements between a manufacturer, wholesaler or distributor with a motor vehicle dealer. . . ."

Specific laws prevail over general laws. *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). An example of this interplay can be seen in *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 266, 692 S.E.2d 894, 894 (2010), where the South Carolina Supreme Court held that even though § 14-3-330 allows appeals from interlocutory orders, that section is inapplicable in cases involving review of a decision of the ALC because the more specific statute, § 1-23-610, limits review to final decisions of the ALC.

Reading sections 30, 40, and 80 of the Dealers Act together, the more specific provisions in § 80 regarding contracts prevail over the very broad language of § 56-15-30(a) and § 40(1) (now §40(B)). The broad provision that the Dealers Act generally prohibits acts that are "arbitrary, in bad faith, or unconscionable" is limited by the more specific statute that the Act does not apply to contract disputes between two dealers.

Likewise, reading § 56-15-110, which provides in part:

> (1) In addition to temporary or permanent injunctive relief as provided in Section 56-15-40(3)(c), any person who shall be injured in his business or property by reason of anything forbidden in this chapter may sue therefor in the court of common pleas . . . .

together with § 80 requires an interpretation that an oral or written agreement between two dealers does not fall under "anything forbidden in this chapter." This is consistent not only with the rule of interpretation that all sections be read together, but also with the rule that a specific statutory

provision prevails over a more general one. *Wooten ex rel. Wooten v. S.C. Dep't of Transp.*, 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999).

D. The Essence of Appellant's Claims are not Actionable Under the Dealers Act

The Court must look to the essence of the Appellant's claim to determine whether it is actionable under the Dealers Act. *Ferguson v. Charleston Lincoln Mercury*, 349 S.C. 558, 564 S.E.2d 94 (2002) is instructive. The South Carolina Supreme Court was asked to consider whether Mrs. Ferguson could recover under the Dealers Act for allegedly fraudulent acts committed against her deceased husband. The Court recognized the Dealers Act encompasses multiple causes of action. *Id.* at fn. 2 ("The Dealers Act has a wide ambit and covers causes of action not rooted in fraud and deceit...."). The Court found the essence of Mr. Ferguson's allegation was that CLM misled him into paying more for the car than he should have paid and that it concealed the overcharge either through intentionally deceptive actions or through grossly negligent disclosure practices. The Court therefore held that allegations of such fraud and deceit were exempted from the general survival statute and did not survive Mr. Ferguson's death. The Court further found it was irrelevant whether Ferguson labeled CLM's actions as unfair, misleading, or deceptive.

In the present case, Appellant alleges as to its cause of action under the Dealers Act:

> The Defendants engaged in conduct designed to deceive or mislead prompted by an interested or sinister motive, including but not limited to, using the current environment and breaching the APAs to renegotiate the terms.

(R. 78, ¶ 89).

Appellant claims that it was damaged when Peacock improperly terminated the APAs. Appellant is bound by its pleadings. *Charleston Cty. Sch. Dist. v. Laidlaw Transit, Inc.*, 348 S.C. 420, 425, 559 S.E.2d 362, 364 (Ct. App. 2001). Labeling the breach as deceptive does not alter the

essence of Appellant's claim. The essence of Appellant's claim against Respondents arises from the alleged breach of the APAs, and therefore it is excluded from the Dealers Act. The Dealers Act does not apply to the breach of an agreement between two dealers, even when it is claimed that the breach occurred in bad faith.

E. Connecticut Indem. Co. v. Burdette Chrysler Dodge Corp. is Inapplicable

Appellant argues that § 56-15-320 indicates that the Act applies to actions by one dealer against another; however, the lower court properly found this section inapplicable to the present case.

Connecticut Indem. Co. v. Burdette Chrysler Dodge Corp., 317 S.C. 406. 453 S.E.2d 902, (Ct. App. 1994) is distinguishable and has been overruled. § 56-15-320 is limited in its scope to recovery under a dealer's surety bond. Not only does *Connecticut Indem. Co.* deal only with recovery under a surety bond, the South Carolina Supreme Court subsequently found the Court of Appeals' finding in *Connecticut Indem. Co.* that § 56-15-320 allows recovery "by anyone" was incorrect. *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 476 S.E.2d 690, 692 (1996).

The Supreme Court found the clear intent of the General Assembly was to provide only the owner of a motor vehicle, or the owner's legal representative, with a cause of action against the surety on a bond issued pursuant to that statute. The Court made this finding based on the language in § 56-15-320 that the purpose of a dealer's bond is to indemnify "for loss or damage suffered by an owner of a motor vehicle, or his legal representative" and because the statute specifically states that "[a]n owner or his legal representative who suffers the loss or damage has a right of action against the ... dealer's ... surety upon the bond."

Therefore, *Burdette* no longer stands for the proposition that § 320 supports the contention that an automobile dealer may be liable to another automobile dealer for a violation of § 56-15-40 if the automobile dealer is not also the owner of an automobile at issue in the case. The Supreme Court's decision in *Mid-State* is consistent with a reading of the Dealers Act as a whole. When a dealer is the owner of an automobile, the dealer is standing in the same position as a consumer. Appellant is not seeking to recover under Peacock's surety bond for a loss it claims as the owner of a motor vehicle.

III. THERE IS NO EVIDENCE THE LOWER COURT CONSIDERED MATTERS OUTSIDE THE PLEADINGS

Appellant appears to be arguing that the lower court was biased by Appellant's motion for continuance and letters to the court; however, Appellant does not argue that Judge Newman should have recused herself. *See Mortg. Elec. Sys., Inc. v. White*, 384 S.C. 606, 616, 682 S.E.2d 498, 503 (Ct. App. 2009) ("It is not sufficient for a party . . . to simply allege bias; rather, the party must show some evidence of bias or prejudice." (internal quotation marks omitted)); *Mallett v. Mallett*, 323 S.C. 141, 147, 473 S.E.2d 804, 808 (Ct. App. 1996) ("The fact a [court] ultimately rules against a litigant is not proof of prejudice by the [court], even if it is later held the [court] committed error in [its] rulings.").

A motion to recuse may not be predicated on the judge's rulings in the case before her or on rulings in a related case, nor on her demonstrated tendency to rule in any particular manner, or on a particular judicial leaning or attitude derived from her experience on the bench. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *Berger v. United States*, 255 U.S. 22 (1921).

There is no evidence that the lower court was improperly influenced by Appellant's motion for a continuance or by the letters from Appellant's counsel. The lower court stated explicitly (and

courteously) that it did not consider any material submitted outside of the record and addressed the counsel for both parties equally:

> I've also read a number of letters submitted by counsel for both parties. I have intentionally not responded to them because as a court of record, you have -- one very important tenant of this Court is that it is a court of record and I do not decide motions or any other substantive matters by letter or e-mail or anywhere outside of the record. So I have intentionally failed to respond to those, but I have read each of them, each and every condescending word, but I'm prepared to go forward.

R. 284, ll. 12-21).

Neither is the lower court's admonition to Appellant's counsel regarding his argument that he did not have sufficient time to prepare to argue motions when he had sufficient time to send a number of communications to the court (R. 284, l. 1 – 285, l. 9) an indication that the lower court was biased against the Appellant.

Finally, the lower court did not admonish Appellant's counsel for answering its question, but for continuing to argue its objection to Respondents' motion after the lower court had ruled. (R . 294, ll. 3-7).

IV. THE LOWER COURT'S DENIAL OF APPELLANT'S MOTION TO AMEND ITS COMPLAINT FOR A SECOND TIME IS NOT PROPERLY BEFORE THIS COURT

A. Orders Denying a Motion to Amend are Interlocutory

It is well settled in South Carolina that orders denying a motion to amend an answer are not immediately appealable. First, S.C. Code Ann. § 14-3-330(1), (2)(c) (1977) provides:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal: (1) Any intermediate judgment, order or decree in a law case involving the merits . . . [and] (2) An order affecting a substantial right made in an action when such . . . (c) strikes out an answer or any part thereof or any pleading in any action.". . .

The lower court's order denying the amendment neither involves the merits nor strikes a pleading. Therefore, the Legislature has made clear the order is not appealable at this time.

Second, an order denying the amendment of a complaint has been found by the South Carolina Supreme Court to be unappealable. This is because the order does not involve the merits or strike a pleading. In *Baldwin Const. Co. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004) the Supreme Court held an order denying a motion to amend was not immediately appealable because the trial court did not rule on the substantive contents of the pleading sought to be amended. Rather, the trial court merely refused to allow the amended pleading's filing. Also, the Supreme Court held in *Jefferson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 318, 368 S.E.2d 456, 456 (1988) that an order denying a motion to file a late answer was not appealable because it neither involved the merits nor struck a pleading. The order ruled only that the appellants failed to show good cause and refused to allow the pleading's filing.

In the present case, the March 24, 2021 order did not rule on the contents of the pleading but merely refused to allow the filing of the second amended complaint. Thus, the order is interlocutory and not immediately appealable.

B. No Nexus Exists Between the Orders

There is no nexus between the order denying the motion to amend and the orders granting Respondents' motion for judgment on the pleadings and striking the Dealers Act. Courts may not accept appeals of interlocutory orders not ordinarily immediately appealable when appealed with a companion issue proper for review if the issue lacks a sufficient nexus or companionship to justify the exercise of immediate appellate review. *See Brown v. Cty. of Berkeley*, 366 S.C. 354, 362 n.5, 622 S.E.2d 533, 538 n.5 (2005) (finding the denial of a preliminary injunction preventing a special audit and the denial of a motion to dismiss claims for defamation, defamation *per se,* and

intentional infliction of emotional distress lacked a sufficient nexus or companionship to justify immediate appellate review).

The South Carolina Supreme Court recently affirmed this holding in *Smith v. Tiffany*, 419 S.C. 548, 799 S.E.2d 479 (2017). Justice Kittredge held:

> Appellants also appeal a trial court order granting Respondent Walter Smith's motion to quash Appellants' notice of deposition of Smith. We decline to address this issue because a discovery order is ordinarily not immediately appealable, and the issue "lack[s] a sufficient nexus or companionship to justify this Court's exercise of immediate appellate review." *Brown v. Cnty. of Berkeley*, 366 S.C. 354, 362 n.5, 622 S.E.2d 533, 538 n.5 (2005) (recognizing courts may accept appeals of interlocutory orders not ordinarily immediately appealable when appealed with a companion issue proper for review, but declining to so where the issues appealed lack a sufficient nexus)...

Smith, supra, 799 S.E.2d at 488, fn.1.

The order denying Appellant's motion to amend its complaint for a second time is not a companion issue to the orders granting judgment on the pleadings as to the Dealers Act. The November 12, 2021 order clearly provides that the court relied on concepts of statutory construction and legislative intent in reaching its decision. The denial of a second amended complaint (which contains the identical Dealers Act cause of action) is wholly unrelated to this reasoning. As in *Smith*, these two motions lack a sufficient nexus or companionship to justify immediate review of the interlocutory order.

C. Ruling on the Interlocutory Order Will Not Avoid Unnecessary Litigation

Finally, this Court's ruling on Appellant's motion to serve a second amended complaint will not avoid unnecessary litigation. *See Morris v. Anderson County,* 349 S.C. 607, 564 S.E.2d 649 (2002); *Watson v. Underwood*, 407 S.C. 443, 756 S.E.2d 155 (Ct. App. 2014). The second amended complaint adds no new causes of action, and all (with the exception of the Dealers Act)

remain to be tried; Appellant will be allowed to argue the evidence it asserts to support its remaining causes of action.

Accordingly, the appeal of the lower court's March 24, 2021, order denying Appellant's motion to serve a second amended complaint should be dismissed as interlocutory and not immediately appealable.

V. APPELLANT'S PROPOSED SECOND AMENDED COMPLAINT IS IMPROPER

Respondents object to Appellant's appeal of the lower court's interlocutory order regarding its request to amend its complaint a second time.[6] This Court requested that Respondents raise these issues in their Brief. Without waiving their objection, Respondents make the following arguments in support of the lower court's ruling.

Rule 15(a), SCRCP, sets forth the standard for granting motions to amend a pleading. It provides:

> A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served . . . Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given **when justice so requires and does not prejudice any other party**. (emphasis added).

Rule 15(d) provides:

> Upon motion of the party the court may, upon reasonable notice and **upon such terms as are just**, permit him to serve a supplemental pleading . . . (emphasis added)

The grant or denial of a motion to amend is within the court's discretion. *See Skydive Myrtle Beach, Inc. v. Horry Cty.*, 426 S.C. 175, 182, 826 S.E.2d 585, 588 (2019. ("A trial court has discretion to deny a motion to amend if the party opposing the amendment can show a valid reason for denying

[6] Appellant objects since the lower court failed to "conduct an analysis" in its written order. Appellant's Brief, p. 18. However, the transcript of the hearing, which Appellant refers to often, sets forth the grounds. (R. 288-291).

the motion."). The court will not be reversed unless there is an abuse of discretion. *See Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 153, 723 S.E.2d 835, 840 (Ct. App. 2012). Thus, it is in the power of this Court to deny this unjust and prejudicial motion.

A. The Proposed Second Amended Complaint Contains Improper Material[7]

The lower court properly denied Appellant's motion to serve a second amended complaint because its proposed pleading was replete with improper material.

1. Improper inclusion of footnotes

Appellant's proposed inclusion of footnotes throughout the complaint does not comply with Rule 10(b), SCRCP requiring "consecutive numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances."

2. Immaterial and impertinent allegations

The proposed amendment is subject to a Rule 12(f), SCRCP, motion to strike as "redundant, immaterial, impertinent, or scandalous matter." The following are examples of the inclusion of improper material in the proposed second amended complaint:

a. The statements in footnote 3 regarding Warner Peacock's state of residence is immaterial as he did not object to personal jurisdiction. This footnote is meant only to prejudice Respondents;
b. Proposed paragraphs 21 and 22 regarding investors in Peacock Automotive who are not parties to the action are immaterial and meant to harass and intimidate those individuals by naming them within the pleading;
c. Paragraphs 37, 41, 72, and 81 are attempts to cast aspersions against Humphries who is not a Defendant in the underlying case. Appellant alleges bias but does

[7] Respondents raised additional sustaining grounds in their response to Appellant's motion for a second amended complaint. (R. 204-213). *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("[A] respondent ... may raise ... any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review. It also could violate the principle that a court usually should refrain from deciding unnecessary questions.").

not claim Humphries breached his duties as an escrow agent and absconded with the funds. Nor does Appellant claim Humphries represented himself as a neutral party or that he had a duty to disclose his membership in Peacock Automotive. Whether he was a member of Peacock Automotive is irrelevant to Appellant's claims;

d. Footnote 7 attempts to mischaracterize the allegations and defenses contained in Defendants' Answer and Counterclaim. Rule 8, SCRCP provides for "a short and plain statement of the facts showing that the pleader is entitled to relief". An amended complaint is not intended as a forum for commenting on the answer or counterclaims.
e. Proposed Paragraph 69 includes another reference to Humphries and an allegation that he or someone in his law firm prepared the termination letter signed by Warner Peacock. It is immaterial whether Peacock Automotive had the assistance of its counsel in preparing the letter.

It is not just to permit proposed amendments that, if allowed, will be subject to a Rule 12(f) motion.

3. Improper references to confidential Early Neutral Evaluation

The lower court was most disturbed by Appellant's repeated references to the early neutral evaluation:

> THE COURT: All right. Young Mr. Studemeyer. That was -- the last part there was really the first thing that stood out at me is this talk about the early neutral evaluation, but even before that the things that have happened since July 2nd, I guess beginning on July 3rd. Are those not attempts at resolution of pending litigation? I mean, I hesitate to use word the "settlement" because I don't know that that is exactly what it was, but because litigation had commenced and these are actions, really back and forth about the very subject of the litigation, are these not settlement efforts? I mean certainly the early neutral evaluation is, but even before that, are those not settlement efforts and if so how is it proper to include those in an amended complaint?

(R. 288, ll. 3-18)

> . . . but to include what really are settlement negotiations to some extent, particularly where there is a demand for specific performance in the amended complaint, right, and so they come back and forth about this, these are settlement negotiations. They are not appropriate for pleadings, and so the motion to amend the complaint is denied because they are futile.

(R. 291, ll. 1-8)

ADR Rule 15(d) applies the confidentiality of ADR Rule 8 to early neutral evaluations (ENE). Rule 8(a) provides that any communications during a mediation settlement conference shall be confidential. Appellant has breached this Rule by referring to the ENE proceedings in the proposed Second Amended Complaint (R. 148-149, ¶¶ 117-122). Not only is it not just to allow the inclusion of these allegations, it is prohibited by the Court's Rules.

B. The Motion to Amend Would be Futile

The lower court properly found Appellant's motion to amend would be futile. A trial court may deny a motion to amend if the amendment would be clearly futile. *See Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010) ("Although leave to amend should generally be 'freely given,' ... it may be denied where the proposed amendment would be futile."), *rev'd on other grounds* , 401 S.C. 1, 736 S.E.2d 242 (2012).

In *Jennings, supra.*, Mr. Jennings alleged that his wife, daughter-in-law, and a private investigator violated the Stored Communications Act when they viewed emails from his Yahoo account related to an affair in which he was engaged. After amending his complaint once, Jennings requested leave from the court to amend a second time to add his wife's attorney as a defendant on the grounds that he had received the email communications from his wife.

The court found liability under the Stored Communications Act extended only to those who improperly accessed an account. Because Jennings did not allege the lawyer accessed his account, the court found adding the lawyer would be futile, as he would be entitled to summary judgment if added. The Court of Appeals affirmed. *Jennings v. Jennings*, 389 S.C. 190, 697 S.E.2d 671, 680 (Ct. App. 2010). Likewise, Appellant's proposed amendment would be subject to a Rule 12(f) motion to strike.

In *Higgins v. Medical University of South Carolina*, 326 S.C. 592, 486 S.E.2d 269 (Ct. App. 1997), Higgins filed a medical malpractice action against MUSC and several doctors. The Court of Appeals found the doctors immune under S.C. Code § 15-78-70 and granted their Rule 12(b)(6) motion to dismiss. The Court of Appeals considered whether to grant the plaintiff leave to amend following the 12(b)(6) dismissal but determined that any amendment claiming the doctors were paid by University Medical Services and not by MUSC would ultimately be futile. *Id.* 486 S.E.2d at 275.

In the present case, Appellant's proposed amendments are futile. Appellant's claims regarding improper termination of the APAs do not come under the Dealers Act. Appellant's proposed supplemental allegations in its amended Paragraphs 82-124 are irrelevant to Appellant's claims as they occurred after the termination of the APAs. *See Tricat Industries, Inc. v. Harper*, 748 A.2d 48 (Md. App. 2000) (finding that withholding documents, even if it constituted a breach, after the contract was terminated for cause, was irrelevant to whether cause existed for the termination.)

Further, Appellant's inclusion of improper material, including the ENE proceedings, is subject to a Rule 12(f) motion to strike and therefore futile.

Respondents respectfully request the Court find denial of Appellant's Motion to Amend its Complaint for a second time is interlocutory and not properly before the Court, or in the alternative, to affirm the lower court's denial of the Motion.

CONCLUSION

The General Assembly, not Appellant, sets the law for the State of South Carolina. § 56-15-80 clearly does not apply to contracts between dealers. The lower court was courteous to

Appellant's counsel and acted with an admirable judicial temperament. The lower court ruled fairly and correctly on the motions before her. Appellant's motion regarding its second amended complaint is interlocutory, and it has failed to show an abuse of discretion. This appeal must be dismissed.

Respectfully submitted,

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The undersigned hereby certifies that Respondents' Final Brief complies with Rule 211(b).

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