THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2021-001489

Stivers Brothers Automotive, Inc., Appellant,

v.

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

PETITION FOR REHEARING

INTRODUCTION

Pursuant to Rule 221(a), SCACR, Appellant petitions for rehearing of Opinion No. 2024-UP-378 issued on November 6, 2024 ("Opinion"), which affirmed the Trial Court's conclusion that the Dealers Act is not applicable to persons licensed as motor vehicle dealers against other motor vehicle dealers. The Opinion overlooked a crucial point of law: the rules of statutory construction.

The "plain meaning rule," where applicable, allows the Court to determine that the rules of statutory interpretation are not needed. However, the "plain meaning rule" is inapplicable where its application would lead to a result that is plainly absurd and would defeat legislative intent. The Court's decision to the effect that a claim may not be pursued under the Dealers Act unless the parties are privy to an agreement included in the scope of Section 56-15-80 leads to a patently

absurd result, one which overrules decades of Dealers Act cases.

LEGAL STANDARD

A petition for rehearing should be granted whenever it shows that the Court has "overlooked" or "misapprehended" a point of fact or law. Rule 221(a), SCACR; *see also* Protestant Episcopal Church in Diocese of S.C. v. Episcopal Church, No. 2020-000986 (2022) (granting petition for rehearing in part); S.C. Coastal Conservation League v. Dominion Energy S.C., Inc., 432 S.C. 217, 219, 851 S.E.2d 699, 700 (2020) (granting petition for rehearing). The petition for rehearing must show "the points supposed to have been overlooked or misapprehended by the Court" to "aid the court in deciding correctly a case heard by it." Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E.2d 234, 238 (1933).

ARGUMENT

I. THIS COURT ERRED IN AFFIRMING THE JUDGMENT ON THE PLEADINGS BASED ON THE CONCLUSION THAT THE DEALERS ACT DID NOT APPLY

A. THIS COURT ERRONEOUSLY ABANDONED THE RULES OF STATUTORY INTERPRETATION AND CONSTRUED SECTION 56-15-80 IN ISOLATION, LEADING TO AN UNINTENDED RESULT

The Respondents have posited that if the asset purchase agreements ("APAs") executed between Peacock and the Appellant are not subject to S.C. Code Ann. § 56-15-80, then Appellant is not entitled to seek relief under any of the other provisions of the Dealers Act, including S.C. Code Ann. §§ 56-15-30 and -40. Based on the rules of statutory interpretation, the Dealers Act should have been read comprehensively to make sense of the individual statutes which are contained therein. Instead, this Court decided that the rules of statutory interpretation should be ignored and construed S.C. Code Ann. § 56-15-80 in isolation.

The Court concluded that a dispute between two dealers is outside the scope of the Dealers Act because Section 56-15-80 is "clear and unambiguous" and does not apply to APAs between

dealers. The Court briefly addressed the rules of statutory construction—namely, to set forth that "if the language of a statute is plain, unambiguous, and conveys a clear meaning," then the rules of statutory construction are not needed. *See* Odom v. Town of McBee Election Comm'n, 427 S.C. 305, 310, 831, S.E.2d 429, 432 (2019). Finding that the rules of statutory construction were not needed, this Court affirmed the Trial Court's finding that the Dealers Act does not apply.

The Court reviewed Section 56-15-80 under a microscope, when it should have taken a bird eye's view of Title 56, Chapter 15. As this Court stated in Fairfield Waverly, LLC v. Dorchester County Assessor, 432 S.C. 287, 292, 852 S.E.2d 739, 741 (Ct. App. 2020):

> "We do not look at statutes in isolation. Instead, we consider how the statutes operate with each other when striving to arrive at any one statute's meaning."

"In construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect." Duke Energy Corp. v. S.C. Dep't of Revenue, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016). "Statutory provisions should be given reasonable and practical construction consistent with the purpose and policy of the *entire act*." Stephens v. Avins Const. Co., 324 S.C. 334, 340, 478 S.E.2d 74, 77 (Ct. App. 1996).

In fact, the Opinion cited a previous case in which this Court specifically read "the Dealers Act as a whole and construe[d] multiple sections to give each one effect." Ritter & Assocs., Inc. v. Buchanan Volkswagen, Inc., 405 S.C. 643, 653-54, 748 S.E.2d 801, 806 (Ct. App. 2013). The reason for the Court's departure in this case is unclear.

The complaint makes no mention of S.C. Code Ann. § 56-15-80. Instead, the complaint invokes S.C. Code Ann. §§ 56-15-30 and -40(1), and alleges that Peacock, a motor vehicle dealer, engaged in actions which were arbitrary, in bad faith, and/or unconscionable. As far as Appellant is aware, it has never been incumbent upon a claimant to establish that it is privy to an agreement

encompassed by S.C. Code Ann. § 56-15-80 in order to seek relief arising out of a motor vehicle dealer's arbitrary conduct in violation of S.C. Code 56-15-40(1).

If the legislature had indeed intended that Section 56-15-80 function as the gatekeeper of all Dealers Act claims as Respondents envision, a position which this Court has adopted, then surely it would have used language to that effect. *See* Ventures S.C., LLC v. S.C. Dep't of Revenue, 378 S.C. 5, 8-9, 661 S.E.2d 339, 341 (2008) ("The statute's language is considered the best evidence of legislative intent"). It did not. Instead, Section 56-15-80, titled "Agreements to which chapter applies," 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, including, but not limited to, the franchise offering, the franchise agreement, sales of goods, services or advertising, leases or mortgages of real or personal property, promises to pay, security interests, pledges, insurance contracts, advertising contracts, construction or installation contracts, servicing contracts, and all such other agreements in which the manufacturer, wholesaler, or distributor has any direct or indirect interest."

Section 56-15-80 was plainly intended to provide additional protection to motor vehicle dealers with respect to their contractual dealings with manufacturers, wholesalers, and distributors. Unfortunately, boilerplate choice of law provisions in dealer agreements have largely rendered this section moot.

Presumably, based on the Respondents' interpretation and this Court's prior decision, consumers would never be entitled to relief under the Dealers Act against a motor vehicle dealer if Section 56-15-80 is indeed the gatekeeper of all Dealers Act claims. Nothing within the plain language of Section 56-15-80 indicates that a transaction between a consumer and a motor vehicle dealer would be encompassed therein, yet this Court has heard dozens of such claims.

The implication, then, based on this Court's recent interpretation of Section 56-15-80, is that precedential Dealers Act cases such as Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997),

Taylor v. Nix, 307 S.C. 551, 416 S.E.2d 619 (1992), and even Freeman v. J.L.H. Investments, LP, 414 S.C. 62, 778 S.E.2d 902 (2015) should all be vacated because the parties were not privy to an agreement to which the Dealers Act applied pursuant to Section 56-15-80. Such a result would be absurd. As this Court mentioned in the Opinion, "the Legislature enacted the...Dealers Act...for the purpose of consumer protection."

Appellant, however, disputes that the Dealers Act is *solely* for the purpose of "consumer protection," as the legislature clearly had other concerns in mind, including the disparate bargaining power between dealers and manufacturers when it promulgated Section 56-15-80. [*Emphasis added*]; See *also* S.C. Code Ann. § 56-15-46, providing protections to an "existing dealership" from a "competing" dealership.

The Respondents' motion for judgment on the pleadings cited case law from Massachusetts wherein the Supreme Judicial Court interpreted a provision of Chapter 93B of the Massachusetts General Laws Annotated. *See* Beard Motors, Inc. v. Toyota Motor Distributors, Inc., 395 Mass. 428, 480 N.E.2d 303 (1985). Chapter 93B is Massachusetts' version of the Dealers Act and is strikingly similar to our own. For instance, M.G.L.A. 93B §§ 3(a)-(b) and S.C. Code Ann. §§ 56-15-30(a)-(b) are mirror images of one another. M.G.L.A. 93B § 11 is the fundamental equivalent of S.C. Code Ann. § 56-15-80. It states:

> "*This chapter shall apply to all* actions by a manufacturer or distributor which relate to the franchise agreement and which arise under *any written or oral agreement between the manufacturer or distributor with a motor vehicle dealer including, but not limited to, the franchise offering, the franchise agreement, sales of goods, services, or advertising, leases or mortgage of real or personal property, promises to pay, security interests, pledges, insurance contracts, advertising contracts, construction or installation contracts, servicing contracts, and all other such agreements in which said manufacturer or distributor has any direct or indirect interest.*

With the exception of one additional clause in the Massachusetts version, which is not italicized

above, these provisions are exactly the same.

As far as Appellant is aware, no Massachusetts court has ever held that parties must be in privity of some type of contract encompassed by M.G.L.A. 93B § 11 in order to seek relief under any other section contained in Chapter 93B. In fact, Appellant was able to find cases decided pursuant to Chapter 93B which were between two motor vehicle dealers. *See* Tober Foreign Motors, Inc. v. Reiter Oldsmobile, Inc., 376 Mass. 313, 381 N.E.2d 908 (1978); Medway Auto Sales, Inc. v. Sutton Motors & Sales, Inc., 2005 WL 937680; Martha's Vineyard Auto Village, Inc. v. Newman, 30 Mass.App.Ct. 363, 569 N.E.2d 401 (1991). Massachusetts simply does not envision M.G.L.A. 93B § 11 as a gatekeeper statute which determines whether a party has standing to sue another under Chapter 93B. Given the similarities between Chapter 93B and Title 56, Chapter 15 of the South Carolina Code, this Court should follow suit.

B. THIS COURT'S INTERPRETATION OF THE DEALERS ACT VIOLATES APPELLANT'S RIGHT TO EQUAL PROTECTION

In the Opinion, the Court dismissed the notion that Appellant, a motor vehicle dealer, is a "person" within the meaning of S.C. Code Ann. § 56-15-10(n). The definition of "person" is quite expansive, including "a natural person, corporation, partnership, trust, or other entity." Id. Clearly, Appellant, a motor vehicle dealer and South Carolina corporation, is a "person" for purposes of Section 56-15-10(n). This has major implications elsewhere in the chapter.

Section 56-15-20 states that any "person" who "engages directly or indirectly in purposeful contacts with this State in connection with the offering or advertising for sale or has business dealings with respect to a motor vehicle within this State" is subject to the chapter—i.e., the Dealers Act. As a motor vehicle dealer, Appellant and Peacock are unquestionably "persons" subject to the Dealers Act.

Section 56-15-110(1), titled "Suits For Damages," further provides that "any person"[1] who shall be injured in his business or property "by reason of anything forbidden in this chapter" may file an action based on the Dealers Act. Appellant, unquestionably a "person" pursuant to Section 56-15-10(n), which is subject to the Chapter pursuant to Section 56-15-20, has attempted to pursue a cause of action under Title 56, Chapter 15 based on conduct forbidden in Section 56-15-30 and -40. This Court has ruled that this categorically cannot happen, violating Appellant's right to equal protection.

Even motor vehicle dealers are "persons" entitled to equal protection, and this Court's interpretation of the Dealers Act fails to satisfy the rational basis test. Denene, Inc. v. City of Charleston, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004). First, this Court's classification of motor vehicle dealers as having fewer rights than any other "person," whether individuals or corporate entities, including consumers, manufacturers, wholesalers, and distributors, bears no relation whatsoever to the legislative purpose sought to be affected by the legislature. The Dealers Act contains certain statutes which are plainly intended to be remedial towards motor vehicle dealers, i.e. Section 56-15-46 and, to an extent, Section 56-15-80. This interpretation of the Dealers Act is clearly punitive in nature towards motor vehicle dealers.

Second, the Opinion makes clear that the Court's interpretation of the Dealers Act is selective in that the only "persons" under the Dealers Act who must satisfy this increased scrutiny are motor vehicle dealers. This Court failed to even acknowledge the widespread potential effect of its decision, indicating that perhaps it neither appreciated nor intended those effects. Nevertheless, the Court ruled that a motor vehicle dealer must establish that it is in privity of some

[1] M.G.L.A. 93B § 15(a), the functional equivalent of Section 56-15-110(1), explicitly provides that any manufacturer, distributor, or motor vehicle dealer who suffers any loss as a result of anything forbidden in Chapter 93B by a manufacturer, distributor, or motor vehicle dealer can file an action.

type of contract encompassed by Section 56-15-80 in order to bring a claim under *any* provision of the Dealers Act. [*Emphasis added*]. The Appellant is the first member of this class to be saddled with such a burden, but this Opinion sets the same precedent for all other South Carolina motor vehicle dealers.

Finally, the classification rests upon no rational basis at all. It was the result of this Court erroneously deciding that the rules of statutory construction could be ignored. Since there is established case law standing for the precedent that statutes—notably, the Dealers Act—should be read together and not in isolation, the classification is not rationally based.

C. THIS COURT MISUNDERSTOOD THE IMPLICATIONS OF THE ALTMAN DECISION ON THE BURDETTE DECISION

Appellant cited Connecticut Indemnity Company v. Burdette Chrysler Dodge Corporation, 317 S.C. 406, 408, 453 S.E.2d 902, 904 (Ct. App. 1994) in its final brief, to the effect that a motor vehicle dealer had the right to recover under the Dealers Act. Specifically, Appellant cited the following language:

> "Had the legislature intended to preclude a motor vehicle dealer from being considered an 'owner of a motor vehicle,' the legislature could have used a less inclusive term to define those who could recover under a motor vehicle dealer bond."

Of course, in Burdette, a motor vehicle dealer recovered against another motor vehicle dealer under Section 56-15-320(2). This Court stated in the Opinion that Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 476 S.E.2d 690 (1996) overruled Burdette to the extent it "specifically overruled the finding that the Dealers Act applied to *anyone*." [*Emphasis added*]. That is not in dispute. In fact, footnote 4 of the Altman decision makes explicit that the Supreme Court overruled Burdette "*to the extent* it recites the latter part of § 56-15-320 allows recovery by anyone, not just motor vehicle owners." [*Emphasis added*].

However, the Supreme Court did *not* specifically overrule the finding in Burdette that a motor vehicle dealer could be considered a "motor vehicle owner" under Section 56-15-320 and recover under the Dealers Act. This Court should take the Supreme Court at its word and not impart any greater meaning to the decision than what Justice Burnett and the concurrence did.

II. THIS COURT ERRED IN AFFIRMING THE JUDGMENT ON THE PLEADINGS BASED ON THE FINDING THAT APPELLANT ABANDONED THE ARGUMENT

This Court found that Appellant argued "in summary fashion without any citation to authority" that the Trial Court erred in considering matters outside the pleadings and, therefore, abandoned the issue on appeal. That is demonstrably incorrect.

In the Final Brief of Appellant, Rule 12(c), SCRCP was cited, and four cases were directly quoted—albeit in the standard of review section. It was plainly erroneous for this Court to claim that the issue was abandoned because the Appellant "failed to provide any argument or supporting authority." Opinion citing First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) and R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 437, 540 S.E.2d 112, 120 (Ct. App. 2000). Neither in McLean nor R&G Constr., Inc did the Court hold that the supporting authority must be included in any particular section or page of the brief.

This Court further found that Appellant made only a "conclusory" argument. Opinion citing R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth., *supra*. "Conclusory" is defined as "expressing a factual inference without stating the underlying facts on which the inference is based." Black's Law Dictionary (12th ed. 2024), conclusory. The R&G Constr., Inc. opinion itself cites a previous decision, Solomon v. City Realty Co., Inc., 262 S.C. 198, 203 S.E.2d 435 (1974), wherein the Supreme Court of South Carolina referred to a "bald conclusion" in a brief which led to abandonment of an issue. There is clearly a distinction to be made with respect to the facts of

the Solomon case and the present.

Appellant did not set forth merely a bald conclusion; rather, Appellant argued that matters which were outside the pleadings had been considered in the Trial Court's decision, and then proceeded to cite various direct quotes from the Trial Court in support. Appellant quoted the Trial Court as stating that although it had failed to respond to the emails of counsel, it had "read each of them, each and every *condescending* word," and found them to be "*illogical*" and "*disingenuous.*" Appellant cited that the Trial Court then proceeded to specifically chastise Appellant's counsel for allegedly not "think[ing] it was possible for me to be ready for motion hearings or possibly adequately to do my job." This was not, by definition, a conclusory argument. It was clear that undue prejudice had played a role in the decision, when the only factor that should be considered is the content of the pleadings themselves.

III. THIS COURT ERRED IN AFFIRMING THE DENIAL OF APPELLANT'S MOTION TO AMEND AND SUPPLEMENT THE COMPLAINT

As the Opinion itself states, "in its second amended complaint, [Appellant] alleged additional facts, including an assertion it had, *inter alia*, (1) provided confidentiality/proprietary information to Respondents and (2) allowed Respondents access to its dealer management system." That is correct.

The motion filed on February 5, 2021, and subsequently denied by the Trial Court was captioned as a motion to file a "second amended and *supplemental* complaint." [*Emphasis added*]. A memorandum in support of the motion was filed on March 4, 2021, and captioned "Memorandum in Support of Motion to Serve Amended and *Supplemental* Complaint." [*Emphasis added*]. The Appellant's final brief, filed on August 19, 2022, stated that "a number of developments had occurred since the filing of the amended complaint eight (8) months earlier and additional information had been made available through discovery." The final brief sets forth the

specific, additional factual allegations that the Appellant wished to assert.

Accordingly, this Court's repeated characterization of the "second amended complaint" was improper. The primary purpose of the proposed second amended and *supplemental* complaint was indeed to "set forth transactions or occurrences or events which have happened since the date of the pleadings sought to be supplemented ...". Rule 15(d), SCRCP.

A. THIS COURT AFFIRMED THE TRIAL COURT'S DECISION BASED ON A MISUNDERSTANDING OF THE PROCEDURAL HISTORY AND THE LAW

First, Appellant has established herein that the Dealers Act indeed applies. The Court only reached an adverse decision previously by admittedly abandoning the rules of statutory construction, interpreting one statute in isolation rather than attempting to harmonize that statute with the rest of the chapter. The Court also failed to consider that this interpretation would remove standing for virtually all consumers, a plainly absurd result with landmark case implications—namely, overruling most Dealers Act opinions ever published by this Court and the Supreme Court of South Carolina.

Second, there appears to have been some confusion about the procedural history of this dispute. The Trial Court denied Appellant's motion to amend and supplement the complaint in a Form 4 order dated March 24, 2021. The Trial Court did not rule on the Respondents' motion for judgment on the pleadings until November 12, 2021. Accordingly, the Appellant's motion to amend and supplement the complaint was denied roughly eight (8) months before the Trial Court decided that the Dealers Act did not apply to this dispute. Therefore, the Trial Court's decision to deny the motion to amend and supplement could not possibly have been based on the finding that the Dealers Act did not apply.

Third, this Court failed to even address the Appellant's argument based on Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 826 S.E.2d 585 (2019). In Appellant's final brief, it

quoted the Trial Court as stating that the proposed amendment was "futile." Appellant's final brief further addressed the fact that the Trial Court's Form 4 order contained no analysis as to "futility" as required by Skydive before deciding whether *any* amendment would be futile.

In Skydive, the Supreme Court of South Carolina rebuked this Court as well as the trial court for reaching the conclusion that a proposed amendment would be "futile" without "articulating any such analysis." 426 S.C. 183, 826 S.E.2d 589. The same mistake has been repeated. This Court affirmed the Trial Court based on the conclusion that "none of the new allegations in the second amended complaint change our finding that the Dealers Act does not apply to [Appellant's] action." That was not the appropriate standard.

"A court's decision to deny a motion to amend should not be based on the court's perception of the merits of an amended complaint." Skydive, 426 S.C. at 182, 826 S.E.2d at 589. However, it appears that was exactly the criteria used by this Court and the Trial Court. This Court expressly held that the supplemental factual allegations would not give rise to a cause of action under the Dealers Act.

The Supreme Court in Skydive expressed that the appropriate standard is rather "to determine whether, in fact, *any* amendment would be futile." Skydive, 426 S.C. at 183, 826 S.E.2d at 589. The Supreme Court cautioned that a trial court could deny a motion to amend if the amendment would be "clearly futile," but that those cases were "rare." Id., 426 S.C. at 182, 826 S.E.2d at 589. In fact, the Court stated that such a ruling would be tantamount to "definitively [saying] it is impossible for [the party] to plead a valid claim against [the other party]." Id., 426 S.C. at 187, 826 S.E.2d at 592. In that context, it is understandable that such cases are "rare."

The amendment was not "futile" because this Court acknowledged in the Opinion that the Appellant asserted the same causes of action as those in the Amended Complaint, and all of those

causes of action—save for the Dealers Act claim—still remain today. "Futility" is a prerequisite finding to dismissing a complaint in its entirety, not one cause of action, and *with* prejudice. 426 S.C. at 190-92, 826 S.E.2d at 593-94. No pleading has been dismissed in this case. "Futility" was the wrong standard.

Whether this Court or the Trial Court thought the Appellant could prevail under the Dealers Act claim was not the proper standard, either. The Appellant was not adding a Dealers Act cause of action for the first time but rather seeking to supplement its well-pleaded Amended Complaint with additional factual allegations pursuant to Rule 15(d), SCRCP.

The Court's misapprehension of the law is especially baffling because the standard governing motions to amend pursuant to Rule 15(a), SCRCP have been so well defined, and the standard for subsection (d) is precisely the same. Tanner v. Florence County Treasurer, 336 S.C. 552, 558, 521 S.E.2d 153, 156 (1999). Under that standard, leave to amend or supplement shall be freely given, and the burden is on the party opposing the amendment to show how it would be prejudiced. Stanley v. Kirkpatrick, 357 S.C. 169, 175, 592 S.E.2d 296, 298 (2003). That prejudice has been defined as a "lack of notice that the new issue is to be tried" or a "lack of opportunity to refute it." Tanner v. Florence County Treasurer, 336 S.C. 552, 558-59, 521 S.E.2d 153, 156.

Neither this Court nor the Trial Court considered how the Respondents would be prejudiced. Given that the proposed Second Amended and Supplemental Complaint was filed nearly four (4) years ago, the Respondents obviously would not be prejudiced in any way envisioned by the Supreme Court in the Tanner decision.

CONCLUSION

For these reasons, Appellant requests that this Court grant the petition for rehearing.

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November 21, 2024.

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PROOF OF SERVICE

I certify that I have served a copy of the Petition for Rehearing upon the Respondents by email and by depositing it in the United States Mail, postage prepaid, on November 21, 2024, addressed to their attorney of record, Bradford N. Martin, Post Office Box 10410, Greenville, South Carolina 29603.

November 21, 2024

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