THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2024-002182

Stivers Brothers Automotive, Inc.....Petitioner,

v.

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

RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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The undersigned counsel for Respondents, W. Warner Peacock and Peacock Automotive, LLC, certify that the Return to Petitioner's Petition for Writ of Certiorari complies with Rule 242(f), SCACR, and Appellant's counsel was served with a copy of Respondents' Return to Appellant's Petition for Writ of Certiorari via email and by depositing a copy in the US Mail, postage prepaid, on January 9, 2025, addressed to Appellant's Counsel of Record J. Gregory Studemeyer, Esq. and Ryan Studemeyer, Esq., Studemeyer Law Firm, P.C., Post Office Box 1014, Irmo, SC 29063 and J. Michael Baxley, Esq., Douglas Jennings Law Firm, LLC, 225 Seven Farms Drive, Suite 202, Charleston, SC 29492.

Bradford N. Martin

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. **DID THE UNANIMOUS COURT OF APPEALS PROPERLY AFFIRM THE LOWER COURT'S HOLDING THAT THE DEALERS ACT DOES NOT APPLY TO CONTRACT DISPUTES BETWEEN TWO DEALERS?**

II. **DID THE COURT OF APPEALS PROPERLY HOLD *CONNECTICUT INDEMNITY CO. V. BURDETTE CHRYSLER DODGE CORP.* HAS BEEN OVERRULED AND DOES NOT PROVIDE A BLANKET AUTHORIZATION FOR RECOVERY BY ONE DEALER AGAINST ANOTHER UNDER THE DEALERS ACT?**

III. **DID THE COURT OF APPEAL'S INTERPRETATION OF THE DEALERS ACT UPHOLD PETITIONER'S RIGHT TO EQUAL PROTECTION WHEN IT BEARS A REASONABLE RELATION TO THE LEGISLATIVE PURPOSE AND TREATS MEMBERS OF THE CLASS ALIKE UNDER SIMILAR CIRCUMSTANCES?**

IV. **DID THE LOWER COURT PROPERLY FIND PETITIONER ABANDONED ITS ARGUMENT THAT THE LOWER COURT ERRED IN CONSIDERING MATTERS OUTSIDE THE PLEADINGS?**

V. **DID THE COURT OF APPEALS PROPERLY AFFIRM THE LOWER COURT'S DENIAL OF PETITIONER'S MOTION FOR A SECOND AMENDED COMPLAINT WHEN THE COURT FOUND NONE OF THE ALLEGATIONS IN THE PROPOSED AMENDMENT BROUGHT THE CLAIMS ALLEGED BY PETITIONER WITHIN THE SCOPE OF THE DEALERS ACT?**

COUNTER-STATEMENT OF THE CASE[1]

Stivers Brothers Automotive, Inc. (Petitioner) and Peacock Automotive, LLC entered into Asset Purchase Agreements (APAs) in January of 2020 to acquire Petitioner's Chevrolet and Hyundai/Genesis dealerships in Columbia, South Carolina. Petitioner filed its Complaint on April 13, 2020 (R. 25) and 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). Petitioner 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 Petitioner's cause of action based on the Dealers Act and a Reply Memorandum in Support on March 17, 2021 (R. 193). Petitioner 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). Petitioner filed a Supplemental Memorandum on March 12, 2021 and in opposition to Respondents' Motion on the Pleadings (R. 189).

Petitioner 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) along with a Reply in Support of their Motion for Judgment on the Pleadings (R. 193).

A hearing was held before the Honorable Jocelyn Newman on March 23, 2021 on a number of Motions, including Petitioner's and Respondents' Motions for Judgment on the Pleadings and

[1] Petitioner's Statement of the case contains contested and unnecessary matters. Respondents object to Petitioner's characterizations of the facts and present this counter-statement of the case.

Petitioner's Motion to Serve a Second Amended and Supplemental Complaint. The lower court issued a Form 4 Order on March 24, 2021 (R. 7), denying Petitioner'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).

Petitioner 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).

Petitioner served its Notice of Appeal on December 10, 2021. The Court of Appeals unanimously affirmed the decision of the lower court by Opinion filed November 6, 2024. Petitioner filed a Petition for Rehearing, which was denied December 6, 2024. Petitioner filed a Petition for Writ of Certiorari on December 27, 2024.

I. THE UNANIMOUS COURT OF APPEALS CORRECTLY AFFIRMED THE LOWER COURT'S FINDING THAT THE DEALERS ACT DID NOT APPLY

The Court of Appeals properly applied the established rules of statutory interpretation in finding that the Dealers Act did not apply.[2] It correctly found:

> [t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.

citing Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The Court then cites *Odom v. Town of McBee Election Comm'n*, 427 S.C. 305, 310, 831 S.E.2d 429, 432 (2019). *See also*,

[2] Petitioner cites to several new cases for the first time in its Petition for Rehearing. A party may not raise an issue for the first time in a petition for rehearing. *See Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, at 532, 564 S.E.2d 322, 322 (2001) ("The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.").

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.

Reading the Dealers Act as a whole, it is clear that the Legislature intended to provide enumerated protections to motor vehicle dealers. The Dealers Act explicitly addresses the contracts that come within its scope. The Dealers Act states it applies only "to all written or oral agreements between the manufacturer, wholesaler, or distributor with a motor vehicle dealer . . . and all such agreements in which the manufacturer, wholesaler or distributor has any direct or indirect interest." S.C. Code § 56-15-80 (2018). All other claims arising from an alleged breach of contract are excluded. 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."). Therefore, the Legislature intended to exclude contractual relationships between dealers from the Act when it did not expressly include such contracts in § 56-15-80.

A "statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect." *S.C. State Ports Auth. v. Jasper County,* 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). The Court of Appeals did not fail to read

the Dealers Act as a whole. It is Petitioner who asks the Court to look only at whether it qualifies as a "person" under the Act and ignore whether the contracts it complains of are within the scope of the Act. Petitioner cannot avoid the plain meaning of the Dealers Act by failing to raise § 56-16-80. As the Court of Appeals correctly found ". . . the essence of Stivers claims against Respondents arises from an alleged breach of contract between two dealers and is thus excluded from the Dealers Act." Opinion, p. 5. This is clear and unambiguous.

The Court should not concentrate on isolated phrases within the statute. Rather it should read the statute so "that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *State v. Sweat,* 379 S.C. 367, 376, 665 S.E. 2d 645, 650 (Ct. App. 2008), *aff'd,* 386 S.C. 339, 688 S.E.2d 569 (2010). Petitioner would have the Court of Appeals read § 56-15-40 in isolation. The lower court's interpretation of the Dealers Act, unanimously affirmed by the Court of Appeals, is required to give meaning to § 56-15-80. Otherwise, the limitations provided in that section are superfluous. *See Spectre, LLC v. S.C. Dep't of Health and Envtl. Control,* 386 S.C. 357, 688 S.E.2d 844 (2010) (where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect). Even where two dealers are "persons" under the Dealers Act, an alleged breach of contract between those dealers is excluded from the Act.

Petitioner misstates the Court of Appeals' reasoning when it argues, "based on the Court of Appeals' opinion, consumers would never be entitled to relief under the Dealers Act against a motor vehicle dealer." The Court of Appeals does not find(nor address) that the Dealers Act only encompasses issues involving written or oral agreements between a dealer and a manufacturer,

wholesaler, or distributor. Rather it finds that the Act excludes claims that arise from the alleged breach of contract between two dealers.

The cases cited by Petitioner do not allege a Dealers Act claim arising from a breach of contract between dealers or even contracts between consumers and dealers. *See Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997) (consumer alleged the dealer made misrepresentations regarding the condition of a previously wrecked vehicle); *Taylor v. Nix*, 307 S.C. 551, 416 S.E.2d 619 (1992)(consumers alleged the dealership's service personnel treated them in an unprofessional manner after selling them a defective vehicle, including laughing at them, avoiding them, and taking Ms. Taylor on a 95 m.p.h test drive); *Freeman v. J.L.H. Investments, LP*, 414 S.C. 62, 778 S.E.2d 902 (2015) (alleging that the dealership arbitrarily charged a closing fee). The Court of Appeals' holding in the present case addresses wholly different issues and does not suggest, as Petitioner claims, these prior cases should be vacated.

II. THE COURT OF APPEALS PROPERLY HELD *CONNECTICUT INDEMNITY CO. V. BURDETTE CHRYSLER DODGE CORP.* HAS BEEN OVERRULED AND DOES NOT PROVIDE A BLANKET AUTHORIZATION FOR RECOVERY BY ONE DEALER AGAINST ANOTHER UNDER THE DEALERS ACT

Connecticut Indemnity Co. v. Burdette Chrysler Dodge Corp., 317 S.C. 406, 453 S.E.2d 902 (Ct. App. 1994) never stood for the general proposition that a dealer can recover under the Dealers Act against another dealer for a claim arising from a breach of contract. Rather, *Burdette* addressed whether a dealer was an "owner of a motor vehicle" within the meaning of S.C. Code § 56-15-320(2).

The Court of Appeals correctly noted the Supreme Court overruled *Burdette* in *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 476 S.E.2d 690 (1996) to the extent that *Burdette* found § 56-15-320 allowed recovery by "anyone" and not just motor vehicle owners, for

loss or damage suffered as a result of a dealer violating any provisions of the Act. This Court, in *Midstate*, 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. This Court made the 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." Section 56-15-80 similarly enumerates a dealer can bring a claim under the Act for an alleged breach of contract only as to agreements between the dealer and a manufacturer, wholesaler or distributor. Petitioner is not asking to recover against Respondent's surety bond. Rather, the issue in the present case is whether a claim arising from an alleged breach of contract between two dealers is within the scope of the Act. The plain language of § 56-15-80 excludes such a claim from the Act.

III. THE COURT OF APPEALS' INTERPRETATION OF THE DEALERS ACT DOES NOT VIOLATE PETITIONER'S RIGHT TO EQUAL PROTECTION

Petitioner failed to raise the issue of equal protection, other than in a conclusory statement, until its Petition for Rehearing. Because Petitioner failed to raise this argument, the Court of Appeals properly did not address the issue.

Petitioner attempts to bring all acts between two dealers with the scope of the Dealers Act by arguing that a dealer is a "person" as defined in the Act. The issue in this case is not whether Petitioner is a "person" under the Act. The Court of Appeals acknowledges the Dealers Act provides some enumerated protections to dealers from manufacturers and distributors.

Contrary to Petitioner's argument, the Court of Appeals' Opinion does not find that a motor vehicle dealer is not a "person". Rather it holds that claims arising from an alleged breach of

contract between two dealers are excluded from the Act. In order to be subject to the Dealers Act, the parties must be "persons" subject to the Act and the acts complained of must be within its scope.

Petitioner abandoned any equal protection argument. The Court of Appeals' interpretation of the Dealers Act does have a rational basis. Petitioner's argument to the contrary, citing *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004), has no merit. Under the rational basis test, the requirements of equal protection are satisfied when: (1) the classification bears a reasonable relation to the legislative purpose sought to be affected; (2) the members of the class are treated alike under similar circumstances and conditions; and, (3) the classification rests on some reasonable basis. *Denene, supra,* citing, *Fraternal Order of Police v. South Carolina Dep't of Rev.*, 352 S.C. 420, 430, 574 S.E.2d 717, 722 (2002); *Gary Concrete Products, Inc. v. Riley,* 285 S.C. 498, 504, 331 S.E.2d 335, 339 (1985).

The Court of Appeals noted the purpose of the Dealers Act is consumer protection. Opinion, p.5 citing *Freeman v. J.L.H. Investments, LP*, 414 S.C. 362, 373, 778 S.E.2d 902, 908 (2015). The Dealers Act also provides enumerated protections to dealers from manufacturers and distributors.

Consumers and dealers are treated alike under the same conditions. S.C. Code § 56-15-80 excludes claims arising from an alleged breach of contract between two dealers as well as from an alleged breach of contract between a consumer and a dealer.

The rational basis for these provisions is to provide protection for parties in a perceived weaker bargaining position. 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 for a breach of contract.

IV. THE COURT OF APPEALS PROPERLY FOUND THAT PETITIONER ABANDONED THE ARGUMENT THAT MATTERS OUTSIDE THE PLEADINGS WERE IMPROPERLY CONSIDERED BY THE LOWER COURT IN GRANTING JUDGMENT ON THE PLEADINGS

South Carolina Appellate Court Rules specify what is required in the arguments section for an appellant's brief:

> (E) Argument. The brief shall be divided into as many parts as there are issues to be argued. At the head of each part, the particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority. . . .

Rule 208(b)(1)(E), SCACR.

Petitioner cited authority in support of the Standard of Review but not in support of its argument that matters outside the pleadings were improperly considered by the lower court. Petitioner argues that its recitation of authority in the Standard of Review section of its Brief is sufficient. However, the Rules require that Petitioner discuss with citations of authority each issue argued within that section of the brief. The Court is not required to assume that authority cited in one section is intended to be argued in another. The Court of Appeals properly found Petitioner only provided a conclusory argument and therefore abandoned the issue. Opinion, p.5. 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 113, 170 (Ct. App. 2000).

V. THE COURT OF APPEALS PROPERLY AFFIRMED THE LOWER COURT'S DENIAL OF PETITIONER'S MOTION TO AMEND ITS COMPLAINT A SECOND TIME

The Court of Appeals recognized that Petitioner's Motion to Serve a Second Amended Complaint is not immediately appealable, except to the extent that it was filed to add allegations regarding the cause of action under the Dealers Act. Opinion, p. 6. Petitioner is not entitled to file

a new complaint each time it discovers an additional fact in the case. As the Court of Appeals noted, the denial of a motion to amend a second time does not limit its ability to argue any additional evidence at trial. *Id.*

The Court of Appeals correctly noted that the decision to allow or deny a motion to amend is within the sound discretion of the lower court and "will not be overturned without an abuse of discretion or unless manifest injustice has occurred." *Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997). *Id.* The Court of Appeals found no manifest injustice because the proposed Second Amended Complaint added no new causes of action and Petitioner is not prevented from arguing additional evidence at trial. *Id.*

Petitioner ignores the reasoning provided by the Court of Appeals in its Opinion as a whole in arguing the Court failed to conduct the required analysis as set forth in *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 826 S.E.2d 585 (2019). As this Court acknowledged in *Skydive,* "[a]lthough leave to amend should generally be 'freely given,' ... it may be denied where the proposed amendment would be futile." *Jennings v. Jennings* , 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010) *rev'd on other grounds* , 401 S.C. 1, 736 S.E.2d 242 (2012).

This Court also acknowledged that the Court of Appeals is not required to specifically state an amendment would "clearly" have been futile to properly consider the issue of futility in its Opinion:

> In *Jennings*, the court of appeals did not specifically state the amendment would "clearly" have been futile. A close examination of the court of appeals' explanation of its decision reveals, however, the proposed amendment in that case was "clearly futile." *See* 389 S.C. at 209, 697 S.E.2d at 681 (explaining the proposed new defendant was the attorney who was given printed emails, but had no direct access to the email account, and the alleged liability extended under the law only to persons who "actually engaged" in accessing the email account).

Skydive, supra n.2.

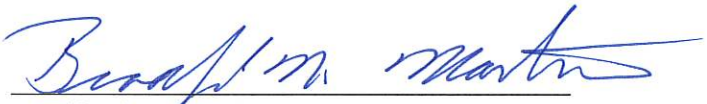
As to the Dealers Act cause of action, the Court of Appeals did address the issue of futility in finding that the issues alleged by Petitioner arise from an alleged breach of contract between two dealers, which is outside the scope of the Dealers Act. The Court of Appeals states in its Opinion that none of Petitioner's new allegations in its Second Amended Complaint change the finding that the Dealers Act does not apply to the subject case. Therefore, the proposed amendment would be futile.

CONCLUSION

The lower court and the Court of Appeals correctly analyzed the facts and law, and properly held the Dealers Act does not apply and there is no abuse of discretion in denying the third attempt to amend the Complaint. The Court of Appeals ruled unanimously in Respondents' favor. There are no special and important reasons to reverse. Respondents respectfully request this Court to deny the Writ.

Respectfully submitted,

January 9, 2025



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