

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2024-002182

RECEIVED

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S.C. SUPREME COURT

Stivers Brothers Automotive, Inc., Petitioner,

v.

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

REPLY

I. **THE COURT OF APPEALS ERRED IN AFFIRMING THE JUDGMENT ON THE PLEADINGS WITH RESPECT TO PETITIONER’S CLAIM UNDER THE DEALERS ACT**

- a. **NEITHER THE PLAIN LANGUAGE OF SECTION 56-15-80 NOR APPLICATION OF THE CANON OF CONSTRUCTION “*EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS*” SUGGESTS THAT THE DEALERS ACT WAS INTENDED TO APPLY “ONLY” TO DISPUTES INVOLVING A BREACH OF CONTRACT EXPRESSLY MENTIONED THEREIN**

The Circuit Court held and the Court of Appeals affirmed its ruling that the Regulation of Manufacturers, Distributors, and Dealers Act, S.C. Code Ann. § 56-15-10, et seq. (the “Dealers Act”), does not apply to disputes between two dealers. This error was based on an erroneous application of the plain meaning rule and a failure to harmonize the rules of statutory construction to ascertain and effectuate the intent of the legislature.

Specifically, the Circuit Court and the Court of Appeals concluded that because asset

purchase agreements (“APAs”) are not expressly contemplated by S.C. Code Ann. § 56-15-80, then dealers who enter an asset purchase agreement with one another are precluded from seeking relief under any other provision of the Dealers Act. The maxim “*expressio unius est exclusio alterius*” has been cited by Respondents throughout the years and appears once more in their Return. However, this “canon of construction” has been grossly misinterpreted and misapplied.

Respondents cite Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001) in support of the proposition that “to express or include one thing implies the exclusion of another.” On this basis, Respondents continue to argue that inclusion of “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 manufacturer has any direct or indirect interest” necessarily implies that the legislature intended APAs between dealers would be excluded.

In fact, Respondents even claim that the Dealers Act itself states that it applies “only” to those aforementioned agreements, which is demonstrably false. The word “only” appears nowhere in the statute. It is Respondents who insist that this Court concentrate on isolated words and phrases in the Dealers Act, but the words and phrases emphasized by Respondents were not put there by the legislature.

Brown, which was overruled twenty years ago on other grounds, was a post-conviction relief claim after the petitioner pleaded guilty to three counts of distributing crack cocaine within proximity of a school, in violation of S.C. Code Ann. § 44-53-445. The aforementioned code section states that it is a “*separate*” criminal offense for a person to distribute a controlled substance:

“...while in, on, or within a one-half mile radius of the grounds of a public or private elementary, middle, or secondary school; a public playground or park; a public vocational or trade school or technical educational center; or a public or private college or university.”

The petitioner in Brown acknowledged distributing crack cocaine, but while within the grounds of a day care center.

Applying the plain and ordinary meaning rule, this Court found that day care centers were not covered by the statute—“the plain and ordinary meaning of ‘elementary school’ does not encompass a day care center.” 343 S.C. at 349, 540 S.E.2d at 850. This Court cited the legal maxim of “*expressio unius est exclusio alterius*” to exclude day care centers from falling within the statute’s purview since day care centers were not expressly included. Id.

Brown is quite distinguishable from this case. First, this is not a criminal case involving construction of a penal statute, and therefore there is no rule that the statute ought to be strictly construed against one party and in favor of the other. 343 S.C. at 348, 540 S.E.2d at 849. Second, the statute in question, S.C. Code Ann. § 44-53-445, explicitly states that it constitutes a *separate* criminal offense and is not part of an Act which is intended to be construed in concert with the “same general statutory law.”

For example, Title 44, Chapter 54 also includes a statute which addresses the investigatory duties of the State Law Enforcement Division (“SLED”) with respect to suppressing the trafficking of narcotics and controlled substances. S.C. Code Ann. § 44-53-120. It would be pointless to try to harmonize the meaning of Section 44-53-445 with Section 44-54-120, or any other section within Title 44, Chapter 54. In such a case, applying the plain meaning rule and the maxim “*expressio unius est exclusio alterius*” makes perfect sense, and the statute should be read in isolation.

The same point applies to another case cited by Respondents: In re Vincent J, 333 S.C. 233, 509 S.E.2d 261 (1998). That case involved an appeal from a sentence imposed by a family court judge in a juvenile criminal contempt proceeding pursuant to S.C. Code Ann. § 63-19-1440

(formerly S.C. Code Ann. § 20-7-7810(B)). Title 63, Chapter 19, Article 13 is generally concerned with dispositional powers of the Court pursuant to the Juvenile Justice Code. S.C. Code Ann. § 63-19-1420 (formerly S.C. Code Ann. § 20-7-7807) allows the Court to suspend or restrict a child's driving license. Clearly, it would not make sense to harmonize the meaning of Section 63-19-1440 and Section 63-19-1420 where the statutes are plainly unrelated and operate independently of one another despite sharing close proximity within the South Carolina Code. Applying the plain meaning rule and citing the canon of "*expressio unius est exclusio alterius*" is appropriate in that case.

Respondents further cite Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) in support of the "*expressio unius est exclusio alterius*" canon of construction. At issue in Hodges was the interpretation of the Restructuring Act of 1993; particularly, S.C. Code Ann. § 1-3-240(b), which grants the Governor broad discretionary authority to appoint and remove executive branch officials at his or her discretion. Subsection (c) of the same statute provides an enumerated list of agencies where the Governor's power of removal is restricted.

This Court found that former Governor Hodges could remove members from South Carolina Public Service Authority in the exercise of his discretion under subsection (b) because that agency was not mentioned among the specifically enumerated list appearing in subsection (c). The Court cited the canon of construction "*expressio unius est exclusio alterius*," but further stated that "the enumeration of exclusions from the operation of a statute indicates that the statute should apply to cases not specifically excluded." 341 S.C. at 87, 533 S.E.2d at 582.

The distinction between Hodges and the present matter is that S.C. Code Ann. § 56-15-80 does not contain any such enumeration of exclusions. There is nothing on the face of the statute suggesting that the agreements listed therein are intended to be an exhaustive list. The statute

does not specifically exclude any agreement. Therefore, Respondents' reliance on Hodges and on the canon of construction "*expressio unius est exclusio alterius*" are plainly misguided.

S.C. Code Ann. § 56-15-80 does not contain express language that it is meant to be read in isolation, as is the case with S.C. Code Ann. § 44-53-445 as discussed in Brown. S.C. Code Ann. § 56-15-80 is not a miscellaneous statute situated amongst other statutes which are, at best, peripherally related as is the case with S.C. Code Ann. § 63-19-1440 as discussed in In re Vincent J. S.C. Code § 56-15-80 does not contain an enumeration of exclusions within the statute itself as does S.C. Code Ann. § 1-3-240(B) as discussed in Hodges.

Despite Respondents' insistence to the contrary, the language of S.C. Code Ann. § 56-15-80 does not limit the application of the Dealers Act to the types of agreements listed therein.¹ In fact, Freeman v. JLH Investments, LP, 414 S.C. 362, 373, 778 S.E.2d 902, 908 (2015), previously cited by Petitioner, expressly provides that "because the Legislature enacted SCCPC and the Dealers Act both for the purpose of consumer protection, *the statutes cannot be read in isolation.*" [*Emphasis added*]. Therefore, the rules of statutory interpretation are needed, particularly the rule that sections which are 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, 292 (2016). Like the statutes themselves, the rules of statutory

¹ See S.C. Code Ann. § 56-15-140 ("Venue"). Clearly, the purpose of S.C. Code Ann. § 56-15-80 is fully effectuated by harmonizing its meaning with S.C. Code Ann. § 56-15-140 so as to give motor vehicle dealers a "home field advantage" in contractual disputes with out-of-state manufacturers and distributors. Manufacturers and distributors have responded by adding forum selection and choice of law clauses to franchise agreements in order to frustrate this purpose. Only by reading S.C. Code Ann. § 56-15-80 and 56-15-140 *together* can that purpose be effectuated: "a provision of a franchise or other agreement with contrary provisions is void and unenforceable." [*Emphasis added*]. S.C. Code Ann. 56-15-140 explicitly mentions one of the type of agreements mentioned in S.C. Code Ann. § 56-15-80; it follows that they would be construed together and not read in isolation.

construction must likewise be harmonized to ascertain and effectuate the intent of the legislature.

b. NO COURT HAS EVER DENIED A DEALERS ACT CLAIM ON THE BASIS THAT IT “ARISES FROM A BREACH OF CONTRACT” NOT LISTED IN SECTION 56-15-80

It is apparent that the legislature never intended that consumers who suffer a breach of a contract at the hands of a motor vehicle dealer would be precluded from seeking relief under the Dealers Act. In fact, the Court of Appeals stated in in the Opinion: “the Legislature enacted the ... Dealers Act ... for the purpose of consumer protection.” The Dealers Act provides protections to other classes of “person,” including motor vehicle dealers, but consumer protection is certainly a priority. *See* S.C. Code Ann. § 56-15-10(n). Nevertheless, the Opinion suggests that consumers who would pursue a claim against an automobile dealer arising out of a contract would be precluded from doing so. This would abrogate decades of Dealers Act cases.

Respondents have previously argued that the Dealers Act applies “only” to parties whose contracts are expressly mentioned in S.C. Code Ann. § 56-15-80. Consumer contracts are not mentioned in § 56-15-80. Consumers with claims arising out of a motor vehicle lease or sales transaction frequently assert claims under the Dealers Act. According to the Court of Appeal’s Opinion, based on the legal maxim “*expressio unius est exclusio alterius*”, consumers with claims arising out a motor vehicle sales or lease transaction with an automobile dealer would be precluded from bringing a claim under the Dealers Act.

Respondents attempt to move the goal posts by arguing that the Dealers Act cases cited by Petitioner in support of this argument “do not allege a Dealers Act claim *arising from a breach of contract*.” These are distinctly different arguments. This particular argument suggests that Petitioner should have its Dealers Act claim restored since the basis of Petitioner’s claim was Respondents’ unfair and deceptive practices in attempting to renegotiate the APA terms after the

breach, not the breach itself. (R. 35).

Nevertheless, in Taylor v. Nix, 307 S.C. 551, 416 S.E.2d 619 (1992), the first sentence of the factual summary states that the Taylors leased an automobile and brought suit against the lessor, an automobile dealer. A lease is a type of contract. One of the claims brought by the Taylors was for breach of warranty due to a multitude of defects discovered shortly after taking possession. The case does not explicitly state whether the warranty in question arose explicitly out of the terms of the lease or by operation of law, but “claims for breach of warranty generally sound in contract.” Stoneledge at Lake Keowee Owners’ Association, Inc. v. IMK Development Co., LLC, 435 S.C. 109 135, 866 S.E.2d 542, 556 (2021). This Court stated in Taylor that “the conduct of the breach of warranty was the same conduct which was deemed to be a violation of the [Dealers Act].” 307 S.C. at 557, 416 S.E.2d at 622.

Another example of such a Dealers Act case, deBondt v. Carlton Motorcars, Inc., 342 S.C. 254, 536 S.E.2d 399 (Ct. App. 2000), arose out of the purchase of a Mercedes SLK from a motor vehicle dealer. The first sentence of the factual summary specifically states that deBondt “contracted to purchase” the Mercedes SLK. The motor vehicle dealer subsequently attempted to unilaterally cancel the contract. 342 S.C. at 261, 536 S.E.2d at 402. Ultimately, deBondt filed suit against the motor vehicle dealer seeking specific performance of the contract as well as relief under the Dealers Act.

It follows that specific performance is a remedy that only “arises from a breach of contract.” The Court of Appeals reversed the grant of summary judgment in favor of the motor vehicle dealer on the Dealers Act claim, breathing life back into the consumer’s claim. 342 S.C. at 265, 536 S.E.2d at 404-405. This would be inconsistent with the Opinion if indeed Section 56-15-80 prohibits actions “arising out of the breach of a contract” unless the type of contract is

explicitly listed therein.

II. THE COURT OF APPEALS MISINTERPRETED THE SCOPE OF THE MID-STATE AUTO AUCTION OF LEXINGTON, INC. v. ALTMAN OPINION

Respondents appear to purposely mischaracterize Petitioner's argument in order to confuse the Court. Petitioner has never asserted that Connecticut Indemnity Company v. Burdette Chrysler Dodge 317 S.C. 406, 453 S.E.2d 902 (Ct. App. 1994) "stood for the general proposition that a dealer can recover under the Dealers Act against another dealer for a *claim arising out of a breach of contract.*" Previously, Petitioner explicitly stated that Burdette is "an example of a case where a dealer had recovered against another dealer under the Dealers Act." It is frankly puzzling how the Respondents could conflate the two arguments.

Petitioner previously acknowledged that Burdette was overruled² to the extent that S.C. Code Ann. § 56-15-320(B)(7) does not allow recovery against a dealer's bond "by anyone," but the "owner of a motor vehicle." Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 476 S.E.2d 690 (1996). This is not Petitioner's unique interpretation of Altman; footnote 4 of the opinion explicitly states the extent to which Burdette was overruled. A dealer who is "the owner of a motor vehicle" can still recover against a dealer³ and a dealer's bond pursuant to the Dealers Act. [*Emphasis added*].

III. THE COURT OF APPEALS' HOLDING VIOLATES PETITIONER'S RIGHT TO EQUAL PROTECTION AS A "PERSON" UNDER THE DEALERS ACT

S.C. Code Ann. 56-15-110 states that any "person" who shall be injured in his business or

² Respondents cite to Brown, *supra*, in support of the application of "*expressio unius est exclusio alterius*" without acknowledgement that it, too, was overruled. Petitioners are arguing the same thing; just because a case has been overruled on certain grounds does not invalidate the rest of the holding.

³ S.C. Ann. § 56-15-320 (B) provides in pertinent part, "An owner or his legal representative who suffers the loss or damage has a right of action against the dealer ... and against the dealer's ... surety upon the bond and may recover damages as provided in this chapter.

property “by reason of anything forbidden in this chapter” may file an action based on the Dealers Act. The broad definition of “person” in Section 56-15-10(n) includes: “natural person, corporation, partnership, trust or other entity.” The definition of “person” is comprehensive enough to include every party to this litigation: Petitioner is a corporation; Respondent Peacock Automotive, LLC is a limited liability company which qualifies as an “other entity;” and Respondent W. Warner Peacock is a “natural person.” Petitioner complained of unfair or deceptive acts within the scope of the Dealers Act; specifically, S.C. Code Ann. § 56-15-30. (R. 30-31; 34-35).

Unfortunately, the Court of Appeals, at Respondents’ insistence, found that a “person” who happens to be a motor vehicle dealer must clear additional hurdles besides those named in S.C. Code Ann. § 56-15-110(1) in order to seek relief under the Dealers Act. Namely, if the basis of the action allegedly “arises from a breach of contract,” it must be a contract explicitly enumerated in Section 56-15-80. The phrase “arises from a breach of contract,” as well as the phrase “breach of contract,” appear nowhere in Title 56, Chapter 15.

While one purpose of the Dealers Act is certainly consumer protection, that is not the sole purpose. As Respondents have argued, motor vehicle dealers have “enumerated protections” under the Dealers Act as well. This classification, which hampers a motor vehicle dealers’ right to seek relief more than any other class of “person” in the history of the Dealers Act, bears no reasonable relation to the legislative purpose sought to be affected. Respondents speciously assert in a summary manner that motor vehicle dealers and consumers are treated alike under the same conditions. Petitioners’ argument above concerning Taylor and deBondt should dispel that notion. Consumers do not have to clear the hurdle of Section 56-15-80 even when they are a party to a contract not expressly enumerated in Section 56-15-80 in order to assert a claim under

the Dealers Act.

Respondents ironically argue that the rational basis for the unique treatment of motor vehicle dealers under the Dealers Act is the protection of parties in a perceived weaker bargaining position. This case can be summed up as follows: the Respondents took advantage of Petitioner's weaker bargaining position as the holder of assets which depreciated overnight due to the COVID-19 pandemic⁴ by refusing to close the subject APAs for pretextual reasons. This classification rests upon the Court of Appeals erroneous decision that the plain meaning rule applied and that the rules of statutory interpretation did not apply, based on a forced interpretation of the Brown, In re Vincent J, and Hodges opinions. That is to say that the classification rests upon no rational basis at all.

IV. PETITIONER DID NOT ABANDON THE ARGUMENT THAT MATTERS OUTSIDE THE PLEADINGS WERE IMPROPERLY CONSIDERED

Respondents claim that the Court of Appeals properly found that Petitioner abandoned the argument that matters outside the pleadings were improperly considered by the Circuit Court based on Rule 208(b)(1)(E), SCACR. In fact, the Court of Appeals never mentioned Rule 208(b)(1)(E) in the Opinion. Instead, the Court of Appeals stated that Petitioner argued in "summary fashion" and "without any citation to authority." Petitioner's writ of certiorari contains a summary of the various legal authorities and transcript excerpts cited in the brief.

V. THE COURT OF APPEALS ERRED IN AFFIRMING DENIAL OF PETITIONER'S MOTION TO AMEND AND SUPPLEMENT ITS COMPLAINT

Respondents assert that Petitioner is not entitled to file a new complaint each time it discovers an additional fact in the case. Ironically, Petitioner sought to file a second amended

⁴ Peacock alleged that "the world had changed, " "the coronavirus pandemic had infected over a million people," and that Petitioner's assets had suffered irreparable harm." R. p. 40.

and supplement complaint on February 5, 2021, as a result of Respondents' additional violations of S.C. Code Ann. § 56-15-30 after this action commenced. These allegations were based on Respondents' acquiring Petitioner's proprietary, confidential information under false pretenses. These allegations were further intended to rebut Respondents' disingenuous defense of failure to mitigate. Notably, these supplemental allegations did not arise out of a breach of contract.

The Court of Appeals affirmed the Circuit Court on the basis that "none of the new allegations in the second amended complaint change our finding that the Dealers Act does not apply to [Petitioner]'s action." This was based on the Court of Appeals' adoption and extension of the plain meaning rule in the context of Section 56-15-80 to mean that an action involving a breach of a contract not included within the scope of the statute cannot be brought under any other provision of the Dealers Act. As discussed above, that interpretation was erroneous, and the proposed supplemental allegations had nothing to do with a breach of contract. Even if this Court is unwilling to overrule that interpretation, this is still not the sort of futility analysis envisioned in Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 826 S.E.2d 585 (2019).

Even in the case of the Court of Appeals' and Circuit Court's erroneous interpretation, it is clear that neither court considered whether "*any* amendment would be futile." Skydive, 426 S.C. at 183, 826 S.E.2d at 589. Presumably, Petitioner could have simply removed the cause of action for breach of contract and related factual allegations and properly brought a claim under the Dealers Act. This follows the reasoning of this Court in Skydive that:

"It is not our role to determine whether the allegations Skydive might make in an amended pleading will state a valid claim. However, *we cannot definitively say it is impossible* for Skydive to plead a valid claim against Respondents." 426 S.C. at 187, 826 S.E.2d at 591. [*Emphasis added*].

Neither the opinion of the Court of Appeals nor the decision of Circuit Court contained any such

analysis and there is no indication that either court performed any such analysis. However, as Petitioner proposed above, it was not *impossible* for Petitioner to amend the complaint so as to properly assert a cause of action under the Dealers Act, notwithstanding the Courts' erroneous interpretation of Section 56-15-80.

CONCLUSION

Based on the foregoing, the Petitioner requests that this Court grant the petition for writ of certiorari.

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