

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2012-CP-23-7156

**RECEIVED**

JAN 24 2014

**SC Court of Appeals**

Toyota of Greenville, Inc. .... Appellant,

v.

David Carroll ..... Respondent.

**RETURN TO RESPONDENT’S MOTION TO DISMISS APPEAL**

Appellant respectfully requests that this Court deny Respondent’s Motion to Dismiss. This appeal is not from an Order compelling arbitration, but from the portion of the Order deciding a question of fact: Respondent was acting as a private attorney general; and applying the law to the facts: the Dealers Act allowed Respondent to act as a private attorney general. All of this is in violation of his written agreement to proceed only in an individual capacity. Therefore, Appellant is being denied its right to arbitrate with Respondent alone, which is immediately appealable under § 15-48-200(a)(1).

Also, the court’s deciding a question of fact and applying that fact to the law makes this a final judgment. *See Good v. Hartford Accident & Indem. Co.*, 201 S.C. 32, 21 S.E.2d 209, 212 (1942). Further, the finding is a decree entered pursuant to the provisions of the Uniform Arbitration Act from which an appeal can be taken under § 15-48-200(a)(6). Finally, this is a

novel issue affecting a substantial right (and many parties) that should be heard in the interest of judicial economy.

### **PROCEDURAL HISTORY OF ISSUES PRESENTED ON APPEAL**

On June 23, 2009, Respondent moved to be substituted as the named Plaintiff against Appellant in the Aiken County case of *Heather Herron, et al. v. Century BMW, et al.*, No. 06-CP-02-1230. Neither Respondent's pleadings, the Motion, nor Memorandum claimed he was acting as a private attorney general. Nevertheless, the Motion was granted on October 12, 2009. Appellant objected and filed a Motion to Alter or Amend on October 29, 2009, which was denied on February 22, 2010.

Appellant then filed its Amended Priority Motion to Dismiss based on Arbitration on June 14, 2012.<sup>1</sup> Respondent filed his Memorandum in Opposition on June 28, 2013, requesting the Motion be denied because "[a]llowing a private attorney general action under the Dealer's Act to move forward does not conflict with the purposes behind the FAA."<sup>2</sup>

The lower court fully addressed the issue raised by Respondent and found that Respondent was not acting as a private attorney general in its order of August 19, 2013. This finding was not dicta. Respondent filed a Motion to Alter or Amend on August 26, 2013, arguing that neither party had requested a ruling on the private attorney general issue. The lower court issued an amended Order on October 10, 2013 reiterating its finding that Respondent was "... acting as a private attorney general under the Dealers Act ..."<sup>3</sup> and further finding that he could proceed in that capacity despite the fact that his arbitration clause requires bilateral (one on

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<sup>1</sup> Appellant had previously reserved its right to demand arbitration in its Answer filed March 10, 2008, and had filed a Motion for Arbitration on September 19, 2011.

<sup>2</sup> Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss Based on Arbitration of June 28, 2013, p.1, ¶ II.

<sup>3</sup> Order Granting Defendant's Motion to Dismiss Based on Arbitration, filed October 10, 2013, p. 14.

one) arbitration. This appeal followed on the narrow issue of the lower court's factual finding that Respondent was a private attorney general under the Dealers Act (applying fact to law), and could proceed in that capacity in a bilateral arbitration.

### ARGUMENT

#### **I. THE ORDER COMPELS BILATERAL ARBITRATION, BUT ALSO FINDS RESPONDENT IS ACTING IN A REPRESENTATIVE CAPACITY AS A PRIVATE ATTORNEY GENERAL, WHICH MAY HAVE THE EFFECT OF DENYING BILATERAL ARBITRATION**

Respondent agreed that he would arbitrate only on an individual basis, and Appellant moved to enforce the arbitration clause as written. Now, with the lower court finding that Respondent can arbitrate on behalf of the State of South Carolina, Appellant is being denied the arbitration as agreed.

Respondent argues the private attorney general finding is *dicta* and has no bearing on the substantive issue decided in the Order. Respondent further argues that all claims addressed by the Order arise out of the arbitration clause and, therefore, there are no claims that might later be prejudiced by the Order compelling arbitration. Respondent omits the fact that he claimed to act as a private attorney general in his Motion to Substitute and again during the Motion to Compel Arbitration, thus altering his agreement to proceed only in an individual capacity.

Had the lower court not ruled on the issue, the Order would simply be an order compelling arbitration. Whether the arbitration proceeds with Respondent as a private attorney general on behalf of the State or in an individual capacity, however, affects substantial rights of the Appellant. *See Vaughn v. Saint Francis Hosp.*, 815 N.Y.S.2d 307 (N.Y. App. Div. 2006) (“[A]n order that limits the scope of issues to be tried, affecting the merits of the controversy or

substantial rights of a party, is appealable.”<sup>4</sup> In *Cooke v. Palmetto Health Alliance*, 367 S.C. 167, 624 S.E.2d 439 (Ct. App. 2006), this Court held that the circuit court’s finding that plaintiff was neither a statutory employee nor a borrowed servant and therefore the worker’s compensation exclusivity provision did not apply was a final determination of a substantial matter forming a part of the defendant’s defense and thus, the order was appealable. Likewise, the private attorney general finding affects Appellant’s defense that all claims are limited to Respondent in his individual capacity.

S.C. Code Ann. § 15-48-200(a)(1) provides that an order denying an application to compel arbitration made under S.C. Code Ann. § 15-48-20(2) is immediately appealable. It is well-settled that a party may not be compelled to submit to class arbitration absent an agreement. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013). *See, e.g., Morvant v. P.F. Chang’s China Bistro, Inc.*, 870 F. Supp. 2d 831, 846 (N.D. Cal. 2012) (“[T]he Court must enforce the parties’ Arbitration Agreement even if this might prevent Plaintiffs from acting as private attorneys general.”).

The lower court specifically found that the arbitration agreement between Respondent and Appellant requires bilateral arbitration. Therefore, the private attorney general finding may have the effect of ordering arbitration in a representative capacity, thus denying Appellant’s motion that arbitration can only proceed in a bilateral manner.<sup>5</sup> Therefore, an immediate appeal is proper and Respondent’s Motion to Dismiss should be denied.

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<sup>4</sup> The lower court’s Order determined that Respondent is acting on behalf of the State as a private attorney general. This case is therefore analogous to *Widener v. Fort Mill Ford*, 381 S.C. 522, 674 S.E.2d 172 (Ct.App.2009) in which this Court found that it had jurisdiction to hear the appeal pursuant to S.C. Code Ann. § 14-3-330 because the lower court had finally determined the rights of the parties by dismissing the action and compelling arbitration.

<sup>5</sup> The lower court’s Order provides no guidance as to what it means to be a “private attorney general.” South Carolina does not have a private attorney general statute and the South Carolina Manufacturers and Dealers Act does not refer to a private attorney general.

**II. THE ORDER FINDS THAT RESPONDENT IS TO ARBITRATE AS A PRIVATE ATTORNEY GENERAL, WHICH IS A JUDGMENT OR DECREE FROM WHICH AN APPEAL CAN BE TAKEN**

S.C. Code Ann. § 15-48-200(a)(6) provides that an appeal may be taken from “a judgment or decree entered pursuant to the provisions of this chapter.” Statutes and rules of court should be construed liberally in favor of the right of appeal. *Stroup v. Duke Power Co.*, 216 S.C. 79, 84, 56 S.E.2d 745, 747 (1949); *Haughton v. Order of United Commercial Travelers of Am.*, 108 S.C. 73, 74-75, 93 S.E. 393, 394 (1917); *O’Rourke v. Atl. Paint Co.*, 91 S.C. 399, 403, 74 S.E. 930, 931 (1912). The lower court specifically found that Respondent can proceed as a private attorney general in a bilateral arbitration in which Respondent has agreed to not act in a representative capacity.<sup>6</sup> That finding is a decree entered pursuant to the provisions of the Uniform Arbitration Act and one from which an appeal may be taken.

**III. THE LOWER COURT’S FACTUAL FINDING THAT RESPONDENT IS A PRIVATE ATTORNEY GENERAL UNDER THE DEALER’S ACT MAY HAVE THE EFFECT OF FINALLY DETERMINING THE PARTIES’ RIGHTS.**

Intermediate orders involving the merits may be immediately appealed pursuant to S.C. Code Ann. § 14-3-330(1). An order which involves the merits is one that “must finally determine some substantial matter forming the whole or a part of some cause of action or defense.” *Cooke v. Palmetto Health Alliance*, 367 S.C. 167, 624 S.E.2d 439 (Ct.App.2006) (quoting *Mid-State Distribs., Inc. v. Century Imps., Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993)). See also Jean Hofer Toal, et al., *Appellate Practice in South Carolina*, 87 (2d. Ed. 2002). Additionally, interlocutory orders affecting a substantial right may be immediately appealed pursuant to S.C. Code Ann. § 14-3-330(2). Orders affecting a substantial right

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<sup>6</sup> The lower court lacked jurisdiction to make the finding that Respondent is acting as a private attorney general. Contract interpretation and procedural matters are issues for the arbitrator. *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003).

“discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense.” *Mid-State Distribs., Inc.*, 310 S.C. at 335 n.4, 426 S.E.2d at 780 n.4.

Appellant’s right to have the Respondent proceed against it only in an individual capacity, rather than in a representative capacity, is a substantial right forming part of the cause of action that has been determined by the lower court.<sup>7</sup> An arbitrator may feel bound to apply the lower court’s finding that Respondent is a private attorney general and can proceed in a bilateral arbitration in that capacity.

**IV. THIS IS A NOVEL ISSUE AFFECTING A SUBSTANTIAL RIGHT THAT SHOULD BE HEARD IN THE INTEREST OF JUDICIAL ECONOMY**

Moreover, this issue presents a novel question of law which should be addressed at this time in the interest of judicial economy and guidance to the bench and bar. *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008). Immediate appeals have been granted in cases where arbitration was compelled. *See York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 749 S.E.2d 139 (Ct.App.2013); *Toler’s Cove Homeowners Ass’n v. Trident Constr. Co.*, 355 S.C. 605, 586 S.E.2d 581 (2003); *Episcopal Housing Corp. v. Fed. Ins. Co.*, 273 S.C. 181, 255 S.E.2d 451 (1979) (granting an appeal from an order consolidating two arbitration proceedings); *McKinney v. Greenville Ice & Fuel Co.*, 232 S.C. 257, 101 S.E.2d 659 (1958) (allowing an appeal from an order denying a motion to consolidate two tort actions).

The issue presented is capable of repetition and needs to be addressed, making it appropriate for the Court to review. *See Toler’s Cove Homeowners Ass’n v. Trident Constr. Co.*,

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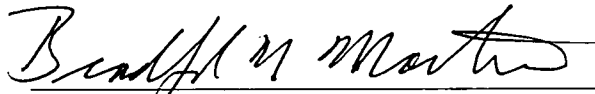
<sup>7</sup> The lower court lacked jurisdiction to make the finding that Respondent is acting as a private attorney general. Contract interpretation and procedural matters are issues for the arbitrator. *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). “[A]n order that is not directly appealable will nevertheless be considered if there is an appealable issue before the Court and a ruling on appeal will avoid unnecessary litigation.” *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 360, 409 S.E.2d 340, 341 (1991), *overruled on other grounds by Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995).

355 S.C. 605, 586 S.E.2d 581 (2003). Hundreds of defendants in *Herron* were involuntarily dismissed from that case after being named as Defendants in the Aiken County case of *Adams, et al. v. Action Ford, et al.* No. 2007-CP-02-1232. The lower court has both cases under a complex case designation. The *Adams* case has been stayed pending determinations in *Herron*. The same issue will be raised by many of the defendants in *Adams* with arbitration provisions.

**CONCLUSION**

Appellant is seeking to appeal the narrow issue of the lower court's finding that Respondent is a private attorney general and can proceed in that capacity in a bilateral arbitration when his arbitration clause allows him to arbitrate only in an individual capacity. For the foregoing reasons, Respondent's motion should be denied and the appeal allowed to proceed.

January 21, 2014



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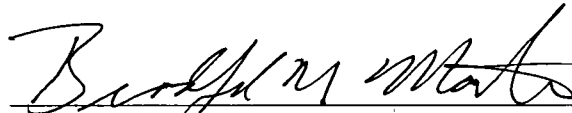
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**PROOF OF SERVICE**

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I certify that I have served Appellant's Return to Respondent's Motion to Dismiss Appeal by depositing a copy in the U.S. Mail, postage prepaid, on January 21, 2014, addressed to Respondent's attorneys, Terry E. Richardson, Jr., Esq., Brady R. Thomas, Esq., James David Butler, Esq., Richardson, Patrick, Westbrook & Brickman, LLC, P.O. Box 1368, Barnwell, South Carolina 29812; A. Camden Lewis, Esq., Lewis & Babcock, LLP, PO Box 11208, Columbia, SC 29211; Gedney M. Howe, III, Esq., Gedney M. Howe, III, PA, Post Office Box 1034, Charleston, South Carolina 29402; Michael E. Spears, Esq., Michael E. Spears, PA, Post Office Box 5806, Spartanburg, South Carolina 29304; and Richard A. Harpootlian, Esq., Richard A. Harpootlian, PA, Post Office Box 1090, Columbia, South Carolina 29211.

January 21, 2014



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January 21, 2014

The Honorable Jenny Abbott Kitchings  
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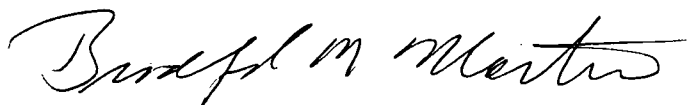
Re: *David Carroll v. Toyota of Greenville, Inc.*  
C/A No.: 2012-CP-23-7156  
SC Court of Appeals Case No. 2013-002599

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Appellant's Return to Respondent's Motion to Dismiss Appeal and a Proof of Service in the above matter. Please file with the records of your Court and return a stamped copy to me in the enclosed envelope.

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,



Bradford N. Martin

/pm  
Enclosures

cc: Terry E. Richardson, Jr., Esq.  
Brady R. Thomas, Esq.  
James David Butler, Esq.  
A. Cam Lewis, Esq.  
Gedney M. Howe, III, Esq.  
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**SC Court of Appeals**



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