THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III

2012-CP-39-01554

Julie Freeman Hair,

Appellant-Respondent,

v.

J.L.H. Investments, LP, aka Hendrick Honda of Easley,

Respondent-Appellant.

APPELLANT'S BRIEF OF RESPONDENT-APPELLANT HENDRICK HONDA OF EASLEY

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STATEMENT OF THE CASE

The Complaint in this action, originally styled *Heather Herron, et al. v. CarMax Auto Superstores, Inc., et al,* 06-CP-02-1230, was filed in the Court of Common Pleas for Aiken County on August 29, 2006, and named four individuals as Plaintiffs and 51 motor vehicle dealers as Defendants. (R. at 113-28). Plaintiffs alleged (1) that Defendants charged vehicle purchasers administrative or closing fees in a misleading and deceptive manner in violation of the South Carolina Regulation of Manufacturers, Distributors and Dealers Act, S.C. Code Ann. § 56-15-10 *et seq.* ("Dealers Act"), and (2) that Defendants engaged in a civil conspiracy to harm Plaintiffs. Plaintiffs sought damages under the Dealers Act and a declaratory judgment that Defendants' practice of charging closing fees was improper. This Complaint made no reference to S.C Code Ann. § 37-2-307 (the "Closing Fee Statute" or "Statute"), which specifically authorizes the charging of closing fees, subject to four straightforward requirements. The Statute is part of the Consumer Protection Code, S.C. Code Ann. § 37-1-101, *et seq.* ("Consumer Code"), and is administered by the South Carolina Department of Consumer Affairs ("Department").

A First Amended Complaint was filed on October 31, 2006, making similar factual allegations, but also alleging violations of the Closing Fee Statute.[1] (R. at 185-86). On January 30, 2007, Chief Administrative Judge Doyet A. Early, III assigned this case to himself for pre-trial purposes.[2] (R. at 1).

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[1] The First Amended Complaint also added four Plaintiffs and 273 motor vehicle dealers as Defendants, bringing the total number of Defendants to 324.

[2] By order dated July 11, 2012, this Court assigned Judge Early to this case for trial and disposition purposes. (R. at 43).

Defendants moved to dismiss on various grounds, including improper joinder, improper venue, failure to comply with Rule 23, SCRCP, and lack of standing. (R. at 314-22). The trial court denied the motions on July 31, 2007. (R. at 2-4). Among other things, the trial court ruled that S.C. Code Ann. § 56-15-110(2) created a substantive right to proceed as a "group action," and therefore, Plaintiffs did not need to plead or prove the elements required for bringing a class action under Rule 23.

On October 2, 2007, the trial court approved a class action settlement with respect to CarMax Auto Superstores, Inc. ("CarMax"), a defendant named in the Complaint and the First Amended Complaint. There, the trial court found that the prerequisites for class certification under Rule 23, SCRCP had been met and required CarMax to comply prospectively with the four requirements of the Closing Fee Statute. (R. at 5-12). The order approving the Car Max settlement did not mention any other requirements for compliance with the Statute. In fact, the court-approved CarMax settlement agreement contained an escalation clause allowing CarMax to increase its closing fees without regard to dealer cost or profit. (R. at 273). Plaintiffs, including Julie Freeman Hair, asserted that the CarMax settlement was fair, just, and reasonable and requested that it be approved and incorporated into the trial court's order. (R. at 257-58).

Plaintiffs then moved to dismiss all parties named in the First Amended Complaint except seven of the original Plaintiffs and the seven Defendants from which those Plaintiffs purchased vehicles, including Hendrick Honda of Easley ("Hendrick Honda"). (R. at 323-29). That motion was granted on January 31, 2008. (R. at 13-26).[3]

[3] On September 4, 2007, Plaintiffs' counsel filed an additional, essentially identical action, *Adams, et al., v. Action Ford Mercury, et al.*, Aiken County Court of Common Pleas, 07-CP-02-1232, against more than 200 automobile dealers previously dismissed

On May 28, 2009, Plaintiffs, including Julie Freeman Hair ("Hair"), filed motions for declaratory judgment against the respective defendants from whom they had purchased vehicles, including Hendrick Honda. (R. at 342-43). The motion sought an order declaring:

> 1. Defendant violated the Closing Fee Statute by failing to disclose its practice of charging closing fees whenever it advertised a price for its motor vehicles;
> 2. Defendant violated the Closing Fee Statute by charging closing fees in amounts that exceeded reimbursement of certain overhead costs;
> 3. That unless the Closing Fee Statute is followed, closing fees are illegal; and
> 4. Defendant's charging of illegal closing fees violates § 56-15-30(a) of the Dealers Act.

Hendrick Honda filed a memorandum and affidavits in opposition. (R. at 1104-1269). At the hearing, Plaintiffs changed the scope of requested relief from the four demands listed above to seeking definitions of two terms: "closing fee" and "advertised price." (R. at 1273-75). The trial court issued an order dated January 11, 2010, which was confined in its application to the claims of Plaintiff Michael Ritz against Defendant Taylor Toyota (the "Declaratory Judgment Order").[4] (R. at 27-39). After lengthy discussion and analysis, the Declaratory Judgment Order defined the specified terms as follows:

> (1) A "closing fee" is a pre-determined set fee for the reimbursement of closing costs, such as document retrieval and document preparation, but only those actually incurred by the dealer and necessary to the closing of the transaction.
> 2) An "advertised price" is a notice given by the seller of a product or service to the general public for the purpose of attracting customers by

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from this action. That case was also assigned to Judge Early, and is now stayed by order of the trial court.

[4] The trial court declined to enter an order on the motions for declaratory judgment against the other Defendants because all of the Defendants other than Taylor Toyota had outstanding objections to venue. (R. at 27).

> means of printed announcements in handbills, signs, catalogs, or letters or announcements paid by or on behalf of the seller in newspapers, radio, television, or electronic media.

(R. at 39).[5] *Ritz v. Taylor Toyota* was later tried before a jury, resulting in a defense verdict on similar facts and an almost identical jury charge to those presented here.[6]

On August 31, 2012, the trial court severed the claims of the remaining Plaintiffs and Defendants for separate trials and dismissed the civil conspiracy cause of action. (R. at 44-45). This case was transferred to Pickens County at that time. (*Id.*). Following its severance, the trial court issued an order on December 18, 2012, applying the Declaratory Judgment Order to this case. (R. at 46-47).

On January 16, 2013, Hair filed a Third Amended Complaint, alleging two causes of action: (1) violation of the Dealers Act, and (2) declaratory judgment. (R. at 202-18). Hendrick Honda filed an Answer on February 7, 2013, and an Amended Answer on September 12, 2013, alleging the following defenses: (1) general denial, (2) arbitration as to certain members of the group, (3) failure to plead or meet the requirements of Rule 23, SCRCP, and unconstitutionality of S.C. Code Ann. § 56-15-110(2) to the extent that compliance with Rule 23 is not required, (4) absence of a Dealers Act remedy, (5) defenses under the safe harbor and good faith error provisions of the South Carolina Consumer Protection Code, (6) application of the filed rate doctrine, (7) waiver and estoppel, (8) application of the voluntary payment doctrine, (9) injury reasonably

[5] The Defendants, including Hendrick Honda, sought to appeal this ruling, but the appeal was dismissed as premature and interlocutory on July 2, 2010. (R. at 40-42).

[6] By way of example, during the charge conference in this action, the trial court responded to Hendrick Honda's arguments with "Thank you. You're protected. I'm going to charge it just like I charged in Aiken." (R. at 1426:18-19).

avoidable and related defenses based on Hair's conduct, (10) failure to state a claim, (11) inapplicability of punitive damages, and (12) unconstitutionality of the Closing Fee Statute as applied in the Declaratory Judgment Order. (R. at 219-35).

On February 4, 2013, Hendrick Honda served a Second Amended Motion to Establish Procedural Requirements, Declare the Scope of the Plaintiff Group, and Require Plaintiff to Give Notice to the Plaintiff Group, which renewed and amended a similar motion filed on December 8, 2010, which had not yet received a ruling. (R. at 1277-97). In its motion, Hendrick Honda sought (1) to require Hair to plead and prove the procedural requirements of Rule 23, SCRCP, (2) to declare that the group of persons represented by Hair was limited to persons who paid closing fees to Hendrick Honda during the four years prior to the commencement of the action, and (3) to require Hair to give notice and an opportunity to opt out of the Plaintiff group prior to any trial or other decision on the merits. By order dated March 20, 2013, the trial court declined to revisit its rulings relating to Rule 23 and whether this case must proceed as a Rule 23 class action. (R. at 49). The trial court further declared that the group represented by Hair with respect to her claims for damages under the Dealers Act was limited to persons who paid closing fees to Hendrick Honda during the four years prior to August 29, 2006, and that the group members were entitled to notice and an opportunity to opt out prior to any decision on the merits.[7] (*Id.*).

[7] The trial court did not make any ruling as to Hair's second cause of action for declaratory judgment seeking an injunction and disgorgement on behalf of all persons who purchased vehicles from Hendrick Honda after the Complaint was filed. The Parties agreed that any trial of those claims would be a non-jury trial to be held, if at all, after a jury trial on the claims of the pre-complaint purchasers. (R. at 50).

On September 5, 2013, the trial court denied Hendrick Honda's Motion for Judgment on the Pleadings which argued that the exclusive remedy for violation of the Closing Fee Statute lies in the Consumer Code rather than in the Dealers Act. (R. at 59-67). In response to Hendrick Honda's Motion for Summary Judgment, Hair abandoned all claims relating to advertising and all claims for punitive damages. (R. at 70). The trial court denied Hendrick Honda's remaining argument for summary judgment pursuant to the voluntary payment doctrine on September 10, 2013, finding that the voluntary payment defense presented questions for a jury. (R. at 68-70).

During a four-day trial, Hendrick Honda made oral and written directed verdict motions at the close of Hair's case and renewed those motions at the close of the evidence. (R. at 1418:13-1428:22, 1614:22-1615:6). The trial court denied these motions. (*Id.*). Hendrick Honda also filed written Requests to Charge and a proposed Verdict Form. (R. at 1618-47). Hendrick Honda renewed its objections to the Charges and Verdict Form prior to the jury's deliberations. (R. at 1665:17-18).

The jury returned a verdict in Hair's favor for $1,445,786.00 on September 19, 2013, which represented one hundred percent of all closing fees collected by Hendrick Honda during the applicable period. (R. at 1666). The trial court gave the parties ten days to make any post-trial motions. (R. at 1667:1-7). Hendrick Honda moved for a new trial or judgment notwithstanding the verdict ("JNOV") on September 27, 2013. (R. at 1668-81). Hair served three post-trial motions on September 30, 2013: (1) motion to double damages; (2) motion for pre-judgment interest; and (3) motion for attorney's fees. (R. at 1683-1706). The trial court heard all post-trial motions on December 4, 2013.

Subject to a provision that the order would be vacated should Hendrick Honda prevail on appeal, the trial court entered a consent order regarding attorney's fees and costs on January 7, 2014. (R. at 72-73). The trial court denied Hendrick Honda's post-trial motion and granted Hair's motion to double damages. (R. at 80-110, 74-75). It also denied Hair's motion for pre-judgment interest on the grounds that this claim did not fall within the parameters set by S.C. Code Ann. § 34-31-20(A). (R. at 76-79). Hendrick Honda moved for reconsideration on March 26, 2014, seeking a ruling as to several matters on which the trial court failed to rule. (R. at 1707-08). The trial court denied the motion on March 31, 2014. (R. at 111-12). This cross-appeal followed.

FACTS

I. HENDRICK HONDA PROPERLY REGISTERED ITS CLOSING FEE WITH THE DEPARTMENT, DISCLOSED THE FEE ON ITS SALES FORMS, AND DISPLAYED A NOTICE REGARDING CLOSING FEES IN THE DEALERSHIP.

The Department administers the Closing Fee Statute, which reads in full as follows:

> Every motor vehicle dealer charging closing fees on a motor vehicle sales contract shall pay a one-time registration fee of ten dollars during each state fiscal year to the Department of Consumer Affairs. The closing fee must be included in the advertised price of the motor vehicle, disclosed on the sales contract, and displayed in a conspicuous location in the motor vehicle dealership.

S.C. Code Ann. § 37-2-307.

In implementing the Closing Fee Statute, the Administrator of the Department issued Administrative Interpretation No. 2.307-0101, regarding the Closing Fee Statute on June 7, 2001 ("Administrative Interpretation"), which describes the process for annual registration of a dealer's closing fee with the Department and other requirements for complying with the Closing Fee Statute. (R. at 1725-28). As noted in the Administrative

Interpretation, prior to the enactment of the Statute, there had been "some question concerning the propriety of charging such fees." (R. at 1725).[8] In providing guidance for dealerships charging closing fees, the Administrative Interpretation follows the language of the Statute and provides in part:

> [A]ny dealer choosing to assess a closing or documentation fee must: 1.) File a registration fee of ten dollars ($10.00) with the Department each state fiscal year prior to the assessment of a closing fee; 2.) Disclose the closing fee on its sales contract; 3.) Display in a conspicuous place in the dealership a statement that indicates the closing fee may be charged; and 4.) If the closing fee is charged, and the vehicle is advertised, the closing fee must be included in the advertised price so that consumers cannot be unfairly surprised by having the closing fee added on after the acceptance of an advertisement's terms. In the absence of any of these requirements, the charging of a closing or other similar fee is an excess charge for Consumer Protection Code purposes.

(R. at 1726).

Danny Collins, the Department's Deputy for Regulatory Enforcement and General Counsel, testified at trial that the purpose of the Administrative Interpretation was "to give dealers guidance on how to comply with the Closing Fee Statute when it

[8] The history of the three South Carolina cases relating to closing fees brought prior to the enactment of the Statute was presented to the trial court as an attachment to a status conference memorandum submitted in January 2007. (R. at 247-50). It is important to note that none of the plaintiffs in those cases challenging the legitimacy of the closing fee under the Dealers Act prevailed either on or after appeal. (*Id.*). *See Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 404 S.E.2d 200 (1991) (finding Dealers Act case challenging closing fees met amount in controversy requirement under Rule 23, SCRCP and remanding matter for further proceedings. Upon information and belief, this case was ultimately settled for a nominal amount.); *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 472 S.E.2d 242 (1996) (holding that the closing fee was neither an illegal additional charge under S.C. Code Ann. § 37-2-202 nor unconscionable under S.C. Code Ann. § 37-5-108. Following remand, trial court granted the dealership's motion for summary judgment on Dealers Act claims because the fee was simply a component of the negotiated cash price of the vehicle, it was fully disclosed to the purchaser, and the dealer's conduct was not arbitrary, in bad faith, or unconscionable.); *Ferguson v. Charleston Lincoln/Mercury, Inc.*, 349 S.C. 558, 564 S.E.2d 94 (2002) (affirming the denial of Rule 23 class certification in a case seeking money damages and a representative action under the Dealers Act filed prior to the enactment of the Statute).

became effective." (R. at 1543:8-11). Collins testified that the Department does not need dealership financial information in order to assess the reasonableness of a closing fee because "[t]he law says that they can do it and we don't go into how much they can charge unless it's extreme." (R. at 1547:15-19). Collins testified that in the past the Department had rejected a proposed fee as excessive and that the Department does not scrutinize proposed fees of less than $1,000. (R. at 1559:5-7, 1564:13-16).

Hendrick Honda registered a closing fee of between $249 and $399 with the Department in each of the years at issue in this case. (R. at 1547:20-1549:20, 1736-45). Hendrick Honda did so using the registration form provided by the Department, which the Department processed, marked "CERTIFIED MOTOR VEHICLE DEALER CLOSING FEE," and returned to Hendrick Honda. (*Id.*). The form provides the following instruction, "3. Listed below on this form is a suggested format for disclosing closing fees. It is not required that dealers use this format and language on this form, *but if you do, you will be deemed compliant if the form is properly filled out.*" (R. at 1736, 1738) (emphasis added). The Department does not require dealerships to use this form language, but Collins testified that if a dealership chooses to use it, "it gives them better protection." (R. at 1546:12-18). As provided in the Administrative Interpretation, "[f]orms considered to be deceptive or that misstate the law will be rejected by the Department." (R. at 1726).

Collins testified that Hendrick Honda filed the registration form, paid the registration fee, and received Department certification for each of the years between 2002 and 2006. (R. at 1547:20-1549:20). Dealership personnel testified that the registration form containing the "Disclosure of Closing Fees Notice" was posted in the dealership

during this period, and Collins confirmed that such a posting would satisfy the Department. (R. at 1488:4-15, 1550:12-16). Collins further testified that the disclosure of the fees in Hair's disclosure paperwork as an "administration fee" or a "procurement fee" was sufficient for Department purposes. (R. at 1551:20-23). Finally, Collins testified that if Hair had filed a complaint with the Department about the assessment of the closing fee in her transaction with Hendrick Honda, the complaint would have been dismissed. (R. at 1557:4-1558:3). Hair does not dispute these facts. (R. at 1319:9-20).

II. IN HAIR'S TRANSACTION AT HENDRICK HONDA, THE CLOSING FEE WAS FULLY DISCLOSED, AND HAIR WAS COMPLETELY SATISFIED.

Hair purchased a white 2005 Honda Accord from Hendrick Honda on July 12, 2006. (*See* R. at 1783). The vehicle was a Honda certified used car. (R. at 1776-77; R. at 1451:3-1452:1). The purchase occurred after extensive negotiations over two days between the parties, in which the vehicle asking price was reduced from $18,995 to $17,975. (R. at 1368:16-1400:8). During those negotiations, Hendrick Honda presented Hair with documents disclosing a $299 "administration fee" or "procurement fee." (R. at 1770, 1783; R. at 1362:20-1363:25). Hair testified she was fully aware of the fee at the time she bought the car, thought it was "just part of the transaction," and knew she was free to ask questions about the fee. (R. at 1363:1-2, 1391:4-7). She further testified the fee was "what I needed to pay to get the car. To be honest, I didn't pay a whole lot of attention to it." (R. at 1363:23-25). Hair repeatedly testified that she was prepared to walk away if she did not get the deal she wanted. (R. at 1373:13-21, 1390:21-25, 1400:13-17). Hair further admitted she was fully satisfied with her experience with Hendrick Honda.

> Q: So, in general terms, Ms. Hair, you were happy with the car you bought, happy with the price you paid, happy with the people at Hendrick

> Honda of Easley who you say treated you very politely and courteously and answered any questions you might have had. Correct?
>
> A: Yes. I was very happy at the time I bought the car.

(R. at 1401:18-25).

Hendrick Honda kept the documents associated with the sale to Hair in a file known in the industry as a "deal jacket" in the same manner and type of file that it keeps for every transaction at Hendrick Honda. (R. at 1748-1800; *see* R. at 1440:11-19). The file contains copies of all the paperwork required to document and implement the sale transaction under state and federal law and the compliance policies of Hendrick Automotive Group and American Honda Motor Company. (*Id.*). Hair testified that Hendrick Honda handled all of the paperwork associated with the transaction, including title and registration. (R. at 1398:10-1400:3). Hair does not allege that her transaction was not properly executed and documented, nor does she contest that Hendrick Honda complied with the "technical" requirements of the Closing Fee Statute. (R. at 1319:14-20).

Despite her satisfaction with her transaction at Hendrick Honda, Hair later had a conversation with a personal friend and attorney of record in this case, Brady Thomas, which caused her to bring this suit alleging that the closing fee charged by Hendrick Honda violated the Dealers Act. (R. at 1355:25-1356:4, 1364:1-1365:26).

ARGUMENTS

I. THE TRIAL COURT ERRED IN NOT ENTERING JUDGMENT IN FAVOR OF HENDRICK HONDA BECAUSE HENDRICK HONDA COMPLIED WITH THE CLOSING FEE STATUTE AND THE DEPARTMENT'S ADMINISTRATIVE INTERPRETATION.

This case never should have reached the trial phase as a "group action" under the Dealers Act. How can Hendrick Honda be liable for a multi-million dollar judgment for doing exactly what the Statute said it could do in exactly the way the Department instructed? This cannot have been the intent of the legislature, and this judgment must be reversed.

The trial court erred in failing to apply the plain language of the Closing Fee Statute and in failing to otherwise apply the terms of the Consumer Code. As it stands, the trial court's interpretation of two unambiguous words ("closing fee") out of the sixty-three word Statute resulted in a judgment of nearly $4,000,000 against a dealership that the Department found complied with the Statute. The result here throws into question the Department's authority and the reliance of the entire dealership industry on that authority.

In reviewing an order denying a motion for JNOV, this Court must view the evidence and its inferences in the light most favorable to the non-moving party. *Jackson v. Speed*, 326 S.C. 289, 304, 486 S.E.2d 750, 757 (1997). If the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and motions for directed verdict and JNOV are properly denied. However, if only one reasonable inference can be drawn from the evidence, the motion must be granted. *Hainer v. American Medical Int'l., Inc.*, 320 S.C. 316, 320, 465 S.E.2d 112, 115 (Ct. App. 1995). As stated by this Court, "[w]hen we review a trial judge's grant or denial of a motion for directed verdict or JNOV, we reverse only when there is no evidence to support the ruling

or when the ruling is governed by an error of law." *Watson v. Ford Motor Co.*, 389 S.C. 434, 455, 699 S.E.2d 169, 180 (2010).

With respect to this Court's standard of review in considering the trial court's construction of the Closing Fee Statute, the Consumer Code, and the Dealers Act,

> [q]uestions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below. The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature. When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. In interpreting a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Further, 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.

In re Estate of Gurnham, 407 S.C. 194, 203-04, 754 S.E.2d 875, 879 (2014) (citations and quotations omitted).

A. There is no cause of action under the Dealers Act for an alleged violation of the Closing Fee Statute.

Hair did not seek recovery under the Consumer Code, opting instead to pursue a representative action and double damages under the Dealers Act. However, there is no cause of action available under the Dealers Act for a violation of the Closing Fee Statute. The exclusive statutory remedy for violations of the Statute lies within the Consumer Code.

1. The Closing Fee Statute and the Consumer Code comprehensively govern closing fees.

The Closing Fee Statute, found in Chapter 2 of the Consumer Code, is the only South Carolina statute that refers to "closing fees" in "motor vehicle sales contracts," and it provides a statutory scheme authorizing and regulating the charging of closing fees. Remedies for violations of the Statute are provided by Chapter 5 of the Consumer Code,

and include recovery of actual damages, statutory penalties, and attorney's fees. *See* S.C. Code Ann. § 37-5-202 (2), (3), and (8).

There are two statutory defenses available to dealers under the Consumer Code for alleged violations of the Closing Fee Statute: the Safe Harbor Defense (S.C. Code Ann. §§ 37-6-104(4) & -506(3)) and the Good Faith Error Defense (S.C. Code Ann. § 37-5-202(7)). The Safe Harbor Defense provides that there is no liability for actions taken in conformity with and reliance upon a written interpretation of the Administrator of the Department. The Good Faith Error Defense provides that there is no liability for a violation of the Statute if the violation was unintentional and occurred despite the maintenance of procedures reasonably adapted to avoid a violation.

2. The Dealers Act does not mention closing fees.

By contrast, the Dealers Act does not mention closing fees. The Dealers Act does, however, provide for double actual damages, and if the conduct was malicious as determined by the jury, for treble punitive damages. S.C. Code Ann. § 56-15-110. The Dealers Act also allows for class actions, and the statute of limitations is four years as opposed to one year under the Consumer Code. *Id.*; *compare* S.C. Code Ann. § 56-15-120 *with* S.C. Code Ann. § 37-5-202(1). Finally, the Dealers Act provides no statutory affirmative defenses to Hendrick Honda. For these reasons, it is easy to see why Hair pursued a claim under the Dealers Act instead of a claim under the Consumer Code, although her decision to do so does not render her Dealers Act claim viable.

3. Hair's exclusive remedy for any claim involving closing fees in a motor vehicle sales transaction is under the Consumer Code, not the Dealers Act.

Although the Dealers Act applies in certain consumer contexts, it does not apply here in light of the plain language of the Closing Fee Statute and its placement in the

Consumer Code. Numerous basic principles of statutory construction support the conclusion that the legislature intended for closing fees to be governed by the Statute and the Consumer Code to the exclusion of the Dealers Act.

First, "[a]s a rule, specific laws prevail over general laws . . . ." *State v. Sullivan*, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993); *Duke Power Co. v. South Carolina Public Service Comm.*, 284 S.C. 81, 88, 326 S.E.2d 395, 399 (1985). The Closing Fee Statute is the only statute that mentions closing fees and it covers no other subject but closing fees in a motor vehicle sales contract. By contrast, the Dealers Act is a general law which does not mention closing fees and very generally proscribes unfair and deceptive acts and practices as defined in that chapter.[9]

Second, "later legislation takes precedence over earlier legislation." *Lloyd v. Lloyd*, 295 S.C. 55, 57-58, 367 S.E.2d 153, 155 (1988). The Closing Fee Statute was enacted in 2000, 28 years after the Dealers Act became law in 1972. 1972 Act No. 1237, 1972 S.C. Acts 2419, §§ 4(a) & 5(1); 2000 Act No. 387, 2000 S.C. Acts 3311, Part II, § 82. Therefore, the Statute takes precedence over the Dealers Act. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 412-13, 526 S.E.2d 716, 719 (2000).

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[9] In a contractual context like this one, the Dealers Act is not applicable, as it governs only "written or oral agreements between a manufacturer, wholesaler or distributor with a motor vehicle dealer." S.C. Code Ann. § 56-15-80. The exclusion of motor vehicle sales contracts from this list indicates that the legislature intended to exclude them. *See Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) ("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.'"). This exclusion does not leave consumers without protection because closing fees in motor vehicle sales contracts are treated comprehensively under the Consumer Code. Hendrick Honda does not argue that the Dealers Act cannot apply in a consumer context. Rather, it argues that the Dealers Act does not apply to closing fees charged in motor vehicle sales contracts because the more specific and later-enacted Closing Fee Statute comprehensively treats that subject.

Third, the timing of the Statute's enactment and its placement within the Consumer Code indicate legislative intent that the Consumer Code exclusively governs closing fees. "There is a presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects." *Lexington Law Firm v. S.C. Dep't of Consumer Affairs*, 382 S.C. 580, 587, 677 S.E.2d 591, 594 (2009). Such is the case here. In 1996, four years before the enactment of the Closing Fee Statute, this Court held that a closing fee charged by a motor vehicle dealer was merely a component of the negotiated cash price of a vehicle and did not violate the Consumer Code. *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 403-04, 472 S.E.2d 242, 245 (1996). However, the *Fanning* court also stated in a footnote: "By our holding we do not imply that inclusion of such fees may not be attacked on other grounds, such as claims for fraud, misrepresentation or unfair trade practices." *Id.* at 404, n.8, 472 S.E.2d at 245, n.8.

After *Fanning*, the legislature statutorily authorized and regulated closing fees by enacting the Closing Fee Statute as a new section of the Consumer Code. The new statute codified the rule in *Fanning* that closing fees are not illegal as a matter of law, but it imposed specific regulatory requirements requiring registration with the Department and disclosure to consumers by dealerships charging a closing fee.

Also telling is the placement of the Closing Fee Statute within the Code of Laws. The legislature could have put this new provision anywhere. For example, it could have included it in an unfair trade practices statute as suggested in *Fanning*, such as the Unfair Trade Practices Act ("UTPA") or the Dealers Act. Instead, it chose to place it under the purview of the Department within the Consumer Code, a deliberate decision by the

legislature which must be given deference. As such, the rights, remedies, and defenses with respect to the Statute are established by the Consumer Code.

Fourth, the plain language of the Consumer Code reveals legislative intent that it is the exclusive statute governing the regulation of closing fees in motor vehicle sales contracts, because it was "intended as a unified coverage of its subject matter." S.C. Code Ann. § 37-1-104. In expressing the reach of the Consumer Code, the legislature provided that "[u]nless displaced by the particular provisions of this title, the Uniform Commercial Code ["UCC"] and the principles of law and equity, including the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause supplement its provisions." S.C. Code Ann. § 37-1-103.[10] Neither the Statute nor the Consumer Code refers to the Dealers Act, and therefore, there is no reservation of claims under the Dealers Act.[11]

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[10] Hair's argument that § 37-1-103 "clarifies" that the Consumer Code is intended to "supplement other principles of law" including the Dealers Act is without merit. Section 37-1-103 does not include the Dealers Act in the list of allowable supplements to the Consumer Code, and "to express or include one thing implies the exclusion of another, or of the alternative.'" *Hodges* at 86-87, 533 S.E.2d at 582. "Exceptions strengthen the force of the general law and enumeration weakens it as to things not expressed." *Id.* "[This] maxim should be used to accomplish legislative intent, not defeat it." *S.C. Dep't of Consumer Affairs v. Rent-A-Ctr., Inc.,* 345 S.C. 251, 256, 547 S.E.2d 881, 884 (Ct. App. 2001). This argument is further bolstered by other statutes which provide for general nondisplacement. *See* S.C. Code Ann. § 39-5-160 (stating that "the powers and remedies provided by [the UTPA] shall be cumulative and supplementary to all powers and remedies otherwise provided by law").

[11] This absence is significant because the legislature has enacted other statutes expressly stating that a violation of one statute is considered a violation of another statute. *See, e.g.,* S.C. Code Ann. § 44-79-120 (violation of the Physical Fitness Services Act is a violation of the UTPA); § 27-32-55 (violation of time share statute is violation of UTPA); §§ 38-77-341, -93-90 (violation insurance chapter provisions are violations of UTPA); § 39-57-80 (violation of Business Opportunity Sales Act is violation of UTPA).

This Court has held that virtually identical language in the UCC displaced common law and other remedies where the UCC comprehensively dealt with a subject. *Hitachi Electronic Devices (USA), Inc. v. Platinum Techs., Inc.*, 366 S.C. 163, 170-71, 621 S.E.2d 38, 41 (2005). Like the Consumer Code, the UCC has a provision providing:

> Unless displaced by the particular provisions of [the UCC], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy or other validating or invalidating cause shall supplement its provisions.

S.C. Code Ann. § 36-1-103. Based on that provision, "[d]isplacement occurs when one or more particular provisions of the UCC comprehensively address a particular subject." *Hitachi* at 170, 621 S.E.2d at 41. Given this rule, § 37-1-103 displaces the Dealers Act because the Consumer Code comprehensively and specifically addresses closing fees, while the Dealers Act does not mention closing fees at all.[12]

Here, in ruling that there was not a displacement, the trial court relied on language from the Administrative Interpretation discussing *Fanning*. *Fanning* effectively confirmed that dealers had a common law right to charge closing fees, subject to claims such as "fraud, misrepresentation or unfair trade practices." *Id.* at 404 n.8, 472 S.E.2d at 245 n.8. However, in response to *Fanning*, the legislature enacted the Closing Fee

[12] This Court endorsed a similar result in *I'On*, where the Court construed two statutes in determining whether zoning by initiative and referendum is allowed in South Carolina. *I'on* at 410, 526 S.E.2d at 718. At issue were two statutes: S.C. Code Ann. § 6-29-710, setting forth specific procedures that a municipality must follow in zoning matters, and S.C. Code Ann. § 5-17-10, describing a general initiative and referendum process. In holding that a municipality may only allow zoning through § 6-29-710 (the more recently enacted statute), the Court noted that the zoning statute was much more detailed and particular to the topic of zoning, whereas the initiative and referendum statute was general. *Id.* at 413, 526 S.E.2d at 719-20.

Statute and placed it within the Consumer Code. Therefore, non-Consumer Code remedies for violation of the Statute are displaced by operation of § 37-1-103.

Fifth, interpreting the Statute and the Dealers Act to allow a claim under the Dealers Act leads to an absurd result. "The goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd." *Hodges* at 91, 533 S.E.2d at 584. These statutes do not conflict, because they do not both concern closing fees in motor vehicle sales transactions. There is thus no overlap and no conflict between the Statute and the Dealers Act for the subject matter of Hair's claim. The only statute that deals with the subject matter of this claim is the Closing Fee Statute, and therefore, there is no reconciliation to be made.

The Closing Fee Statute permits the charging of closing fees under certain conditions. Under Hair's suggested interpretation, the Dealers Act would inexplicably penalize a fee that the Statute expressly permits. Such an absurd outcome would expose motor vehicle dealers to liability that the Consumer Code does not authorize, including double damages, possible punitive damages, a longer limitations period, and class actions. Further, it would subject dealers to that enhanced liability in spite of their compliance with the Statute and the Department's guidance. This cannot have been the legislature's intent.

Sixth and finally, "when a statute creates a substantive right . . . and provides a remedy for infringement of that right, the plaintiff is limited to that statutory remedy." *Lawson v. S.C. Dep't of Corr.*, 340 S.C. 346, 350, 532 S.E.2d 259, 261 (2000). "It has generally been held that a statutory remedy to enforce a new right or liability created by

the same statute is exclusive unless the statute clearly shows a contrary intention." *Petition of State ex rel. Hutchinson*, 182 S.C. 369, 374, 189 S.E. 475, 477 (1937).

Prior to the enactment of the Closing Fee Statute, neither the Consumer Code nor the Dealers Act nor any other statute regulated or prohibited closing fees. *See Fanning* at 399, 472 S.E.2d at 242. In enacting the Statute, the legislature responded to *Fanning* and created a statutory right for motor vehicle dealers to charge closing fees if they complied with the requirements of the Statute and imposed statutory liability under the Consumer Code where none had existed before for noncomplying dealers. Thus, Hair's exclusive remedy is found in the Consumer Code. Very simply, this was not "merely" a "new remedy for an independent right or liability already existing" as discussed in *Hutchison.* Instead, the Statute imposed new statutory rights, obligations, and liabilities where none existed before.

Hair has previously argued that the remedies under the Consumer Code do not apply because the remedies of S.C. Code Ann. § 37-5-202(3) only apply to "creditors." However, the Department addressed this issue in its Administrative Interpretation, stating that if a dealer does not satisfy the requirements of the Statute, "the charging of a closing or other similar fee is an excess charge for Consumer Protection Code Purposes." (R. at 1726). Moreover, Collins testified that the Department does not view the Statute as limited to creditors, but rather it applies to any "motor vehicle dealer who wants to charge a closing fee in their sale." (R. at 1541:5-17). These determinations are entitled to deference by this Court. *See Faile v. S.C. Employment Sec. Comm'n,* 267 S.C. 536, 540, 230 S.E.2d 219, 221-22 (1976); *Lexington Law Firm* at 586, 677 S.E.2d at 594. Additionally, § 37-5-202(2) specifically states that "[a] consumer is not obligated to pay a

charge in excess of that allowed by this title and has a right of refund of any excess charge paid," and there is no question that Hair is a "consumer" under the Consumer Code. *See* S.C. Code Ann. § 37-1-301(10)(1) (defining a consumer as "a natural person who is a purchaser . . . in any transaction arising out of the . . . sale . . . of consumer goods."). Therefore, and consistent with the Administrative Interpretation, nothing limits the application of the Statute to credit transactions.

Furthermore, there is no evidence that the legislature intended the remedies under the Consumer Code for violations of the Closing Fee Statute to be cumulative rather than exclusive. Though certain remedy provisions of the Consumer Code plainly state that they are not exclusive, the applicable remedy provision here contains no such language. S.C. Code Ann. § 37-5-202.[13]

B. The trial court's Declaratory Judgment Order erroneously adds requirements to the Closing Fee Statute and applies those new requirements retroactively.

In defining the term "Closing Fee," the Declaratory Judgment Order impermissibly imposes new and additional requirements for compliance with the Closing Fee Statute that are not contained anywhere in the plain, unambiguous language of the

[13] *See* S.C. Code Ann. § 37-5-108(7) ("The remedies of this section are in addition to remedies available for the same conduct under law other than this title."); § 37-20-200(E) (stating that the statutory remedies for violation of provisions designed to prevent consumer identity theft are cumulative); § 37-23-50(D) (stating that the statutory remedies for high-cost home loans are cumulative); § 37-23-70(I) (stating that the statutory remedies for consumer home loans are cumulative). With respect to exclusivity, the trial court's reliance on *Tilley v. Pacesetter Corp.*, 333 S.C. 33, 40, 508 S.E.2d 16, 19 (1998) is misplaced. In *Tilley,* the issue was whether one of two different remedies, § 37-5-202 or § 37-10-105, *both of which were in the Consumer Code*, would apply for a violation of the Attorney Preference Statute, which is also part of the Consumer Code. This Court ultimately concluded that the remedy in § 37-5-202 was not exclusive. Here, the only remedy within the Consumer Code that could apply to a violation of the Statute is § 37-5-202.

Statute or in the Administrative Interpretation. As a result, the Declaratory Judgment Order is erroneous, should not have been applied retroactively, and rendered the Statute unconstitutionally vague.

As the trial court stated in jury selection, the trial court's role is to read the law, not write it. (R. at 1316:4-6). "[C]ourts may not enlarge by construction the language of a clear and unambiguous statute." *Jordan v. Montgomery Ward & Co.*, 442 F.2d 78, 82 (8th Cir. 1971). As this Court has stated:

> [C]ourts have no legislative powers, and in the interpretation and construction of statutes their sole function is to determine, and within the constitutional limits of the legislative power to give effect to, the intention of the Legislature. They cannot read into a statute something that is not within the manifest intention of the Legislature as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute, to legislate and not to interpret. The responsibility for the justice or wisdom of legislation rests with the Legislature, and it is the province of the courts to construe, not to make, the laws. There is a marked distinction between liberal construction of statutes, by which courts, from the language used, the subject-matter, and the purposes of those framing them, find out their true meaning, and the act of a court in ingrafting upon a law something that has been omitted, which the court believes ought to have been embraced. The former is a legitimate and recognized rule of construction, while the latter is judicial legislation, forbidden by the constitutional provisions distributing the powers of government among three departments, the legislative, the executive, and the judicial.

Laird v. Nationwide Ins. Co., 243 S.C. 388, 395, 134 S.E.2d 206, 209 (1964); *Bentley v. Spartanburg County*, 398 S.C. 418, 426, 730 S.E.2d 296, 301 (2012) ("[W]e are interpreters not legislators and are bound by the language of [the statute] as written.").

The Declaratory Judgment Order violates this rule against judicial legislation and goes well beyond the language of the Closing Fee Statute and the Administrative Interpretation to impose potential liability on dealerships that have complied with the four requirements of the Statute. The trial court added the following requirements:

> The "'closing' in relation to the sale of a motor vehicle is . . . 'the final meeting between the parties to a transaction, at which the transaction is consummated.' Closing occurs at the time the [buyer] fills out the motor vehicle sales contract and other paperwork necessary to complete a purchase." . . . .
>
> S.C. Code Ann. §37-2-307 authorizes the charging of "closing fees" [by dealers to buyers in motor vehicle sales transactions. Closing fees] are for the reimbursement of set overhead costs, such as document retrieval and document preparation, arising from [the closing of the transaction. The closing fee] charge[d to the buyer] is for the actual cost associated with a closing, which can be predetermined, and does not allow a dealer to name a fee a "closing fee" and then use the fee to make a hidden profit. . . . .
>
> The "closing fee" is a pre-determined set fee for the reimbursement of closing costs, such as document retrieval and document preparation. . . . .
>
> The "closing fee" is not limited to [reimbursement] of document retrieval and document preparation [costs]; it may include other closing [costs] actually incurred from the consummation of the transaction. [The closing fee] cannot be arbitrarily set, unlimited, or include dealer profit. The dealer may only charge the buyer closing [costs] that are actually incurred and are a necessity to the closing, thus reimbursing the dealer for actual closing [costs] incurred.

(R. at 35-37).

The trial court's requirement that the fee be "pre-determined" for the reimbursement of specific, "pre-determined" costs is not present in the plain language of the Closing Fee Statute or in the Administrative Interpretation. Nothing in the Statute requires any kind of cost analysis from a dealer prior to charging a closing fee. Further, the directive that a closing fee cannot be "arbitrarily set" is inconsistent with the Department's role in certifying the fee. As stated in the Administrative Interpretation, "[f]orms considered to be deceptive or that misstate the law will be rejected by the Department." (R. at 1726). How can a closing fee be illegal, arbitrarily set, or not pre-

determined if the fee has been certified by the Department?[14] This cannot have been the legislature's intent.

1. The Closing Fee Statute regulates "fees," not "costs."

As an initial matter, the Closing Fee Statute uses the word "fee" rather than the word "cost." A fee, in its plain and ordinary sense, is a charge for a service or privilege. *Webster's New World Dictionary* at 512 (2d ed. 1986) (a fee is a "payment asked or given for professional services, admissions, tuitions, etc.; charge"); *Black's Law Dictionary* 614 (6th ed. 1990) (a fee is a "[a] fixed charge or perquisite charged as a recompense for labor; reward, compensation, or wage given to a person for the performance of services or something to be done."). Given the ordinary definition of fee, the proper construction of the Statute is that a closing fee is simply a fee charged at closing for services rendered by a dealership.[15]

Hendrick Honda performs a wide variety of services for its customers at the time of closing for which it charges a fee, including:

- inspecting and appraising any trade-in vehicle(s), verifying and paying any existing liens on any trade-in vehicle(s), and obtaining title to any trade-in vehicle(s);

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[14] And as previously noted, the trial court's order approving the Car Max settlement did not mention any other requirements for compliance with the Statute and also contained an escalation clause allowing CarMax to increase its closing fees without regard to dealer cost or profit. (R. at 5-12, 273). How can a settling defendant be allowed to increase fees in the future without regard to dealer cost or profit while other dealers are bound by the restrictions of the Declaratory Judgment Order?

[15] The Closing Fee Statute also refers to a one-time registration fee that the dealer must pay to the Department prior to charging a closing fee. There is no reason to believe the term "fee" should be given a different meaning in different parts of the same statute. As the registration fee is a fee paid at the time of registration with the Department, the closing fee is a fee paid at the time of closing.

- arranging for financing, if needed by the customer, including loan applications, credit checks and verifications, and preparing loan documentation;
- providing all consumer disclosures and other documentation required by state and federal law;
- registration of the purchased vehicle with the South Carolina Department of Motor Vehicles ("DMV") or the department of motor vehicles in the purchaser's state of residence;[16]
- transferring the customer's existing vehicle license plate, or providing a temporary vehicle tag and registering for a newly issued vehicle license plate;
- preparing and submitting any necessary warranty paperwork for the purchased vehicle and paying any warranty registration fees;[17]
- providing the customer's liability insurance carrier with information regarding the newly purchased vehicle; and
- retaining all transaction documentation in secured, restricted-access storage areas as required by state and federal law and internal policy.

(*See, e.g.*, R at 1466:16-1459:22, 1802-2013). The customer would otherwise have to perform many of these services himself or herself.

"Cost," on the other hand, is the amount spent in producing or manufacturing a commodity or service. *See Webster's New World Dictionary* at 321 (2d ed. 1986); *Black's Law Dictionary* 446 (3rd ed. 1933) ("cost" is "the amount originally expended in performing a particular act or operation."). The term "cost" in this context would refer to the amount of money a dealer is required to expend to perform the services it provides to

[16] During the relevant time period of this case, this required having a dealership employee travel to and from the local office of the DMV. (R. at 1515:17-1516:4).

[17] The certified used car warranty received by Hair cost Hendrick Honda $359.00. (R. at 1517:15-19).

a customer at closing, and to otherwise comply with the disclosure, documentation, and record retention requirements imposed under state and federal law.[18]

The Closing Fee Statute makes no reference to "cost." The legislature could have enacted a statute tying closing fees to a dealer's costs; however, it chose not to do so. *See, e.g.*, S.C. Code Ann. § 23-31-215(I) (providing SLED may charge a fee "not to exceed its costs in releasing the information under this subsection" for issuing lists of concealed weapons permit holders to law enforcement agencies). The Declaratory Judgment Order's emphasis on "costs" therefore falls completely outside the language of the Statute.

2. The Closing Fee Statute permits the Department to approve an appropriate closing fee and does not establish how that fee should be determined.

In addition to the distinction between "fee" and "cost," the Closing Fee Statute is silent on what may be included in the fee, at what level the fee should be set, and how the fee should be determined. Instead, the legislature enacted a straightforward disclosure statute, designed to protect consumers from hidden or undisclosed fees and not an effort to set the amount of the closing fees that can be charged by the dealership.[19] This intent

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[18] By way of example, Hendrick Automotive Group's Transaction Compliance Manual contains an annual listing of the forms that must be included by all Hendrick dealerships on each transaction as applicable. (R. at 1822-23 (25 items); R. at 1832-33 (25 items); R. at 1858 (35 items); R. at 1886 (36 items)). Hendrick Honda's record retention policy further details how long many of these items must be kept. (R. at 1899-1904). The state and federal governments impose additional obligations. (*See* R. at 1906-2012).

[19] *See Small v. Going Forward, Inc.*, 915 A.2d 298, 300 (Conn. 2007) (holding Connecticut closing fee statute was a disclosure statute and not a limitation on the amount that could be charged, despite definition providing that conveyance fee "means a fee charged by a dealer to recover reasonable costs for processing all documentation and performing services related to the closing of a sale, including, but not limited to, the registration and transfer of ownership of the motor vehicle which is the subject of the

that the Statute provides for disclosure is illustrated by its placement in Part 3 of Chapter 2 of the Consumer Code, which is titled "Disclosure and Advertising." This construction is further bolstered by the Administrative Interpretation, which provides "[t]he only analogous statute of which the Department is aware requiring similar filings in a fiscal year are Sections 37-2-305(8) and-3-305(8), concerning the maximum rate schedule filing." (R. at 1726). These "analogous" provisions are pure disclosure statutes. Furthermore, the Statute delegates the authority to approve or reject a closing fee to the Department.

By contrast, the closing fee statutes and regulations enacted by some other states (many of which were enacted before the Closing Fee Statute) provide specific directives regarding the amount of the fee, what can be included in the fee, and how the fee should be set. The Indiana closing fee statute regulates how a fee is charged and what can be included, using the following language:

> It is an unfair practice for a dealer to require a purchaser of a motor vehicle as a condition of the sale and delivery of the motor vehicle to pay a document preparation fee, unless the fee:
> (1) reflects expenses actually incurred for the preparation of documents;
> (2) was affirmatively disclosed by the dealer;
> (3) was negotiated by the dealer and the purchaser;
> (4) is not for the preparation, handling, or service of documents that are incidental to the extension of credit; and
> (5) is set forth on a buyer's order or similar agreement by a means other than preprinting.

Ind. Code Ann. § 9-32-13-7 (effective July 1, 2013). Similarly, the New Hampshire statute expressly links closing fees to closing costs, as quoted here:

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sale"). The Closing Fee Statute contains no such definition or requirement that the closing fee bear some connection to closing costs.

> "Documentary fees" mean the fees for filing, recording or investigating, perfecting and releasing or satisfying a retained title or a lien created by a retail installment contract, and shall not exceed the actual cost assessed by the department of safety, division of motor vehicles, or other state or local agency for filing, recording or investigating, perfecting and releasing or satisfying such title or lien.

N.H. Rev. Stat. Ann. § 361-A:1(IV) (definition adopted in 1997 N.H. Laws 0944).

In Ohio, the legislature set a maximum "documentary service charge" of $250 for reimbursement of "any lawful fee actually paid out, or to be paid out, by the retail seller to any public officer for filing, recording, or releasing any instrument securing the payment of the obligation owed on any retail installment contract," and prohibited reimbursement of any other cost for "examination, service, brokerage, commission, expense, fee, or other thing of value." Ohio Rev. Code Ann. § 1317.07 (although amount has changed over time, cap on fee has been in place since 1949).

Maryland also expressly allows closing fees, but sets a maximum "dealer processing charge" of $200. The Maryland legislature also imposed a number of regulations on dealers charging closing fees and requires that the fees reflect certain "expenses generally incurred." Md. Code Ann. [Transportation] § 15-311.1 (originally enacted in 1993 Md. Laws 631).

In Michigan, the legislature chose to address closing fees as part of the definition of the cash price of a motor vehicle, as follows,

> This amount shall include any taxes, the cash price of agreed upon accessories and installation of the accessories, the cash price of any extended warranty or service contract, **and a documentary preparation fee. The documentary preparation fee shall not exceed 5% of the cash price of the motor vehicle or $160.00, whichever is less.**

Mich. Comp. Laws § 492.113 (emphasis added, originally enacted in 1990 Mich. Legis. Serv. 27). In Minnesota,

> "Cash sale price" means the price at which the seller would in good faith sell to the buyer, and the buyer would in good faith buy from the seller, the motor vehicle which is the subject matter of the retail installment contract, if such sale were a sale for cash, instead of a retail installment sale. . . . **The cash price may not include a documentary fee or document administration fee in excess of $75 for services actually rendered to, for, or on behalf of, the retail buyer in preparing, handling, and processing documents relating to the motor vehicle and the closing of the retail sale.** . . .

Minn. Stat. § 53C.01 (emphasis added, enacted in 2006). This statute caps the fee and requires that the fee be for "services actually rendered."

Texas has perhaps the most onerous requirements for the collection of closing fees. There, "[f]or a cost to be included in a documentary fee, a cost must directly relate to the retail seller's handling and processing of documents for the sale and financing of a motor vehicle in compliance with state and federal law" and listing numerous requirements for how that fee should be determined and documented and which costs may be reimbursed. 7 Tex. Admin. Code § 84.205.

These other statutes illustrate how the General Assembly could have crafted a statute designed to cap fees at an amount or percentage of the sales price, linked the fee to some particular cost, or otherwise directed how the fee should be determined, if that had been the legislature's intent. Instead, it chose to adopt a disclosure statute to be administered by the Department in its sole discretion. Courts cannot step in and do what the legislature did not.

3. In any event, the Declaratory Judgment Order should not be applied retroactively.

Even assuming *arguendo* that the extra-statutory requirements of the Declaratory Judgment Order withstand scrutiny, they may only be applied prospectively. *See Carolina Chloride, Inc. v. S.C. Dep't of Transp.*, 391 S.C. 429, 433, 706 S.E.2d 501, 503 (2011). If so, then under the undisputed evidence at trial, there would be no liability for closing fees charged before February 5, 2013, the date the Declaratory Judgment Order was applied in this case.

Generally, "[j]udicial decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively; *prospective application is required when liability is created where formerly none existed.*" *Hardee v. Hardee*, 355 S.C. 382, 391, 585 S.E.2d 501, 505 (2003) (emphasis added). "Other cases which have held prospective application to be appropriate include those in which immunities have been dissolved." *Osborne v. Adams*, 346 S.C. 4, 11, 550 S.E.2d 319, 323 (2001) (quoting *Toth v. Square D Co.*, 298 S.C. 6, 8, 377 S.E.2d 584, 585 (1989)). The same rule applies to rulings that have the effect of negating an affirmative defense existing at the time a claim accrued. *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 401, 520 S.E.2d 142, 156 (1999).

When the trial court issued its Declaratory Judgment Order, dealers were operating under the decision in *Fanning*, the terms of the Closing Fee Statute, and the Administrative Interpretation. Given those authorities, dealers had every reason to believe that compliance with the four requirements set forth in the Statute would prevent liability. The Administrative Interpretation echoes those factors, and the Consumer Code

provides complete defenses for dealers complying with the terms of the Administrative Interpretation, even if the Department's interpretation is later determined to be invalid by a court, and for dealers making good faith efforts to comply with the Statute. S.C. Code Ann. §§ 37-6-506(3) & -5-202. Under these authorities, there was no indication that the Dealers Act could impose liability above and beyond the stated parameters of the Statute. Here, Hair conceded that Hendrick Honda complied with the "technical requirements" of the Statute. (R. at 1319:14-20). That should have ended the inquiry.

Instead, the trial court's ruling in the Declaratory Judgment Order retroactively stripped Hendrick Honda of those defenses and imposed liability where before there was none by expanding the term "closing fee" beyond the language of the Statute. As such, the trial court imposed new requirements on Hendrick Honda, conferred new rights of action on Hair, and deprived Hendrick Honda of its statutory defenses under the Consumer Code. Therefore, the ruling must be applied prospectively only, if it is to be applied at all. *See Douglass v. Florence Gen. Hosp.*, 273 S.C. 716, 720, 259 S.E.2d 117, 119 (1979) (finding opinion modifying charitable immunity applied prospectively only).

As noted in *Fanning*, a closing fee is simply one component of a negotiated cash price. Retroactively unraveling one component, particularly when the stated requirements of the Statute have been met, works a crushing hardship on Hendrick Honda and any dealership that faces retroactive liability for failure to comply with the Declaratory Judgment Order.

4. Applying the Declaratory Judgment Order renders the Closing Fee Statute unconstitutionally vague.

If the new, additional requirements of the Declaratory Judgment Order are applied, the Closing Fee Statute becomes unconstitutionally vague and violates Hendrick

Honda's federal and state constitutional rights to due process and fair and unambiguous notice of statutory obligations. "The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *City of Beaufort v. Baker,* 315 S.C. 146, 152, 432 S.E.2d 470, 472 (1993). "A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application." *Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2001). The established test for vagueness is whether the statute provides "fair notice to those to whom the law applies." *Id.* at 571, 549 S.E.2d at 598.

Fanning, the Closing Fee Statute, and the Administrative Interpretation all led dealerships to believe that closing fees could be charged if the dealer complied with four unambiguous requirements. The Good Faith Error and Safe Harbor Defenses of the Consumer Code further bolstered this belief. In direct contravention of the reasonable expectations of those who sought to comply with the Statute, the Declaratory Judgment Order engrafted new obligations onto the term "closing fee" and expanded liability. Absent clairvoyance, dealerships could not have ascertained those requirements from the language of the Statute alone.

The trial court's construction of the Closing Fee Statute renders a dealer unable to tell whether its fees are in compliance at any given time because the Declaratory Judgment Order does not provide any specificity about how a dealership can comply with those additional elements as a matter of law. The Declaratory Judgment Order provides that closing fees "are for the reimbursement of set overhead costs, such as document retrieval and document preparation, arising from [the closing of the transaction]. (R. at

36). However, it goes on to provide that the closing fee "is not limited to [reimbursement] of document retrieval and document preparation [costs]; it may include *other* closing [costs] actually incurred from the consummation of the transaction." (R. at 37) (emphasis added). The Declaratory Judgment Order does not provide a listing of costs that may be properly reimbursed through charging a closing fee, nor does it define the terms "document retrieval" or "document preparation."

Further, the definition presented is simply unworkable. In attempting to opine about how a dealer could comply with the "pre-determined" requirement of the Declaratory Judgment Order, Hair's expert testified that a dealer cannot determine the costs for each transaction in advance, but instead should determine an average cost. (R. at 1349:13-1352:10). However, a fee set at the amount of the dealership's average cost to close a transaction will necessarily mean many customers will pay a fee that exceeds the cost of that customer's individual transaction.

The potential for inconsistent results under the regime created by the Declaratory Judgment Order is demonstrated by the opposite outcomes in this case and the *Ritz v. Taylor Toyota* case. Such results could not have been the legislature's intent and are inconsistent with public policy. Quite simply, the Declaratory Judgment Order creates, rather than answers, questions about what constitutes compliance with the Closing Fee Statute and as such, it renders the Statute unconstitutionally vague.

In construing a statute, "all reasonable doubt must be resolved in favor of the constitutionality of the act. If a constitutional construction of a statute is possible, that construction should be followed in lieu of an unconstitutional construction." *Crow v. McAlpine*, 277 S.C. 240, 242, 285 S.E.2d 355, 356 (1981). Given this rule, the correct

and better reading of the Closing Fee Statute is the clear, easy to follow construction inherent in the Statute and the Administrative Interpretation that a dealer complies by (1) completing an annual registration with the Department; (2) including the amount of the fee in any advertised price; (3) disclosing the fee on the sales contract; and (4) displaying a notice that the dealer charges a fee in a conspicuous location in the dealership.

C. This action is barred by the filed rate doctrine because Hendrick Honda did not charge a fee in excess of that certified by the Department.

Hendrick Honda is insulated from any Dealers Act liability for the closing fees it charged because those fees were expressly approved by the Department, which is vested with authority to regulate the charging of closing fees by motor vehicle dealers. *See* S.C. Code Ann. § 37-6-104(1)(a) (the Department may "receive and act on complaints, take action designed to obtain voluntary compliance with [the Consumer Code], or commence actions on its own initiative."). The undisputed evidence demonstrated that Hendrick Honda, at all relevant times, has filed and registered its closing fee with the Department and has never exceeded the amount of the closing fee filed, registered, accepted, and certified by the Department. Thus, Hair's claims are barred by the filed rate doctrine as adopted in *Edge v. State Farm Mutual Insurance Co.*, 366 S.C. 511, 517-19, 623 S.E.2d 387, 390-92 (2005). In *Edge*, the Court reasoned as follows:

> The filed rate doctrine was originally a federal preemption rule which provided that rates duly adopted by a regulatory agency are not subject to collateral attack in court. The filed rate doctrine stands for the proposition that because an administrative agency is vested with the authority to determine what rate is just and reasonable, courts should not adjudicate what a reasonable rate might be in a collateral lawsuit.

Id. (citations & quotations omitted). The reasons for the doctrine are: 1) to preserve "the agency's authority to determine the reasonableness of rates"; (2) to recognize "the

agency's expertise with regard to that industry"; (3) "allowing an action would undermine the regulatory scheme because the statute allows for enforcement by the appropriate state officers"; and (4) "allowing an action may result in different prices being paid by victorious plaintiffs." *Id.*

Given the discretion provided to the Department in connection with the fee filings, the filed rate doctrine will apply regardless of whether the Department actually investigated the fees prior to certifying them. *See Dolan v. Fid. Nat. Title Ins. Co.*, 365 F. App'x 271, 274 (2d Cir. 2010) ("To the extent plaintiffs suggest that the filed rate doctrine should not apply because the Department has not adequately scrutinized the defendants' rates, the argument has no merit. It is well-established that the doctrine applies to all filed rates, not merely those rates investigated before their approval."); *In re Pa. Title Ins. Antitrust Litig.*, 648 F. Supp. 2d 663, 677 (E.D. Pa. 2009) ("In conclusion, the absence of meaningful DOI review of filed title insurance rates, as alleged by plaintiffs, does not render the filed rate doctrine inapplicable.")[20]; *McCray v. Fidelity*

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[20] The district court went on to hold:

> [N]o direct authority requires that, for the filed rate doctrine to apply, the agency must exercise a particular level of review of filed rates. Considerable authority, including the Supreme Court, has rejected any meaningful review requirement and strongly suggested or held that the mere filing of a rate invokes application of the filed rate doctrine, making meaningful review an unnecessary requirement. Other authority holds that, at most, the statutory scheme must afford the agency the legal authority to review filed rates for compliance with statutory standards for the filed rate doctrine to apply. Here, Pennsylvania law governing title insurance provides for this type of review. The extent to which the agency exercises this review remains properly at the agency's discretion, upon which this court will not intrude.

648 F. Supp.2d at 677.

Nat'l Title Ins. Co., 636 F.Supp.2d 322, 329–30 (D. Del.2009) (expressing belief that Third Circuit would not limit application of filed rate doctrine to "only those regulatory regimes that expressly approve rates"). This is true even in cases alleging fraud in the filing business's application. *In re Title Ins. Antitrust Cases*, 702 F. Supp. 2d 840, 857-64 (N.D. Ohio 2010) ("Even assuming as true that the rates submitted by the Defendant were fraudulent or the product of unlawful conduct, the filed rate doctrine still applies to bar Plaintiffs' claim for damages. . . . This Court holds, in accord with every other court that has confronted this issue, that there is no exception to the filed rate doctrine for fraudulent or wrongful conduct."). Further, the doctrine applies to bar claims for consumer fraud relating to filed rates. *See, e.g., Weinberg v. Sprint Corp.*, 801 A.2d 281, 287 (2002) ("[T]he filed rate doctrine bars money damages . . . where the damage claims are premised on state contract principles, consumer fraud, or other bases on which plaintiffs seek to enforce a rate other than the filed rate."); *Maxwell v. United Servs. Auto. Ass'n*, 2014 COA 2 (Col. Ct. App. 2014) (citing *Edge* and applying doctrine to consumer fraud claims and finding "not applying the filed rate doctrine would invite judicial second-guessing of agency-approved premium rates and could produce disharmony between judicial determinations and those of the DOI. And declining to apply this doctrine would disregard the DOI's greater expertise.").

In this case, the Department affirmatively certified the fees set by Hendrick Honda. (R. at 1736-45). Danny Collins testified that Hendrick Honda was in full compliance as far as the Department was concerned. (R. at 1547:20-1557:3). Yet the trial court allowed Hair to challenge the filed rate and allowed the jury to consider what other rate would be just and reasonable. Such a result is not permitted under the filed rate

doctrine and undermines the reasons behind the doctrine by not recognizing the Department's authority and expertise, not allowing the Consumer Code and the Department to operate as provided by law, and providing a recovery to some, but not all purchasers, depending on the date of purchase. For all of these reasons, the trial court erred in failing to grant Hendrick Honda's motions for judgment as a matter of law.

D. The evidence in this case does not support a verdict against Hendrick Honda.

1. There is no evidence showing Hendrick Honda violated the Closing Fee Statute.

a. Hair does not and cannot contest that Hendrick Honda complied with the four stated requirements of the Statute.

As an initial matter, the construction of a statute is a question of law, not a question of fact. *Boiter v. S.C. Dep't of Transp.*, 393 S.C. 123, 132, 712 S.E.2d 401, 405 (2011). Therefore, witness testimony cannot change the proper construction of the statute, nor can lay witnesses make admissions as to matters of law.

As outlined above, Hair concedes that Hendrick Honda complied with the four elements required by the plain language of the Closing Fee Statute. Hendrick Honda: (1) annually registered with the Department; (2) included the amount of the fee in the advertised price of a motor vehicle, if any; (3) disclosed the existence of the fee on the sales contract; and (4) displayed a notice that the dealer charges a fee in a conspicuous location in the motor vehicle dealership. Both the Administrative Interpretation and the instructions on the required registration form indicate that a dealer, such as Hendrick Honda, who posts the Department's form notice has complied with the fourth element of

the statute.[21] (*See* R. at 1725-27, 1736, 1738). Moreover, Don Pendleton, General Manager at Hendrick Honda, testified that he thought all he needed to do to comply with the Statute was satisfy these four elements. (R. at 1536:10-23).

In addition, the Department has made it clear that closing fees go by many names in the industry ("a 'closing' or 'documentation' fee (also occasionally denominated as an 'administrative,' 'processing,' or 'procurement' fee)"). (R. at 1725). Witness testimony from Collins and Randall Clemment, a Hendrick Honda employee, confirmed that those terms are synonymous in the industry. (R. at 1469:8-14, 1544:8-1545:14, 1552:13-17). This meaning given to the term "closing fee" in the industry should be applied by the Court. *Poole v. Saxon Mills*, 192 S.C. 339, 347, 6 S.E.2d 761, 764 (1940); 82 C.J.S. *Statutes* § 420 (2009) ("Terms used in a statute applicable to a particular industry or profession are construed as they are understood in that industry or profession."). Further, Hair testified that she was not confused by the terms and understood that the $299 fee, referenced alternatively as an "administration fee" and a "procurement fee," referred to the same $299 fee. For these reasons, there simply was no evidence supporting a finding that Hendrick Honda violated the Statute.

b. Hair failed to present evidence that would entitle her to a verdict even under the trial court's Declaratory Judgment Order.

Moreover, even when the evidence presented at trial is compared to the extra-statutory requirements in the Declaratory Judgment Order, Hendrick Honda was not liable. The trial court charged the jury that Hair suffered no damage unless the fee charged exceeded the closing costs of Hendrick Honda. (*See* R. at 1661:18-23) As the

[21] Nothing in the form or the Administrative Interpretation requires any kind of underlying calculations for compliance. Both are directed to the format of the notice.

trial court emphasized, it believed the only issue for trial was the "very narrow issue of whether or not the fee charged by the Defendant was for more than what the actual closing costs were, as we've defined in our order." (R. at 1317:1-6)

Hair never offered any evidence showing that Hendrick Honda's fee was in excess of its actual closing costs. In contrast, Hendrick Honda's evidence showed its closing costs greatly exceeded the closing fee, and Hair never offered any reliable evidence to rebut Hendrick Honda's cost calculation.[22] Hair's own expert witness, Thomas Pendarvis, conceded that some amount of closing costs are inevitable and reasonable for any dealership but he was unable and unwilling to provide a number in this case, because he never performed any calculation of Hendrick Honda's closing costs. (R. at 1346:5-1347:24, 1348:4-21, 1353:19-22, 1354:3-22). In the event this Court determines that Hair could assert a claim for violation of the Dealers Act based on a closing fee charged by a dealership, Hair had the burden of proving damages beyond mere speculation (i.e., that the closing costs were some definitive number less than the closing fee charged), and she failed to present any competent evidence on that point.

Furthermore, as recognized by the trial court in its charge, Hair cannot recover more than her loss. (R. at 1661:17-18). Yet, that is exactly what occurred when the jury rendered its verdict for the full amount of all closing fees charged to all purchasers in the plaintiff group. First, as noted above, Hair's expert conceded that some amount of closing costs are justifiable. (R. at 1346:5-1347:24). Thus, the full amount of the closing

[22] Hendrick Honda's expert, certified public accountant Michael Thompson, testified that based on his analysis the average costs of closing for Hendrick Honda for each of the years in question was as follows: $502.19 (2002), $512.21 (2003), $480.76 (2004), $477.33 (2005), $507.96 (2006). (R. at 1582:22-1575:3).

fee is not an appropriate recovery. Second, the uncontroverted testimony showed that even if Hendrick Honda did not charge a closing fee, the vehicle price would not have been reduced by that same amount ($299 or $249). (R. at 1344:13-1345:8, 1518:8-12, 1570:5-1571:1). As testified by Hendrick Honda's employees, the purchase price or the option package or some other component of the transaction would likely have been higher if there was not a closing fee. (R. at 1570:5-1571:1). Accordingly, there is no evidence showing consumers were damaged in the full amount of the fee because there are costs associated with closing and there is not a dollar for dollar correlation between the amount of the fee and the negotiated cash price.

For these reasons, Hendrick Honda was entitled to judgment at either the directed verdict or the JNOV stage.

2. The only evidence in the record shows that Hendrick Honda complied with the Administrative Interpretation and established procedures to ensure compliance with the Closing Fee Statute.

The Consumer Code insulates Hendrick Honda from liability if either the Safe Harbor Defense or the Good Faith Error Defense applies. Both of these defenses apply even if a court later finds that the Department's guidance, on which Hendrick Honda relied, is erroneous or invalid. S.C. Code Ann. §§ 37-6-104(4), 37-6-506(3), & 37-5-202(7). In this case, even assuming *arguendo* that the Declaratory Judgment Order is valid and retroactively applicable, Hendrick Honda was entitled to the benefit of these defenses.

a. Safe Harbor Defense.

Hendrick Honda acted in conformity with the Administrative Interpretation when it charged Hair a closing fee, and therefore, there can be no liability for this fee under the Safe Harbor Defense. Pursuant to S.C. Code Ann. § 37-6-506(3):

> No provision of this title or of any statute to which this title refers which imposes any penalty on any creditor shall apply to any act done, or omitted to be done, in conformity with any rule or regulation so adopted, amended or repealed or in conformity with any written order, opinion, interpretation or statement of the Commission or of the Administrator, notwithstanding that such rule, regulation, order, opinion, interpretation or statement may, after such act or omission, be amended, or rescinded or be determined by judicial or other authority to be erroneous or invalid for any reason.

See also S.C. Code Ann. § 37-6-104(4). Hendrick Honda's closing fee was certified by the Department, and Hendrick Honda fully complied with the Department's guidance when it charged that fee to Hair. As a result, the trial court erred in failing to grant a directed verdict or JNOV to Hendrick Honda on this basis.

b. Good Faith Error Defense.

Alternatively, the Good Faith Error defense warranted a directed verdict or JNOV on another, independently sufficient ground. Pursuant to this defense, a motor vehicle dealer is not liable under the Closing Fee Statute and the Consumer Code if the dealer shows by a preponderance of evidence that the purported violation was unintentional and resulted from a bona fide error that occurred despite procedures reasonably adapted to avoid the error. S.C. Code Ann. § 37-5-202(7). The evidence established Hendrick Honda's concerted and deliberate efforts to comply with the Statute and the Administrative Interpretation. (*See* R. at 1536:10-23). There was no evidence of any intentional violation of the Statute. Even assuming there was a violation of the extra-

statutory terms of the Declaratory Judgment Order, the Good Faith Error Defense applies and absolves Hendrick Honda of any liability.

3. Hair voluntarily paid the closing fee with full knowledge of all facts.

In addition, the trial court erred in failing to grant Hendrick Honda's motions for directed verdict or JNOV because Hair knowingly and voluntarily paid the closing fee. Under the voluntary payment rule, a plaintiff cannot recover the amount of a voluntarily paid charge even if the charge itself was illegal and the plaintiff was unaware of his or her legal rights. *Hardaway v. Southern Ry. Co.*, 90 S.C. 475, 73 S.E. 1020 (1912); *Moody v Stem*, 214 S.C. 45, 51 S.E.2d 163 (1948). The common law places the burden on the plaintiff to show that the payment was not made voluntarily. *Baker v. Allen*, 220 S.C. 141, 151, 66 S.E.2d 618, 622-23 (1951) ("It follows from the foregoing views that one of the cardinal issues in this case is whether respondent paid the alleged illegal excess of $3.00 involuntarily. The burden of proof is upon him, as all payments are presumed to be voluntary until the contrary is made to appear."). In this case, the only evidence shows that the fee was fully disclosed and voluntarily paid as part of the negotiated cash price of the vehicle. As a result, the voluntary payment doctrine bars any recovery.

Contrary to the findings of the trial court, *Hardaway* does not stand for the proposition that the voluntary payment rule does not apply to any statutory claim. Rather, a statutory scheme may specifically exclude the voluntary payment defense ("[e]xcept where otherwise provided by statute"). *See, e.g.*, Fla. Stat. § 725.04 ("When a suit is instituted by a party to a contract to recover a payment made pursuant to the contract and by the terms of the contract there was no enforceable obligation to make the

payment or the making of the payment was excused, *the defense of voluntary payment may not be interposed* by the person receiving payment to defeat recovery of the payment.") (emphasis added). Here, the Dealers Act does not provide any language relating to the recovery of excess or improper charges that were voluntarily paid by the customer as part of the negotiated cash price of a vehicle.[23]

4. There is no evidence showing that Hendrick Honda violated the Dealers Act by charging a closing fee or that Hendrick Honda's actions resulted in damage to Hair.

To the extent this Court determines Hair could pursue a claim under the Dealers Act based on Hendrick Honda's assessment of a closing fee in her transaction, there is no evidence showing any actionable conduct on the part of Hendrick Honda. Under the trial court's reasoning, Hair could not recover under the Dealers Act for an allegedly improper closing fee unless there was a violation of the Closing Fee Statute. If the jury found some violation of the Statute, Hair would then have the burden of proving "unfair or deceptive acts or practices" by showing: (1) an action that is arbitrary, in bad faith, or unconscionable as those terms are defined that (2) causes damage to the plaintiff. S.C. Code Ann. §§ 56-15-30 & -40.

Arbitrary acts are acts that are "unreasonable, capricious or nonrational; not done according to reason or judgment; depending on will alone." *Taylor v. Nix*, 307 S.C. 551, 555, 416 S.E.2d 619, 621 (1992). "Motor vehicle dealers are not required to deal with their customer guided solely by fixed rules and standards. Their conduct under this Act

[23] The trial court's ruling would likely be correct under an excess fee regime, such as the Consumer Code, because in that situation, the legislature has shown an intent to displace the common law rule that a plaintiff cannot recover the amount of a voluntarily paid charge. *See* S.C. Code Ann. § 37-5-202(2). However, a general statute for the recovery of damages, like the one in the Dealers Act, does not reflect a legislative intent to displace the common law voluntary payment defense.

need only have some reasonable basis." *Id.* at 556, 416 S.E.2d at 621. In this case, there is no evidence showing Hendrick Honda did not have a reasonable basis for setting and collecting its closing fee as it did. Instead, the evidence shows Pendleton set the fee based on his years of experience in the industry and his knowledge of the expenses at Hendrick Honda. (R. at 1503:25-1511:2). Further, as explained above, Hendrick Honda followed the established statutory regime to the letter, and Hair freely admits she was fully informed about the fee at the time of her purchase.

Additionally, Hendrick Honda's decision to charge the closing fee was not unconscionable as a matter of law. In *Fanning*, this Court specifically ruled that: (1) a closing fee is not an "additional fee," but simply part of the cash price of the vehicle, and (2) charging a closing fee is not unconscionable. *Fanning* at 401, 472 S.E.2d at 244. The *Fanning* decision controls, and Hendrick Honda's charging of closing fees cannot be considered unconscionable. Nor was the transaction unconscionable at common law. In a contractual context, unconscionability is "the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Carolina Care Plan, Inc. v. United HealthCare Servs.*, 361 S.C. 544, 554, 606 S.E.2d 752, 757 (2004) (citing *Fanning*). Here, Hair freely negotiated the terms of her contract and was free to purchase a vehicle elsewhere. (R. at 1373:13-21, 1390:21-25, 1400:13-17). Nothing about her transaction with Hendrick Honda presents evidence of unconscionability.

Nor was there any evidence of bad faith. The term "bad faith" is a contract term. As used in the Dealers Act, it means:

> The opposite of good faith, generally implying or involving actual or constructive fraud, or a design to deceive or mislead another, or a neglect or refusal to [fulfill] some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.

In re Estate of Carr v. Circle S. Enters., Inc., 379 S.C. 31, 43, 664 S.E.2d 83, 88-89 (Ct. App. 2008) (quotation omitted). There is no evidence of any bad faith, fraud, or deception in this transaction. Hair admits the closing fee was fully disclosed to her, in writing, on two different documents that she signed. (R. at 1362:20-1363:25; *see* R. at 1770, 1783). She also admits she had a good experience at Hendrick Honda. (R. at 1401:18-25).

Finally, this case is devoid of any evidence that links Hendrick Honda's decision to charge a closing fee or the manner in which the fee was set with the alleged damage to Hair. Section 56-15-40 requires that the bad faith, arbitrary, or unconscionable action cause damage to the plaintiff. *See Barton v. Superior Motors, Inc.*, 309 S.C. 491, 494, 424 S.E.2d 524, 526 (Ct. App. 1992) (affirming grant of directed verdict motion in Dealers Act case where there was no testimony showing the connection between the underlying conduct and the alleged damages). Actual damages are the amount needed to put the plaintiff in the same position he or she would have enjoyed if there had been no violation. *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 312, 594 S.E.2d 867, 874 (Ct. App. 2004). In this case, assessment of actual damages is not measured simply by the amount of the closing fee, but rather a comparison between the total out of pocket cost actually paid by Hair and the total out of pocket cost she would have paid in the absence of a closing fee.

Given the overall context of the fee as one component of the negotiated cash price of the vehicle, the testimony was that there was not a dollar for dollar correlation between the closing fee and the total negotiated cash price. (R. at 1344:13-1345:8, 1518:8-12, 1570:5-1571:1). Instead, the testimony established conclusively that the closing fee is simply one aspect of the negotiations for price. For example, if a closing fee were not charged, the overall purchase price could be higher or an option package may cost more. (R. at 1570:5-1571:1). Accordingly, there is no evidence supporting the assumption that Hair's loss automatically equaled the amount of the closing fee she paid. At a minimum, such an assumption amounts to nothing more than pure speculation that no other element of the transaction would have changed in the absence of a closing fee. Therefore, Hair has failed to prove damages under the Dealers Act.

II. THE TRIAL COURT ERRED IN ALLOWING THIS ACTION TO PROCEED IN A REPRESENTATIVE CAPACITY WITHOUT FOLLOWING THE REQUIREMENTS OF RULE 23, SCRCP.

The party seeking to maintain an action as a class action has the burden of showing each element of Rule 23(a), SCRCP. *Waller v. Seabrook Island Prop. Owners Ass'n,* 300 S.C. 465, 467, 388 S.E.2d 799, 801 (1990). "It is imperative the court apply a rigorous analysis to assure the prerequisites of Rule 23(a) have been satisfied. The failure of the proponents to satisfy any one of the prerequisites is fatal to class certification." *Id.*

Hair did not plead these prerequisites, nor did the trial court engage in the required analysis for class treatment. Instead, the trial court refused to apply Rule 23 and found that Hair had a substantive right to proceed with a "group action" pursuant to S.C. Code Ann. § 56-15-110(2). (R. at 3). Hendrick Honda has never been given the opportunity to address the many reasons why this action is not appropriate for class treatment, including the

myriad variations between consumer transactions and historical changes in federal, state, manufacturer, and loan documentation requirements.

A. S.C. Code Ann. § 56-15-110(2) does not provide a substantive right to a "group action" independent of the requirements of Rule 23, SCRCP.

S.C. Code Ann § 56-15-110(2) does not provide a blanket authorization for any case under the Dealers Act to proceed as a "group action" without complying with the South Carolina Rules of Civil Procedure ("Rules"). Under this section, a plaintiff may bring a class action under appropriate circumstances; however, Rule 23, SCRCP still applies. As stated in Rule 1, SCRCP, "These rules govern the procedure in all South Carolina courts *in all suits of a civil nature* whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81." (Emphasis added).

Nothing in Rule 81, SCRCP or the Dealers Act creates a special exception to the Rule 23 requirements. There is nothing unusual about the wording used in subsection (2), and it closely mirrors the statutory predecessor to Rule 23. *See* S.C. Code Ann. § 15-5-50 (repealed 1985). Based on the language of § 56-15-110(2) and prevailing law on class actions at the time it was enacted in 1972, the legislature only intended this provision to remove a then-existing legal impediment to filing a class action for personal damages.[24] In adopting the Rules, the legislature explicitly provided that, upon taking

[24] Before the adoption of Rule 23, class actions were governed by statute. "[T]he general rule as developed by case law in the State [was] . . . that actions at law for personal remedies . . . [could] not be brought as class actions." *General Supplies, Inc. v. Southwire Co.,* 276 S.C. 55, 58, 275 S.E.2d 579, 580 (1981). In the pre-Rules period, plaintiffs were not allowed to bring an action for damages as a class action unless the plaintiffs suffered joint injuries and sought damages *in solido* or there was a statute providing for a class suit. *Id.* Thus, under the law that existed when § 56-15-110 was enacted, if the legislature had not included subsection (2) permitting a plaintiff to bring a representative action, no such action would have been allowed. Further, pre-Rule statutes were not construed as a general, unlimited right to bring a class action seeking money damages. *See* J. Flanagan, *South Carolina Civil Procedure* at 175 (2d ed. 1996) (stating

effect, the Rules would control procedures in any civil lawsuit in the event of conflicts between the new rules and existing statutes. 1985 Act No. 100, 1985 S.C. Acts 277, §3 (emphasis added).[25] South Carolina courts immediately recognized that the Rules control matters of procedure, regardless of previously enacted statutes. *See McGann* at 568, 340 S.E.2d at 156. As long as the statutory right granted is not substantive, the Rules control.

Section 56-15-110(2) does not create a substantive right to file a "mass action" or "group action" that ignores longstanding law and rules of class action procedure, standing, and joinder. As held by the United States Supreme Court, class representation is a procedural, rather than a substantive, right. *See e.g. Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) ("the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims"). The same is true in South Carolina. *See Knowles v. Standard Savings & Loan Assoc.*, 274 S.C. 58, 59, 261 S.E.2d 49, 49 (1979) ("Class certification, essentially procedural in nature, does not involve substantial or essential legal rights . . . ."). Here, the language of § 56-15-110(2)

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class actions were permitted in only three situations: "if there was a prior organizational bond between the class members; if they sought a common fund; or if common declarative or injunctive relief was sought"); *McGann v. Mungo*, 287 S.C. 561, 567, 340 S.E.2d 154, 157 (Ct. App. 1986) (interpreting former S.C. Code Ann. § 15-5-50). Hair's Dealers Act claim for individual damages does not meet any of these criteria.

[25] Section 15-5-50 was among the procedural statutes repealed in 1985 concurrent with the adoption of the Rules. 1985 Act No. 100, 1985 S.C. Acts 277; Rule 86, SCRCP. The repeal of § 15-5-50 demonstrates that the legislature intended Rule 23 to control all class actions. Having repealed the general statute, the legislature inserted the catchall provision in Act No. 100 that "the rules shall control" any other provisions "not repealed by this act" to address the statutes addressing class actions and other procedural issues sprinkled throughout the Code of Laws.

merely permits a party to pursue a representative action, which is a procedural expedient and not a substantive right. Therefore, it is subject to Rule 23.

This Court has discussed class action matters in the context of the Dealers Act. *See Ferguson v. Charleston Lincoln/Mercury, Inc.*, 349 S.C. 558, 564 S.E.2d 94 (2002) (affirming the denial of Rule 23 class certification in a case seeking money damages and a representative action under the Dealers Act). Neither Hair nor the trial court has cited even one case filed in the post-Rules era that proceeded as a private "group action" for damages without first complying with Rule 23. In fact, the trial court, at the behest of the Plaintiffs including Hair, applied Rule 23 in its order approving the CarMax settlement. (*See* R. at 6).

B. The Court must harmonize Rule 23, SCRCP, and S.C. Code Ann. § 56-15-110(2).

Even assuming, *arguendo*, that the Closing Fee Statute creates an independent substantive right, Rule 23, SCRCP still applies. Courts must harmonize seemingly conflicting court rules and statutes wherever possible. *Grazia v. S.C. State Plastering, LLC,* 390 S.C. 562, 703 S.E.2d 197 (2010). In *Grazia*, this Court reversed the trial court's ruling that the Notice and Opportunity to Cure Construction Dwelling Defect Act ("Right to Cure Act") was incompatible with Rule 23, holding that the trial court had a duty to reconcile seemingly inconsistent statutes using "basic precepts of statutory construction, namely harmonization." *Id.* at 571, 703 S.E.2d at 201. The Court ultimately held that Rule 23 did not conflict with the Right to Cure Act because Rule 23 was merely the procedural device through which representative claims under the Right to Cure Act could be brought. *Id.* at 576, 703 S.E.2d at 204.

Because § 56-15-110(2) authorizes representative actions but does not provide any procedural guidelines for such actions, Rule 23 sets forth the mechanism through which the procedural right in § 56-15-110(2) may be pursued by a named plaintiff in a representative capacity. *See Grazia* at 573, 703 S.E.2d at 202. Therefore, there is no irreconcilable conflict between the two provisions. *See id.* at 571, 703 S.E.2d at 201; *see also Cullum Mech. Constr., Inc. v. Charleston,* 272 S.C. 553, 556, 253 S.E.2d 106, 107 (1979) (statutes concerning the same subject matter should be construed so as "to render both operative").

The trial court attempted to make findings on the Rule 23 elements in its order denying Hendrick Honda's post-trial motions. (R. at 90-91). Those general statements do not excuse Hair's failure to plead and prove those elements as required by Rule 23. This last ditch effort to save the group verdict sets the class procedure on its head. Hendrick Honda was never given any opportunity to present its own evidence showing why class treatment was not proper. As shown in the trial in the matter, every transaction is different in terms of paperwork, negotiations, and complexity. Nothing about the verdict or the trial court's order denying Hendrick Honda's post-trial motions corrects the failure to comply with Rule 23. Accordingly, the trial court erred in failing to abide by the procedures set forth in Rule 23, and this Court should reverse and remand with instructions to the trial court that in order for Hair to proceed with a class action, the requirements of Rule 23 must first be met.

III. IN THE EVENT THIS COURT DETERMINES HAIR CAN ASSERT A CLAIM UNDER THE DEALERS ACT FOR ALLEGED VIOLATIONS OF THE CLOSING FEE STATUTE, HENDRICK HONDA IS ENTITLED TO A NEW TRIAL.

In assessing Hendrick Honda's arguments that this case should be reversed and remanded for a new trial, this Court will apply the following standard: "[t]he grant or

denial of new trial motions rests within the discretion of the trial judge and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." *Chapman v. Upstate RV & Marine*, 364 S.C. 82, 88-89, 610 S.E.2d 852, 856 (Ct. App. 2005) (quotations omitted); *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 49, 691 S.E.2d 135, 149 (2010) ("Whether to grant a new trial is a matter within the discretion of the trial judge, and this decision will not be disturbed on appeal unless it is unsupported by the evidence or is controlled by an error of law.").

A. The jury charge failed to give the jury the full and correct law applicable to its determination.

The essence of a party's challenge to erroneous jury instructions is that the jury has been instructed in such a way as to prevent it from reaching a fair and just verdict. The remedy for a court's failure to correct an erroneous jury charge is a new trial. *See Gamble v. Int'l Paper Realty Corp. of S.C.*, 323 S.C. 367, 375, 474 S.E.2d 438, 442 (1996); *Eaddy v. Dorn*, 289 S.C. 356, 359, 345 S.E.2d 513, 515 (Ct. App. 1986). As allowed by Rule 51, SCRCP, the parties submitted written jury charges for the trial court's consideration. "Ordinarily, a trial court has the duty to give a requested instruction that correctly states the law applicable to the issues and the evidence." *Williams v. Addison*, 314 S.C. 35, 40, 443 S.E.2d 582, 585 (Ct. App. 1994). Here, the trial court omitted several proper instructions, including instructions on *all* of Hendrick Honda's defenses; gave incomplete instructions; and gave improper instructions. Each of these errors warrants a new trial in this case.

1. The trial court omitted numerous charges submitted by Hendrick Honda when it charged the jury, resulting in prejudice to Hendrick Honda.

a. Hendrick Honda was entitled to have the jury charged on its defenses under the Consumer Code.

As charged by the trial court, there is no violation of the Dealers Act unless there was also a violation of the Closing Fee Statute. (R. at 1657:6-19). Because the Statute is part of the Consumer Code, there is no liability for actions taken in reliance on the advice of the Department (Safe Harbor Defense (S.C. Code Ann. §§ 37-6-104(4) & -506(3)), or in a good faith effort to comply with the terms of the Consumer Code (Good Faith Error Defense (S.C. Code Ann. § 37-5-202(7)).

At trial, Collins testified that Hendrick Honda complied with its duties under the Closing Fee Statute required by the Department and the Administrative Interpretation. (R. at 1547:20-1549:20, 1551:20-23, 1557:4-1558:3). Thus, the evidence supported the requested charges. (R. at 1624-25, 1643-44). The trial court, however, declined to give any charges relating to these defenses. (R. at 1600:21-1601:14). Although the trial court acknowledged there could be no violation of the Dealers Act without a violation of the Closing Fee Statute, it failed to recognize that there can be no violation of the Closing Fee Statute if there is an applicable defense under the Consumer Code. This is in stark contrast to the trial court's statement in its Declaratory Judgment Order that "if an entity regulated under the Consumer Code (including motor vehicle dealers) acts 'in conformity with any written order, opinion, interpretation or statement" of the Department, then that entity shall be free from penalty." (R. at 31).

In addition to being valid defenses under the Consumer Code, the requested charges would have also helped establish that Hendrick Honda's conduct was not

offensive to public policy and therefore, not a violation of the Dealers Act. For both of these reasons, the requested charges were appropriate and warranted under the facts of this case.

b. The evidence supported and the jury should have been allowed to consider Hendrick Honda's voluntary payment defense.

As discussed above, the voluntary payment doctrine precludes Hair from recovering money that she paid voluntarily, even if the charge paid was illegal and even though she may have been unaware of her legal rights. *Hardaway v. Southern Ry. Co.*, 90 S.C. 475, 73 S.E. 1020 (1912); *Moody v Stem*, 214 S.C. 45, 51 S.E.2d 163 (1948). The evidence showed that Hair paid the closing fee after full disclosure of the price and without any objection. Therefore, the facts supported this charge, and the trial court erred in refusing it.[26] (R. at 1602:21-1603:1, 1630).

c. The evidence supported Hendrick Honda's requested charges on waiver and estoppel.

The defenses of estoppel by silence and waiver concern Hair's conduct when she chose to enter into the transaction with Hendrick Honda. Hendrick Honda contends the jury should have been allowed to decide whether Hair waived her right to object to the closing fee by signing the Buyer's Order and purchasing her vehicle with full knowledge that she was paying a closing fee. (R. at 1631). Under South Carolina law,

> A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Generally, the party claiming waiver must show that the

[26] The trial court appeared to concede that this defense presented a jury question in its order denying Hendrick Honda's motion for summary judgment, stating "there is a question of fact as to whether Mrs. Freeman Hair paid the fee with 'full knowledge of all the facts.'" (R. at 69)

> party against whom waiver is asserted, possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended.

Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 388-89 (1992). Waiver may be implied from the circumstances. *Bonnette v. State*, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981); *Lyles v. BMI, Inc.*, 292 S.C. 153, 158, 355 S.E.2d 282, 285 (Ct. App. 1987). Acts that are inconsistent with the continued assertion of a right may also give rise to a waiver. *Bonnette* at 18, 282 S.E.2d at 598.

Here, although evidence supported a charge that Hair waived any right to object to Defendant's charging of the closing fee, the jury was not charged to consider that evidence in its decision. Hair is a mature, elementary school teacher with a master's degree. (R. at 1373:15-1374:3). She signed both the Sales Worksheet and the Buyer's Order, each of which had the closing fee prominently disclosed in bold print. (R. at 1770, 1783). She is presumed to have read, understood, and agreed to the statements contained in the documents she signed, regardless of whether she read them or not. *See, e.g., Regions Bank v. Schmauch*, 354 S.C. 648, 664, 582 S.E.2d 432, 440 (Ct. App. 2003) ("One who signs a written instrument has the duty to exercise reasonable care to protect himself.") (citations omitted).

In addition to waiver, the evidence supports a finding that Hair was equitably estopped from objecting to her payment of the closing fee. Under South Carolina law, the essential elements of estoppel are divided between the estopped party and the party claiming estoppel. *S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth.*, 311 S.C. 29, 33, 426 S.E.2d 748, 750 (1993). As to the estopped party, the essential elements are:

(1) conduct amounting to a concealment of material facts, or conduct calculated to convey the impression that the facts are otherwise than, and inconsistent with, the party's subsequent assertions;
(2) intention or expectation that such conduct be acted upon by the other party; and
(3) actual or constructive knowledge of the real facts.

Id. As to the party claiming estoppel, the essential elements are:

(1) lack of knowledge or the means of acquiring, with reasonable diligence, knowledge of the true facts;
(2) reasonable reliance on the other party's conduct; and
(3) a prejudicial change in position.

Id. Unlike waiver, the estopped party need not intend to relinquish or change any existing right for estoppel to arise. *Janasik* at 339, 415 S.E.2d 384. The reliance by the party claiming estoppel must be reasonable, and it must proceed in good faith. *Masonic Temple, Inc. v. Ebert,* 199 S.C. 5, 17, 18 S.E.2d 584, 589 (1942).

Hair's conduct during her transaction is inconsistent with her subsequent claims that charging the closing fee was illegal, unconscionable, deceptive, and misleading. Hair testified that she would not have completed her transaction if the terms were not acceptable to her. (R. at 1373:13-21, 1390:21-25, 1400:13-17). She also admitted that she remembered signing the Sales Worksheet and the Buyer's Order, both of which prominently disclosed the closing fee, and ultimately agreed to purchase the vehicle— all of which signaled to Hendrick Honda that she harbored no objection to the terms of the transaction. If Hair believed that she was being misled, the time to complain was before the transaction became final. Instead, Hair knew or reasonably should have expected that Hendrick Honda would rely on her voluntary conduct in purchasing the vehicle.

As to Hendrick Honda, its personnel had no indication that Hair objected to the fee. Both the salesman and the finance manager involved in Hair's transaction testified

that there were things that could be done in the event the customer objected to the fee. (R. at 1485:12-1486:11, 1569:25-1571:6). Here, Hair remained silent about her objections throughout the transaction. Hendrick Honda reasonably relied on this silence, only to be prejudiced and surprised a month and a half later when Hair filed suit. If Hair had objected to the fee, Hendrick Honda likely would have reduced the purchase price by some amount to accommodate her objections (while still accounting for the fee).

Hendrick Honda did not seek any gain by way of these defenses, it merely sought to maintain the status quo, which allows both parties to keep the benefit of their bargain. The closing fee does not stand in isolation. As noted by the court in *Fanning* at 403-04, 472 S.E.2d at 245, the fee is merely one item that comprises the negotiated cash price as a whole. For these reasons, the requested charges should have been issued and Hendrick Honda should have been able to make corresponding arguments to the jury.

d. The trial court erred in failing to charge the jury about Hair's duty to read the contract at issue.

Hendrick Honda also sought the following charge outlining Hair's duty to read the sales documents:

> Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it. One who signs a contract has the duty to exercise reasonable care to protect himself. One cannot complain of fraud and misrepresentation in the contents of a document if the truth could have been ascertained by reading it. The law does not impose a duty on one party to explain to an individual what he could learn from simply reading the document

(R. at 1629). *See* Ralph King Anderson, Jr., *South Carolina Requests to Charge-Civil*, 2002, § 19-23; *Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 39-40, 340 S.E.2d 786, 789 (1986); *Regions Bank* at 663-64, 582 S.E.2d at 445. The trial court refused to give this charge because it found "[y]ou either violated the statute or you didn't." (R. at 1601:23-

1602:19). However, this reasoning contradicts the language of the Closing Fee Statute, which indicates it applies to "closing fees on a motor vehicle sales contract." S.C. Code Ann. § 37-2-307; *see also Fanning* at 402, 472 S.E.2d at 244 (stating "the fee is not an 'additional charge' but is, rather, an element of the negotiated cash price of the vehicle."). Therefore, all of the traditional jury charges relating to contract claims should apply. Hair had a duty to read and understand the contract. The trial court had an obligation to give the requested charge.

e. The trial court erroneously failed to charge the jury as to the calculation and certainty required for the assessment of damages.

Hendrick Honda proposed two charges on damages: one as to calculation and the other related to the certainty of the amount of damages. (R. at 1636-37). These two requested charges would have provided the jury with the proper framework for assessing damages. The trial court declined the portion of the charge relating to speculative damages, and as a result, the jury did not have all of the information it needed to assess the damages portion of this case.

With respect to the damages charge, the trial court directed that "if the Defendant's closing fees exceeded the amount to necessarily reimburse the Defendant for his actual closing costs, then actual damages [are] a portion of that fee which exceeded actual closing costs." (R. at 1661:19-23). As previously argued, Hair did not put forth any evidence concerning Hendrick Honda's actual closing costs. Her expert expressly declined to assign any value; however, he conceded that there would be some associated costs that would be properly recovered as part of the closing fee. (R. at 1346:5-1347:24, 1348:4-21, 1353:19-22, 1354:3-22). Hendrick Honda, on the other hand, presented evidence showing that the costs exceeded the fee. (*See* R. at 1586:5-1588:12). Hair had

no evidence short of speculation that the amount of the closing costs was less than the fee. For that reason, the speculative damages charge was appropriate, and the trial court erred in failing to issue the requested charges.

2. The trial court's charge contained inaccurate statements of law or otherwise failed to instruct the jury fully, resulting in prejudice to Hendrick Honda.

a. The trial court's charge on the Closing Fee Statute fell well outside the language of the Statute and impermissibly deprived the jury of its ability to assess compliance with the Statute as written.

Hendrick Honda has argued since the beginning of this action that it complied with the Closing Fee Statute as written. The trial court issued its own construction of the statute in its Declaratory Judgment Order, over the strenuous objection of Hendrick Honda. As this case progressed, the trial court declined to revisit this definition and indicated that it would charge the jury pursuant to that order. At trial, Hendrick Honda again argued to no avail that the definition was inappropriate, and the trial court charged the jury with the language of the Declaratory Judgment Order. In the event the Court finds that Hendrick Honda was not entitled to judgment as a matter of law with respect to compliance with the Statute, Hendrick Honda asks that this matter be remanded for a new trial with clear direction as to how the jury should be charged with respect to how a dealer may comply with the Statute.

In addition, the trial court's charge on the Closing Fee Statute was inconsistent with its charge on damages. The portion of the charge on the Statute appeared to instruct the jury that it was to determine whether this was a "closing fee" at all. In that section of the charge, the trial court instructed, "[n]ow, you must make a determination in your findings, in this case your analysis must be as to whether or not what the dealer charged

in this case was, in fact a closing fee as defined by the declaratory judgment order, or was it not a closing fee." (R. at 1657:6-11). This charge impermissibly permitted the jury to determine whether or not the fee qualified as a closing fee at all, and it directly contradicts the trial court's charge on damages, which provided:

> And obviously, the purpose of awarding these types of damages is not to enable the Plaintiff to make a profit on the transaction, but simply to compensate her and the class for the losses they incurred, if the dealer has violated both of these statutes. But she cannot recover more than her loss. And as applied to this claim and the – if the Defendant's closing fees exceeded the amount necessary to reimburse him for his actual closing costs, then actual damages [are] a portion of that fee which exceeded actual closing costs. So if you find that she's entitled to damages, obviously you've got a wide range in this case, anywhere from zero to two hundred ninety-nine dollars.

(R. at 1661:13-1662:1). Even assuming the trial court's instructions derived from its Declaratory Judgment Order were correct, the measure of damages should have correlated to the amount by which the fees exceeded the permissible closing costs—not the entire amount of the closing fee.

b. The trial court's charge regarding "unfair" conduct was unnecessary and was not a correct recitation of the law under the Dealers Act.

The trial court's charge regarding the statutory term "unfair" was unnecessary and was an incorrect recitation of the law under the Dealers Act, because it included a separate definition of the term "unfair" taken from a different statutory scheme. Even if the term "unfair" required definition, the definition submitted by Hendrick Honda was more appropriate than the one ultimately charged by the trial court. (R. at 1628, 1645).

Liability for "unfair or deceptive acts or practices" under S.C. Code Ann. § 56-15-30 is limited to the definition provided in S.C. Code Ann. § 56-15-40. *See Estate of Carr* at 42, 664 S.E.2d at 88. As stated by the Court of Appeals,

> The Dealers Act declares certain unfair methods of competition and unfair or deceptive acts or practices to be unlawful. S.C. Code Ann. § 56-15-30(a) (2006). It is a violation of the Dealers Act for any manufacturer or motor vehicle dealer 'to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public.'

Id. There is no mention of a separate basis of liability for an "unfair" act or practice.

This construction is supported by the plain language of the statute and the titles applied in the 1976 and 1962 codes. The Dealers Act provides in § 56-15-40(a) that "[u]nfair methods of competition and unfair or deceptive acts or practices as defined in § 56-15-40 are hereby declared to be unlawful." Section 56-15-40(1) states "[i]t shall be deemed a violation of paragraph (a) of § 56-15-30 for any . . . motor vehicle dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public." Nothing in the definition provided in § 56-15-40 requires a separate charge on the word "unfair."

This argument is further supported by the title of § 56-15-40, which reads in part, "[s]pecific acts deemed unfair methods of competition and unfair or deceptive acts or practices." This direct relationship between §§ 56-15-30 and 56-15-40 is even more apparent when the titles from the 1962 code are considered. In the previous code, what is now § 56-15-30, was titled "[u]nfair methods of competition and unfair, etc. practices unlawful" and what is now section 56-15-40 was titled in part "[w]hat acts deemed violations of [§ 56-15-30]." S.C. Code 1962 §§ 46-150.153 & -150.154 (Supp. 1975). Courts may "of course, consider the title or caption of an act in determining the intent of the Legislature." *Beaufort County v. S.C. State Election Comm'n*, 395 S.C. 366, 373 n.2, 718 S.E.2d 432, 436 n.2 (2011). In this case, consideration of the titles shows the legislative intent that liability under § 56-15-30 is limited to those circumstances

described in § 56-15-40. The trial court denied Hendrick Honda's arguments on these points and instead insisted on using the charge given in *Ritz v. Taylor Toyota.* (R. at 1426:18-19).

Moreover the "unfair" charge given by the trial court was a legally incorrect charge borrowed in part from old cases arising under the UTPA. Following the trial court's denial of its request that there not be a separate charge defining "unfair," Hendrick Honda submitted an alternative charge based on the current Federal Trade Commission's ("FTC") definition of "unfair." (R. at 1628, 1645; *see* R. at 1426:20-1427:12, 1601:15-22). Application of FTC interpretations is permissive under the Dealers Act and mandatory under the UTPA. *See* S.C. Code Ann. §§ 39-5-20 & 56-15-30. Under the FTC definition, conduct cannot be considered unfair if it was reasonably avoidable by the consumer. 15 U.S.C. § 45(n). The relevance of this standard is clear; the jury was presented with evidence that Hair could have avoided the injury. She admitted at trial that she could have and would have walked away from the transaction if she was not completely satisfied (R. at 1373:13-21, 1390:21-25, 1400:13-17), and dealership witnesses testified that they could have changed the terms of the transaction had Hair objected to the fee (R. at 1485:12-1486:11, 1569:25-1571:6). The trial court refused Hendrick Honda's reasonable request in favor of old UTPA language that relies on a long outmoded FTC definition of "unfair." (R. at 1428:15-22).

When the trial court denied that request, Hendrick Honda then submitted a definition of "unfair" from a recent case interpreting the UTPA. (R. at 1645; *see* R. at 1595:12-1597:21). The trial court gave that charge, but added to it additional verbiage that "an action that violates a statute, violates public policy." (R. at 1659:7-10). This

was a misstatement of the law and allowed Hair to conflate a violation of the Closing Fee Statute with a violation of the Dealers Act in contravention of § 56-15-40. This additional language is also inconsistent with the Good Faith Error and Safe Harbor Defenses found in the Consumer Code, both of which absolve a dealer of liability if that dealer has complied with or instituted policies designed to comply with the Statute and Department guidance, even if the Department guidance is later proven to be erroneous. The trial court's "unfair" charge, coupled with the failure to charge the Good Faith Error and Safe Harbor language, prevented the jury from accurately assessing the law under both the Statute and the Dealers Act to the grave prejudice of Hendrick Honda.

c. The trial court failed to issue a complete charge on the definition of "arbitrary" for purposes of the Dealers Act.

Hendrick Honda submitted a full and complete proposed charge on the definition of the word "arbitrary" for purposes of the Dealers Act, as follows:

> "[A]rbitrary" acts are acts that are unreasonable, capricious, or non-rational; not done according to reason or judgment, depending on will alone. Motor vehicle dealers are not required to deal with their customers guided solely by fixed rules and standards. Their conduct under this Act need only have some reasonable basis.

Estate of Carr at 42-43, 664 S.E.2d at 88; *Taylor* at 555, 416 S.E.2d at 621. (R. at 1632). The trial court, however, charged only the first sentence, claiming the remaining requested language was a charge on the facts. (R. at 1598:10-12). That is simply not the case. The requested charge was quoted from the holding in *Taylor*, which reads as follows:

> We note the lower court charged arbitrary meant "not governed by any fixed rules or standards." This definition was derived from *Deese v. South Carolina State Board of Dentistry,* 286 S.C. 182, 332 S.E.2d 539 (Ct.App.1985). This definition applied in *Deese* is appropriate for reviewing the conduct of agencies, however, it is too narrow as applied to

> the conduct of motor vehicle dealers. Motor vehicle dealers are not required to deal with their customer guided solely by fixed rules and standards. Their conduct under this Act need only have some reasonable basis. . .

Taylor at 555-56, 416 S.E.2d at 621. This language arises from a discussion of jury charges; therefore, there is no question that it should have been charged in this case. It is a direct statement of the law applicable to this case, and not a charge on the facts. The trial court's failure to give the complete charge was particularly damaging given Hair's arguments that Hendrick Honda was required to conduct a detailed, written cost analysis and calculation prior to setting the closing fee.

d. The trial court failed to issue a complete charge on the definition of "unconscionable" in the context of this case.

Hendrick Honda submitted a full and complete proposed charge on the definition of the word "unconscionable," which included the following language:

> When describing a written contract, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.

(R. at 1634). The trial court refused to give this instruction because it believed the only issue to be whether the fee included improper elements. (R. at 1599:20-1600:2). However, this reasoning is inconsistent with the language of the Closing Fee Statute, which does not apply without a contract for sale. S.C. Code Ann. § 37-2-307. Hendrick Honda did not enter this transaction alone. Hair was aware of the fee, negotiated a hard bargain, and was free to walk away at any time. This ability to negotiate or walk away means that the closing fee could not have been unconscionable, or at the very least, that the jury should have been given a full and complete charge on unconscionability.

B. The trial court erred by using a non-specific verdict form and compounded that error by directing the jury to reach a verdict for the entire "group."

The trial court declined to use the verdict form submitted by Hendrick Honda, which was short and focused solely on the issues presented in this case:

> (1) Do you find that Defendant Hendrick Honda failed to comply with the requirements of the South Carolina Closing Fee Statute in any year between 2002 and 2006?;
>
> (2) Do you find that the Defendant Hendrick Honda failed to comply with the South Carolina Regulation of Manufacturers, Distributors and Dealers Act resulting in damages to the plaintiff in any year between 2002 and 2006?; and
>
> (3) We find that Defendant Hendrick Honda's actual closing costs per vehicle in each year are as follows[.]

(R. at 1646-48). This proposed verdict form walked the jury through the process that the trial court outlined in its charges: (1) to assess whether the closing fee contained any "costs that were not in connection with the closing of the transaction;" (2) to assess whether there was a violation of the Dealers Act, and (3) to assess damages "as applied in this claim and the—if the Defendant's closing fees exceeded the amount necessary to reimburse him for his actual closing costs, then actual damages [are] a portion of that fee which exceeded actual closing costs." (R. at 1654:7-1662:15).

Instead of presenting the jury with a form tailored to the charge, the trial court instead used a general verdict form that only asked whether the jury found for the Defendant or the Plaintiff and in what amount. This form made it impossible for the jury to apply the charge.

In addition, the trial court charged that this action was brought in a representative capacity and that the jury should assess damages for the group as a whole, but without instructing the jury as to how it should do this. The evidence conclusively showed that

the closing fee changed over time and that every transaction was different. (*See, e.g.*, R. at 1487:2-11). In addition to Hendrick Honda's objections to this action proceeding in a representative capacity, the charge as issued did not give the jury the tools it needed to determine damages for the group as a whole. The general verdict form compounded this error and pre-disposed the jury to a verdict awarding the reimbursement of all closing fees collected.

Hendrick Honda's proposed verdict form was designed to focus the jury on the task assigned by the trial court. As argued above, there were several errors in the charge that were prejudicial to the Defendant; however, some of that prejudice could have been erased through the use of a tailored verdict form.

C. The trial court should have granted a new trial *nisi remittitur* at a level that reflected solely Hair's claim.

In the event the Court determines that this action should not have proceeded as a "group action" outside the scope of Rule 23, SCRCP, the trial court erred in failing to grant Hendrick Honda's motion for a new trial *nisi remittitur* reducing the verdict amount to one that reflects only Hair's transaction.

A new trial *nisi remittitur* is appropriate if the evidence failed to support the jury's verdict. *See Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006) (stating "compelling reasons must be given to justify invading the jury's province by granting a new trial *nisi remittitur*" and noting "[t]he consideration for a motion for a new trial *nisi remittitur* requires the trial judge to consider the adequacy of the verdict in light of the evidence presented"). A trial court has broad discretion to grant *nisi remittitur* if the verdict is merely excessive, provided it provides compelling reasons for its decision. *Id.*

Because a "group action" was inappropriate, the trial court should have granted the new trial *nisi remittitur* and set the *remittitur* no higher than $299, the amount of the closing fee paid by Hair. In addition, the trial court directed that damages are limited to the amount by which the fee exceeded the actual closing costs, and, as previously argued, there is no evidence supporting an award of the full amount of the closing fee. Therefore, the verdict should have been reduced accordingly, and the trial court abused its discretion in failing to grant a new trial *nisi remittitur*.

IV. THE TRIAL COURT ERRED IN GRANTING HAIR'S MOTION TO DOUBLE DAMAGES.

In the event the underlying judgment is reversed, the order doubling damages must be reversed as well. *See Stroud v. Elliott*, 316 S.C. 242, 245, 449 S.E.2d 261, 262 (Ct. App. 1994) (holding reversal of actual damages award requires reversal of punitive damages award as well). If the judgment is reversed, there is nothing to double.

Additionally, the trial court erred in entering the order doubling damages as to the entire represented group. The section of the Dealers Act establishing remedies provides as follows:

> (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 therefore in the court of common pleas and shall recover double the actual damages by him sustained, and the cost of suit, including a reasonable attorney's fee.
>
> (2) When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief.

S.C. Code Ann. § 56-15-110. Throughout this case, Hair has maintained that she brought this action as a "group action" pursuant to § 56-15-110(2). Subsection (2) does not provide for double damages. Only subsection (1), which provides for a private right of

action *on behalf of an individual*, contemplates an award of "double the actual damages by him sustained." Subsection (1) expressly limits the damages that can be doubled to those actual damages suffered by the plaintiff; it does not provide for the doubling of any damages suffered by anyone else.

Courts "must follow the plain and unambiguous language in a statute and have no 'right to impose another meaning'" unless the literal meaning "leads to a result so patently absurd that the General Assembly could not have intended it." *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 535-36, 725 S.E.2d 693, 695-96 (2012). The plain language of § 56-15-110 provides different recoveries under subsections (1) and (2). For the individual plaintiff, who may have a small claim but nevertheless been injured, the legislature provided an incentive under subsection (1) to bring the claim to remedy violations of the statute—the availability of double damages, costs, and attorney's fees. For the plaintiff who brings the claim "for the benefit of the whole" under subsection (2), no such incentive was needed because in the case of a "group" action, the damages awarded would reflect the damages sustained by the entire group. Subsection (2) already contemplates substantial damages, even without doubling, because it requires the "group" to be "numerous" and the claims "impracticable to bring them all before the court."

At trial and consistent with subsection (2), Hair argued that the jury should return only the fees paid by the group and did not request double damages. (*See* R. at 1616:23-25 ("We believe that [Defendant] ought to give all of these folks their money back. They ought to refund the full amount of all of that."), R. at 1335:21-22 ("[W]e're going to ask you to give those illegally collected fees back.")). Consequently, the trial court specifically charged the jury that Hair "cannot recover more than her loss." (R. at

1661:17-18). Consistent with these arguments and charge, and only to the extent the remedies of subsection (1) apply, the award of double damages under the Dealers Act is up to the jury. Thus, Hair waived her right to request double damages by failing to request double damages from the jury. *Compare* S.C. Code Ann. § 56-15-110(1) (simply providing that a party "shall recover double the actual damages by him sustained") *with* S.C. Code Ann. § 39-5-110 ("If the *court* finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of § 39-5-20, the court shall award three times the actual damages sustained and may provide such other relief as it deems necessary or proper.") (emphasis added) *and* S.C. Code Ann. § 41-10-80(c) (providing the *court* may award treble damages for violation of the Wage Payment Act) (emphasis added)). For these reasons, the trial court's order doubling the damages award on behalf of the group must be reversed.

V. IN THE EVENT THE JUDGMENT IN THIS CASE IS REVERSED, THE ATTORNEY'S FEE AWARD MUST ALSO BE VACATED.

Following trial, the parties reached an agreement as to an appropriate award of attorney's fees and costs in this matter, which was memorialized in a consent order dated January 7, 2014. (R. at 72-73). The order expressly provides it will be vacated in the event Hendrick Honda prevails on appeal. Accordingly, in the event this Court reverses the judgment in this matter in whole or in part, the order granting attorney's fees and costs should also be vacated. *See Camburn v. Smith*, 355 S.C. 574, 581, 586 S.E.2d 565, 568 (2003) ("An award of attorney's fees will be reversed where the substantive results achieved by counsel are reversed on appeal.").

CONCLUSION

In summary, the evidence shows that Hair was a completely satisfied customer who negotiated a good deal. She was not misled or deceived when she paid a fully disclosed closing fee that had been registered by Hendrick Honda and certified by the Department. Yet, she has been allowed to sue on behalf of thousands of other customers, each of whom negotiated his or her own transaction with Hendrick Honda at different times and under different circumstances. The statutory scheme and applicable rules do not authorize such a result.

Hendrick Honda fully complied in good faith with the unambiguous requirements of the Closing Fee Statute and the Administrative Interpretation of the Department. The trial court's orders in this case, as applied, have resulted in a completely arbitrary and crippling judgment against Hendrick Honda for doing exactly what the Statute and the Department allow. This cannot have been the intent of the legislature, and in no event should this result be allowed to stand. Accordingly, Hendrick Honda respectfully requests that this Court reverse the trial court with regard to the issues presented herein.

[Signature on Following Page.]

Respectfully submitted,

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December 4, 2014

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III

2012-CP-39-01554

Julie Freeman Hair,

Appellant-Respondent,

v.

J.L.H. Investments, LP, aka Hendrick Honda of Easley,

Respondent-Appellant.

CERTIFICATE OF COUNSEL

I certify that the Final Briefs of Respondent-Appellant in this matter comply with Rule 211(b), SCACR and the April 15, 2014 Order of the South Carolina Supreme Court relating to personal data identifiers.

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December 4, 2014

Dm: 3903358 v.1

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In the Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III

2012-CP-39-01554

Julie Freeman Hair,

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PROOF OF SERVICE

I hereby certify that one copy of the Appellant's Brief of Respondent-Appellant Hendrick Honda of Easley, Respondent's Brief of Respondent-Appellant Hendrick Honda of Easley, Reply Brief of Respondent-Appellant Hendrick Honda of Easley, and Certificate of Counsel in the above-referenced matter were served on the following counsel of record for Appellant-Respondent, in the manner indicated below, on December 4, 2014:

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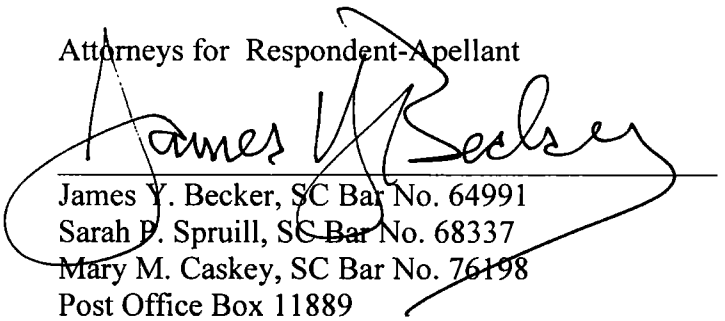

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