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.

REPLY BRIEF OF RESPONDENT-APPELLANT HENDRICK HONDA OF EASLEY

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There is nothing inherently illegal about a dealership charging closing fees in a motor vehicle transaction. This Court has never issued an opinion finding a closing fee invalid. *See Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564 S.E.2d 94 (2002); *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 472 S.E.2d 242 (1996). Since 2000, however, closing fees have been regulated by S.C. Code Ann. § 37-2-307 (the "Closing Fee Statute" or "Statute"), which is contained in the Consumer Protection Code, S.C. Code Ann. § 37-1-101, *et seq.* ("Consumer Code") and administered by the South Carolina Department of Consumer Affairs ("Department"). Hair and the trial court have interpreted the Closing Fee Statute to impose requirements beyond the language of the Statute and the guidance provided by the Department. All of Hair's arguments depend on that flawed construction of the Statute because her claims under the South Carolina Regulation of Manufacturers, Distributors and Dealers Act, S.C. Code Ann. § 56-15-10 *et seq.* ("Dealers Act") necessarily fail if she does not first establish that there was a violation of the Statute.

In this case, the closing fee was fully disclosed in multiple places as a component of the total cash price negotiated by Hair with Hendrick Honda. (R. at 1770, 1783; *see* R. at 1362:20-1363:25). Hair was completely satisfied with her vehicle and with the price she negotiated. She was also fully aware of the closing fee. (R. at 1401:18-25). Further, the only trial testimony presented by an expert accountant shows that Hendrick Honda's costs in closing transactions exceeded its closing fee for the entire period at issue. (R. at

[1] Hendrick Honda of Easley ("Hendrick Honda") has fully briefed the arguments addressed by Julie Freeman Hair in its Appellant's Brief. It does not undertake to repeat all of those arguments here, but rather to address certain points raised in Hair's Respondent's Brief.

1582:22-1585:3). The testimony also shows that the total cash price of the vehicle would not necessarily have been lower had Hendrick Honda not charged a closing fee. (R. at 1344:13-1345:8, 1518:8-12, 1570:5-1571:1). Given these facts, there is no indication that Hair or any other consumers were harmed in any way by Hendrick Honda's practice of charging a registered, approved, and disclosed closing fee.

I. HENDRICK HONDA COMPLIED WITH THE CLOSING FEE STATUTE AND THE REQUIREMENTS OF THE DEPARTMENT.

A. The Closing Fee Statute is a straightforward disclosure statute and must be construed according to its terms.

In the first sentence of the "Facts" section of Hair's Respondent's Brief, she states, "This case arises from Hendrick charging 'closing fees' to its customers that were in no way calculated to reimburse Hendrick for its actual closing costs." However, this recitation bears little resemblance to the Closing Fee Statute. The sixty-three words at the heart of this case are as follow:

> 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. The words "costs," "reimburse," "calculate," and "sit there and do the math" do not appear in the Statute.[2]

"Determining the proper interpretation of a statute is a question of law, which this Court reviews de novo." *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Protection, LLC*, 409 S.C. 331, 339, 762 S.E.2d 561, 565 (2014). In performing this function, courts

[2] As set forth in Section I(B)(2) of Hendrick Honda's Appellant's Brief, many state legislatures have expressly included such terms and additional requirements. Importantly, South Carolina's Closing Fee Statute does not.

cannot add "requirements that are not present in the statute itself." *Id.* As further recited by this Court, "[w]e are not at liberty, under the guise of construction, to alter the plain language of [a] statute by adding words which the Legislature saw fit not to include." *Id.* at 343, 762 S.E.2d at 567.

As argued in Section I(B) of Hendrick Honda's Appellant's Brief, that is precisely what the trial court has done in this case in defining the term "closing fee" to mean something other than a fee charged at the time of closing. The Closing Fee Statute and the Department guidance provide four discrete requirements for compliance with the Statute that a dealership can easily satisfy. In contrast, the trial court's Declaratory Judgment Order, which was entered at Hair's request, renders it impossible to determine whether a dealership has complied without a jury trial on the issues of whether the closing fee was set using the correct methodology and whether it reimburses allowable costs. The trial court compounded the problem by applying these additional elements retroactively and refusing to itemize which costs may be properly reimbursed as "closing costs," creating sweeping and uncertain liability for all dealerships in this state that have charged closing fees following the passage of the Statute.

Hair argues at the close of Section II(A) of her Respondent's Brief that the charging of closing fees should be limited to "reimbursement of *certain* overhead costs arising from automobile closings *such as* document retrieval and document preparation." (Emphasis added). However, that construct leaves dealerships unable to determine what they must do to comply with the Statute.[3] As such, this construction presents a textbook

[3] Hair's approach ignores the realities of the modern dealership and is not workable as a practical matter even if it were clear which costs may be included in the calculation. It would require detailed financial analysis based on the specifics of each transaction. Even

example of impermissible vagueness. *See Curtis v. State*, 345 S.C. 557, 571-72, 549 S.E.2d 591, 598 (2001). Hair does not explain how a dealership may comply with the Statute, nor does she cite any authority to support her argument that this construction is not unconstitutionally vague.[4] Hair's efforts to escape this result through the testimony of Hendrick Honda witnesses is also unavailing because "[a] statute's constitutionality is judged on an objective, not subjective, basis." *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 535 n.6, 737 S.E.2d 830, 838 n. 6 (2012).

B. The Department's guidance and the testimony of Danny Collins, the Department's Deputy for Regulatory Enforcement and General Counsel, provide that a dealership only needs to do four things to comply with the Closing Fee Statute: (1) complete an annual registration with the Department; (2) include the amount of the fee in any advertised price; (3) disclose the fee on the sales contract; and (4) display a notice that the dealer charges a fee in a conspicuous location in the dealership.

The Department has provided one official statement of guidance on the application of the Closing Fee Statute, Administrative Interpretation No. 2.307-0101 ("Administrative Interpretation"). (R. at 1543:6-15). In the Administrative Interpretation, the Department instructs dealerships as follows:

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her expert concedes costs cannot be determined on a per-transaction basis, and he instead suggested a prior year average. (R. at 1349:13-1352:10). This creates even more questions, such as, how could a new dealership calculate the fee and how could a dealer implement changes in closing procedures as required by law, lenders, distributors, or manufacturers during the year.

[4] Hair's argument and the trial court's Declaratory Judgment Order have already produced wildly inconsistent results in other cases that were originally filed with this one (Aiken County Court of Common Pleas 2006-CP-02-1230), including a defense verdict in *Ritz v. Taylor Toyota* and an approved class action settlement in *Herron v. Car Max Auto Superstores, Inc.* Contrary to Footnote 3 of Hair's Respondent's Brief, CarMax continues to register a $199 closing fee with the Department. *See* Maximum Interest Rates and Motor Vehicle Closing Fees by Company (as of Oct. 1, 2014) at 36 *at* http://www.consumer.sc.gov/business/licensing_registration/max_rate/Documents/mr_mvcf_list.pdf.

> As clearly indicated from the terminology of Section 37-2-307 . . . , any 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; *see also* R. at 1725 (enumerating the same four elements in bold print)). Thus, the Administrative Interpretation twice provides that only these four elements are required to comply with the Statute. Collins's testimony echoes this language, as follows:

> Q: According to the Department's interpretation, what are the requirements for a dealership to charge a closing fee in the sale of a motor vehicle to a consumer?
>
> A: They have to file a closing fee amount with our office together with a check for ten dollars. The have to display [conspicuously] a statement that they are charging a closing fee and how much it would be. On the sales contract it has to be delineated so that the person can see what the fee is and it's got to be within the range of what they have got posted.

(R. at 1545:15-25). Collins confirmed that Hendrick Honda met each of these elements for the period at issue. (R. at 1547:20-1557:3).[5] Neither the Statute nor the

[5] Hair concedes that Hendrick Honda satisfied these requirements. (R. at 1319:9-20). Hendrick Honda contends that should end the inquiry in this case. Hair argues for additional requirements that are not present in the Closing Fee Statute, are not listed as requirements in the Administrative Interpretation, and were not recognized by Collins in his testimony. The Closing Fee Statute, Administrative Interpretation, and testimony of Collins speak for themselves and support Hendrick Honda's argument that the Closing Fee Statute is a disclosure statute that is satisfied if a dealer complies with the four requirements described above.

Administrative Interpretation indicates that a dealership must perform a closing cost analysis prior to assessing closing fees.

The Administrative Interpretation further clarifies that closing fees go by many names in the industry, including "'administrative,' 'processing,' or 'procurement' fees." (R. at 1725). Collins again confirmed that all these terms are "used in describing this particular type fee." (R. at 1545:10-14). Nothing in the Administrative Interpretation suggests that dealerships should refer to closing fees using any particular term. Instead, the implication is that it is acknowledged and accepted by the Department that these fees are known by many names. As such, nothing in the Administrative Interpretation suggests that dealerships should discontinue the use of these terms or that the use of these terms violates the Closing Fee Statute.

With respect to the disclosure to be provided, the Administrative Interpretation attached an optional form that included sample disclosure language. (R. at 1726, 1728; *see* R. at 1546:10-18). In discussing the sample disclosure, the Administrative Interpretation provides,

> The attached disclosure may be used for this purpose. It is not required that the dealers use the attached form, but if they do, they will be deemed compliant if the form is properly filled out. Forms considered to be deceptive or that misstate the law will be rejected by the Department.

(R. at 1726). The form is therefore just a sample form. It does not make any additional interpretation of the Statute, and it does not supply any additional terms for compliance by a dealership. It does not require dealerships to perform any type of cost accounting relating to the actual cost of closing a transaction. Nor is it an affirmation or representation that the dealership has performed a detailed cost analysis. When asked why the Department does not "require financial information or information about the

Dealership's costs?," Collins responded, "Well, it's just a simple filing with us. We don't really need their financial information to assess whether or not this is a reasonable charge. The law says that they can do it, and we don't go into how much they can charge unless it's extreme." (R. at 1547:12-19). The registration process does not require any type of certification by dealerships with respect to the reasons for charging the fee or how the fee was determined, and the Department has provided that if dealerships use the Department's form, "they will be deemed compliant if the form is properly filled out." (R. at 1726). Therefore, nothing in the Department guidance requires any type of financial or cost analysis by dealerships charging closing fees or anything beyond the four requirements laid out in the Administrative Interpretation.

Lastly, the Administrative Interpretation notes that the Closing Fee Statute does not "legitimize[] a closing fee or any fee or charge if it is assessed through fraud or misrepresentation." (R. at 1727). Thus, the Department has acknowledged fraud and misrepresentation claims may exist outside the Consumer Code. This acknowledgement is supported by S.C. Code Ann. § 37-1-103, which expressly provides that fraud and misrepresentation claims are not displaced by the Consumer Code. However, neither the Administrative Interpretation nor § 37-1-103 indicates that a claim for a violation of the Statute can be brought pursuant to the Dealers Act. Notably, Hair concedes in Section VI(H) of her Respondent's Brief that she does *not* pursue a claim for fraud or misrepresentation.

The Department's construction of the Closing Fee Statute is entitled to deference. *See Lexington Law Firm v. S.C. Dep't of Consumer Affairs*, 382 S.C. 580, 586, 677 S.E.2d 591, 594 (2009); *Faile v. S.C. Employment Sec. Comm'n,* 267 S.C. 536, 540, 230

S.E.2d 219, 221-22 (1976). As such, the Court should find that a dealership complies with the Statute when it complies with the four requirements set forth in the Administrative Interpretation. It is undisputed that Hendrick Honda complied with those requirements; therefore, there has been no violation of the Statute and no resulting violation of the Dealers Act. Accordingly, the judgment in this matter must be reversed.

C. The testimony of the Hendrick Honda witnesses is consistent with Hendrick Honda's arguments that it complied with the Closing Fee Statute.

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). As a result, the testimony of Hendrick Honda's witnesses cannot change the proper construction of the Closing Fee Statute because lay witnesses cannot make admissions as to matters of law.[6] *See McDuffie v. McDuffie*, 308 S.C. 401, 410, 418 S.E.2d 331, 336-37 (Ct. App. 1992) (finding parties' stipulation as to a matter of law was not binding because the resolution of questions of law rests with the court); *McGinty v. Hoosier*, 239 P.3d 843, 853 (Kan. 2010) ("Parties are not permitted to define the law for the courts through agreements, admissions, or stipulations.").

With respect to the testimony from Randy Watkins, Vice President of Transaction Compliance for Hendrick Automotive Group ("HAG"), and Don Pendleton, General Manager of Hendrick Honda, about the requirements and purpose of the closing fee at Hendrick Honda, Hair has not presented an accurate summary of their testimony. A closer review shows that Hendrick Honda was committed to complying with the Closing

[6] Hendrick Honda notes that the materials from the South Carolina Automobile Dealers Association referenced in Hair's Respondent's Brief were not presented at trial and were not considered by the jury.

Fee Statute and the Department's guidance. Yes, these witnesses testified that they believed that closing fees should be charged to reimburse certain overhead expenses, such as document preparation, storage, and retrieval. This testimony, however, is not a party admission that the dealership was required to perform any kind of detailed accounting prior to registering a closing fee with the Department. Nothing in the cited testimony reflects any violation of the Statute or the Dealers Act. This is especially true in light of *Taylor v. Nix*, 307 S.C. 551, 555, 416 S.E.2d 619, 621 (1992), which holds "[m]otor 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."

Watkins testified that he did not set the fee at Hendrick Honda, and he was not asked about how the fee was set. He did not testify that the closing fees at Hendrick Honda were unfair, unreasonable, or exceeded the costs of document preparation, storage, and retrieval. His responsibility was limited to making sure the fee and fee procedures complied with HAG policy. When asked, "when it talks about certain overhead costs, it means those costs need to be predetermined; right?," Watkins responded, "I don't know." (R. at 1414:19-25). Watkins further clarified in response to the question "you're trusting the manager of the dealership to make the calculation to ensure that the closing fee is actually charged for the reimbursement of the closing cost?," by explaining, "As permitted by the regulations, yes." (R. at 1416:3-7). Thus, Watkins deferred to the requirements of the law rather than any implication that a calculation was required.

Pendleton testified that he relied on the Administrative Interpretation in setting the fee and that he thought all he needed to do to comply with the Statute was satisfy the four elements set forth by the Department. (R. at 1496:4-1502:9, 1519:7-13, 1536:10-23). Pendleton testified about his extensive knowledge of the costs incurred by the dealership with respect to car sales. (R. at 1503:25-1511:1, 1519:25-1521:4). He then testified that he set the fee at an amount he believed was less than those costs. (R. at 1512:5-20).[7]

Although he did not perform a calculation to determine the cost for closing each transaction, it is untrue that Pendleton set the amount arbitrarily or that the fee was not a reimbursement for some of the costs of closing transactions. Hendrick Honda did not make a profit from charging closing fees. (R. at 1588:9-12). Further, the evidence does not show that any individual member of management received additional income as a result of increasing the closing fee. In fact, the testimony reflected that an increase in the total amount of manager salaries in one year "[m]ore likely than not [] was the hiring of an additional employee that managed that particular division as opposed to anything else, such as bonuses that would have been paid." (R. at 1588:21-1592:13). As for the language of the disclosure, Pendleton said, "We used that language to post because that's what was recommended to us to use from the [Department]. If we used that, we felt like we were safe, because that's what they recommended to do." (R. at 1502:5-9).

[7] Michael Thompson, the only accounting expert that testified in this case, confirmed that the closing fees were set well below Hendrick Honda's average closing costs calculated according to generally accepted accounting principles. (R. at 1582:22-1585:3).

Thus, nothing in this testimony amounts to the admissions urged by Hair in her Respondent's Brief. To the contrary, these witnesses' testimony demonstrates that Hendrick Honda acted in compliance with the requirements of the Statute.

II. EVEN IF THERE WAS A VIOLATION OF THE CLOSING FEE STATUTE, HENDRICK HONDA IS NOT SUBJECT TO LIABILITY UNDER THE DEALERS ACT.

A. Hair's exclusive remedy is under the Consumer Code.

The Administrative Interpretation provides that in the absence of any of the four requirements enumerated by the Department, "the charging of a closing or similar fee is an excess charge for Consumer Protection Code purposes." (R. at 1726). The remedy for excess charges under the Consumer Code is found in S.C. Code Ann. § 37-5-202. Hair's arguments about the terms "consumer" and "creditor" contravene the Administrative Interpretation and the Legislature's intent in placing the Closing Fee Statute within the Consumer Code. Further, Hair's argument leads to the absurd result that the remedies for violations of the Statute are different for closing fees charged in credit sales as opposed to closing fees in cash transactions or transactions financed outside the dealership.[8] Accordingly, and for the reasons given in Section I(A) of Hendrick Honda's Appellant's Brief, Hair's exclusive remedy lies in the Consumer Code, not the Dealers Act.

B. Hair's claim is barred by the filed rate doctrine.

As discussed above, Hendrick Honda fully complied with the Department's requirements for charging closing fees. The Department retains the authority to determine whether a dealership's fee should be certified or not. Collins testified that

[8] Should the Court find that the Consumer Code does not apply to Hair's transaction, this provides further evidence as to why this case cannot proceed as a class action pursuant to Rule 23, SCRCP. The undisputed evidence at trial demonstrates that other purchasers Hair purports to represent in this action purchased their vehicles with credit provided by Hendrick Honda. (*See* R. at 1513:17-1514:21, 1567:17-1568:1).

while the Department does not generally look behind the rates requested by dealerships, it will reject an application for an unreasonable amount. (R. at 1559:5-11). As argued in Section I(C) of Hendrick Honda's Appellant's Brief, the fact that the Department does not generally double check the rates it certifies does not render the filed rate doctrine inapplicable.[9]

C. Hair has failed to establish any violation of the Dealers Act resulting in damages to her.

1. Hendrick Honda's closing fee was not arbitrary, in bad faith, or unconscionable.

Hair's Respondent's Brief takes the position that Hendrick Honda violated the Dealers Act by engaging in "unfair" or "arbitrary" conduct in charging closing fees that did not comply with the Closing Fee Statute. However as argued in Section III(A)(2)(b) of Hendrick Honda's Appellant's Brief, a review of S.C. Code Ann. §§ 56-15-30 and -40 shows that there is not an independent "unfair" basis for Dealers Act liability. "Specifically, it is a violation of § 56-15-30 for any manufacturer 'to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties,' including dealers." *Love Cadillac, Buick, GMC Truck, Inc. v. Gen. Motors Corp.*, 173 F.3d 851 (4th Cir. 1999), *available in full at* 1999 WL 125562.

Moreover, as discussed above, there was a rational basis supporting Pendleton's determination of the closing fee. As such, there was no violation of the Dealers Act. *Id.* at *3 ("Defendants' actions were not in bad faith because they were based on a

[9] Hendrick Honda raised the filed rate doctrine in its answer (R. at 230-31), in its written directed verdict motion presented and renewed at the close of Hair's case and at the close of the evidence (R. at 1418:13-22, 1614:20-25, 1712), and in its post-trial motion (R. at 1671-72). The trial court denied each of these motions. (R. at 100-01, 1420:19-21, 1606:1-6). Without question, this argument is preserved.

reasonable exercise of business judgment. . . For the same reasons, defendants' actions cannot reasonably be deemed arbitrary or unconscionable. By definition, an action which is based on a legitimate business rationale is not an arbitrary action.").

2. Hair was not damaged by any action on the part of Hendrick Honda that was arbitrary, in bad faith, or unconscionable.

Damages are an element of a Dealers Act claim, and those damages must be tied to the offending conduct. *See Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 312, 594 S.E.2d 867, 874 (Ct. App. 2004); *Barton v. Superior Motors, Inc.*, 309 S.C. 491, 494, 424 S.E.2d 524, 526 (Ct. App. 1992). 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* at 312, 594 S.E.2d at 874. Hair failed to meet her burden on this element, and she does not respond to these arguments in her Respondent's Brief. There is no evidence that Hair paid $299 more for her car than she would have paid if the fee had not been charged or if the fee had been determined in some other manner. (*See* R. at 1344:13-1345:8, 1422:8-12, 1518:8-12, 1570:5-1571:1 (testimony about the relationship of the fee to the total price of the car)). In addition, there was no evidence showing that the fee exceeded Hendrick Honda's costs. Given this complete absence of evidence on an element of Hair's claim, Hendrick Honda was entitled to judgment as a matter of law.

III. THIS CASE, LIKE EVERY CIVIL ACTION, IS SUBJECT TO THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE AND RULE 23, SPECIFICALLY.

Hair has not cited any cases that allowed a case to proceed as a "group" action without applying Rule 23, SCRCP. She further fails to address previous Dealers Act cases that were required to comply with Rule 23 pleading requirements and analysis. *See Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564 S.E.2d 94 (2002). Hair's argument also fails to distinguish Rule 1, SCRCP, which provides: "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). As argued by Hendrick Honda in Section II of its Appellant's Brief, the application of Rule 23 in this case is required and consistent with S.C. Code Ann. § 56-15-110(2), the provision of the Dealers Act cited by Hair.

The trial court's failure to apply Rule 23 was error, which can only be corrected by reversal. Hair makes the conclusory statement in Section V(A)(2) of her Respondent's Brief that the elements of Rule 23 were met. However, she has never plead or attempted to prove those elements as required by South Carolina law. *Waller v. Seabrook Island Prop. Owners Ass'n,* 300 S.C. 465, 467, 388 S.E.2d 799, 801 (1990). Moreover, Hendrick Honda was not given a chance to refute those arguments because the trial court decided at the motion to dismiss phase that this action would proceed as a group action and never gave Hendrick Honda the chance to argue to the contrary. (R. at 2-4, 48-50). The trial court issued these rulings even given the portions of Hendrick Honda's Answer to Plaintiff's Third Amended Complaint addressing the problems with this procedure and resulting inequities, including Hendrick Honda's inability to assert arbitration clauses and other defenses that might be applicable in transactions other than Hair's.[10] (R. at 226-29).

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[10] In its Second Defense, Hendrick Honda alleged:

> 44. Certain customers of Hendrick Honda of Easley may have signed a sales or financing-related document, including, but not limited to, a buyer's order, invoice, retail installment contract or lease agreement, that contains an arbitration agreement governed by the Federal Arbitration Act or South Carolina arbitration laws. These agreements likely allow a party or entity to which the agreement applies to require submission to binding arbitration of all disputes covered by the arbitration agreement, including any claim or dispute arising in contract, tort or otherwise. The claims of

Hendrick Honda further contends that Hair's brief illustrates why this action would not satisfy this analysis with respect to the elements of commonality and typicality. For example, Hair has argued throughout her Respondent's Brief, including in Section III(A), that the Consumer Code did not apply to her because her transaction was not a credit sale, but she has also agreed that the Consumer Code remedies in S.C. Code Ann. § 37-5-202 "*only* apply to transactions involving loans and lenders." (Emphasis in original.) As demonstrated at trial, many customers in the "group" Hair purports to represent were credit customers and would be subject to the terms and defenses available

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> any such customers whom Plaintiff purports to bring in a representative capacity must be dismissed or, in the alternative, stayed pending the submission of such claims to binding arbitration as provided in such agreements.

Hendrick Honda raised further concerns relating to group treatment in its Third through Fifth Defenses, including:

> 51. Plaintiff purports to bring the claims of unnamed or absent "group" or class members in a representative capacity pursuant to S.C. Code § 56-15-110(2) and without pleading and proving the requirements of Rule 23, SCRCP. Any such action is unconstitutional and violates Hendrick Honda of Easley's due process and equal protection rights in that it creates a different standard from the class certification procedures under Rule 23, SCRCP, for motor vehicle dealers only, and not any other entity, person, or business, without any reason or justification. Thus, Plaintiff's claims brought in a representative capacity are barred and should be dismissed because S.C. Code Ann. § 56-15-110(2) violates the due process and equal protection rights afforded to motor vehicle dealers.
>
> 53. Further, any alleged violation by Hendrick Honda of Easley of the Dealers Act, the Closing Fee Statute, or any other law governing motor vehicle dealers or the charging of closing fees requires an individualized inquiry, and any determination of liability on behalf of Plaintiff on a class-wide or "group-wide" basis will deprive Hendrick Honda of Easley of its due process rights under the state and federal constitutions to present all the evidence and defenses which may be applicable to the claims of unnamed or absent group or class members and this will cause Hendrick Honda of Easley irreparable harm.

under the Consumer Code by her admission. As testified at trial, every deal is different. (R. at 1487:2-11, 1513:17-1514:21).

The procedural safeguards of Rule 23 would have allowed Hendrick Honda to demonstrate that Hair's claims lacked commonality and typicality, that Hendrick Honda has defenses that vary from customer to customer, and that an individualized inquiry is necessary in each customer's case. *See Gardner v. S.C. Dep't. of Revenue*, 353 S.C. 1, 21, 577 S.E.2d 190, 200 (2003) (finding plaintiffs "must articulate the existence of 'significant common, legal, or factual issues' which bind the proposed class together," and that the trial court, when making a determination on the existence of commonality, must examine both the plaintiff's claims and the defendant's defenses in light of the determinative issues in the case) (citations omitted)). A plaintiff does not meet the commonality requirement if the court must investigate each plaintiff's individual claims or if the defendant's anticipated defenses "necessitate[] forming legal arguments around the individual facts of each case." *Id.* If there will be factual differences on predominate legal issues or defenses, commonality is not satisfied and class certification is inappropriate. *Id.*

Hair's suggestion that the matter should be remanded to have this action rubber-stamped as a class action would violate Hendrick Honda's fundamental due process rights and the South Carolina Rules of Civil Procedure. Hair's proposal does not provide sufficient redress for the harm done here, and, if it were accepted, it would encourage other litigants to attempt to thwart the safeguards put in place by Rule 23. Further, Hair does not make any suggestion about what would happen if the trial court on remand found the elements of Rule 23 were not met.

IV. HENDRICK HONDA WAS ENTITLED TO HAVE THE JURY CONSIDER THE APPLICABLE LAW AND DEFENSES IN THIS CASE. THE TRIAL COURT'S CHARGE DEPRIVED HENDRICK HONDA OF THAT RIGHT.

A. Hendrick Honda was entitled to have its defenses charged.

The trial court refused to charge the jury with any of Hendrick Honda's affirmative defenses. As shown above, Hendrick Honda at all times sought to comply with the Closing Fee Statute and the Administrative Interpretation. In addition, Hair contends in Section VI(E) of her Respondent's Brief that the jury found that Hendrick Honda violated *both* the Closing Fee Statute and the Dealers Act. Therefore, Hendrick Honda was entitled to charges on the defenses provided by the Consumer Code.[11]

The evidence also supported a charge on the voluntary payment doctrine. Hair attempts to argue that the voluntary payment doctrine is inapplicable to any statutory cause of action. However, this is not the rule. Instead, the voluntary payment doctrine is inapplicable where the remedial statute itself specifically provides for recovery of a voluntarily paid fee. *Hardaway v. Southern Ry. Co.*, 90 S.C. 475, 488-89, 73 S.E. 1020, 1025 (1912); *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."). Here, the Dealers Act does not contain any such language.

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[11] To the extent this action included buyers other than Hair, Hendrick Honda would certainly be a creditor for purposes of the Consumer Code. (*See* R. at 1514:6-11 (testimony regarding credit transactions at Hendrick Honda)).

Hair further attempts to argue that there was no evidence the fee was voluntarily paid with full knowledge of the facts. However, the plaintiff has the burden of showing that the payment was not made voluntarily. *Baker v. Allen*, 220 S.C. 141, 151, 66 S.E.2d 618, 622-23 (1951). In this case, the record shows that the fee was fully disclosed and paid as part of the negotiated cash price of the vehicle and that Hair did not ask any questions about the fee. This evidence, at the very least, was sufficient to create a jury issue on this point.

B. Hendrick Honda was entitled to a full and fair charge on the Dealers Act.

As previously argued, there is no basis for a separate charge on the term "unfair." If this Court determines it was appropriate for the trial court to define the term "unfair," the trial court did not charge the term correctly.

Hendrick Honda's proposed charge was supported by both the law and the evidence. Application of Federal Trade Commission ("FTC") interpretations is permissive under the Dealers Act and mandatory under the South Carolina Unfair Trade Practices Act. *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); *see also Porsche Cars N. Am., Inc. v. Diamond*, 140 So. 3d 1090, 1098-99 (Fla. Ct. App. 2014) (reversing class certification decision because trial court used outdated definition of "unfair" and that under proper FTC definition individual issues would predominate over common issues, reasoning, "[t]o prove an unfair trade practice, the class must prove that the injury caused by the allegedly unfair trade practice could not have been reasonably avoided by the consumers.") As stated by the Florida Court of Appeals, "[t]he idea behind the reasonably avoidable inquiry is that free and informed

consumer choice is the first and best regulator of the marketplace . . . .". *Id.* The same is true here. Hair could have avoided the injury. She admitted 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 1485:12-1477:11, 1569:25-1571:6). Moreover, Hair was free to buy a vehicle elsewhere.

In addition, the trial court's charge added language that a violation of a statute is a violation of public policy. (R. at 1659:7-10). A violation of a statute is not always a violation of public policy. *See Jacobs v. Cent. Transp., Inc.*, 83 F.3d 415 (4th Cir. 1996), *available in full at* 1996 WL 223688 ("Not every technical violation of a federal regulation constitutes a violation of public policy."); *Derisme v. Hunt Leibert Jacobson P.C.*, 880 F. Supp. 2d 339, 374-75 (D. Conn. 2012) ("Connecticut courts have repeatedly acknowledged that a technical violation of a statute does not necessarily offend public policy and thereby give rise to a CUTPA violation."). A review of the Consumer Code shows that an action in violation of one of its provisions may not be against public policy, particularly if the action was taken in conformity with the guidance of the Department as reflected in the Good Faith Error and Safe Harbor provisions. *See* S.C. Code Ann. §§ 37-5-202, 6-104, & 6-506. The trial court's charge, coupled with the failure to charge the Good Faith Error and Safe Harbor language from the Consumer Code, prevented the jury from accurately assessing the law under both the Closing Fee Statute and the Dealers Act to the grave prejudice of Hendrick Honda.

Adding to the prejudice created by the improper charge on the term "unfair", the trial court's failure to provide a full charge on arbitrary conduct undermined Hendrick

Honda's ability to defend itself in this matter. Hair repeatedly argued that Hendrick Honda was required to perform some type of detailed computation (to "sit there and do the math") or its closing was arbitrary, when in fact, "[m]otor 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." *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). Quite simply, there was no computation requirement, and even under the Dealers Act, there could be no liability unless there was no rational basis for the way Hendrick Honda set its fee. The trial court's incomplete charge did not make this point clear.

C. Hendrick Honda was entitled to a full and fair damages charge.

Hendrick Honda proposed two charges on damages: one as to calculation and the other as to the certainty of the amount of damages. (R. at 1636-37). 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. The requested charge was consistent with Hair's burden of proving a claim under the Dealers Act. *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 312, 594 S.E.2d 867, 874 (Ct. App. 2004).

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 closing 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

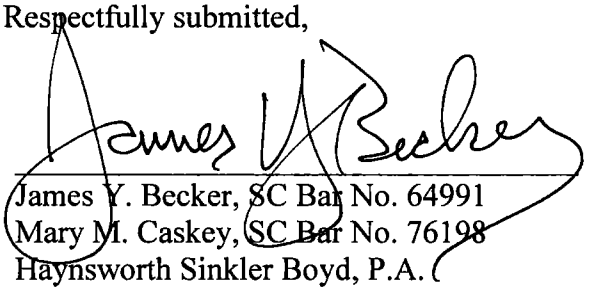
Hendrick Honda's actual closing costs was less than the fee charged or what that amount might be, nor did she present any evidence linking the alleged "unfair" or "arbitrary" conduct to any particular injury. Therefore, the speculative damages charge was appropriate and supported by the evidence.

CONCLUSION

Hendrick Honda intended to comply with the Closing Fee Statute, and it followed the Administrative Interpretation to the letter for each of the years in question. Given these facts, how can Hendrick Honda justly be held liable for doing exactly what the applicable statute and administrative guidance provide? This result is particularly troubling because the closing fee was disclosed numerous times, the consumer was happy with the price she extensively negotiated, and there is no evidence that the total cash price the consumer paid would have been any lower had the fee not been charged. Under these undisputed circumstances, Hendrick Honda's conduct is not actionable.

For all of the foregoing reasons and those previously argued by Hendrick Honda, the judgment in this matter must be reversed and remanded for entry of judgment in favor of Hendrick Honda.

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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Dm: 3903358 v.1

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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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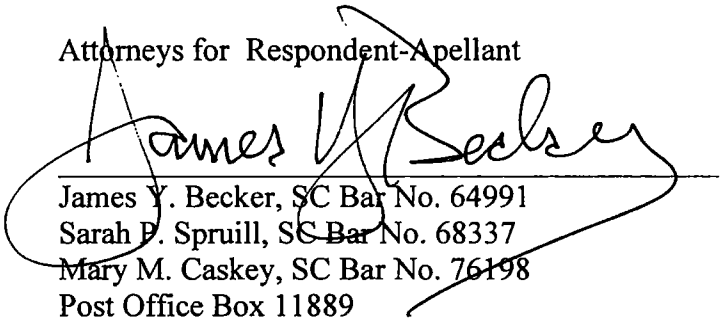

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