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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2012-CP-39-01554
Appellate Case No. 2014-000642

Julie Freeman Hair. Appellant-Respondent,

v.

J.L.H. Investments, LP a/k/a Hendrick Honda of Easley Respondent-Appellant.

**MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF
OF THE ADAMS BUSINESSES**

COME NOW the Adams Businesses,¹ by and through their counsel, Bradford Neal Martin & Associates, PA, pursuant to Rule 213 of the South Carolina Appellate Court Rules, to file this Motion for Leave to File an Amicus Curiae Brief.²

¹ In *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542 (7th Cir. 2003), Judge Posner noted that the standard for granting a motion for amicus curiae would most like be granted, "in [cases] in which a party is inadequately represented; or in which the would-be amicus has a direct interest in another case that may be materially affected by a decision in this case; or in which the amicus has a unique perspective or specific information that can assist the court beyond what the parties can provide." See also *Sossamon v. Greater Gaffney Metropolitan Utilities Area*, 236 S.C. 173, 113 S.E.2d 534 (1960) (granting permission to file a brief of amicus curiae to the cities of Greenville, Spartanburg, Rock Hill, Charleston and Easley in an action instituted by certain citizens and taxpayers of Cherokee County for the purpose of determining the constitutionality of Act No. 1042 of the 1958 Acts of the General Assembly where the cities claimed that their waterworks systems were vitally affected by some of the questions raised).

² The Businesses are dealerships that are sued in a companion case of *Howard Adams, et al. v. Action Ford Mercury, Inc., et al.*, No. 2007-CP-02-1232 (Aiken County) that has been stayed. Therefore, the outcome of the Freeman case will have a direct impact on these several defendants: Beach Ford Lincoln-Mercury-Volvo, Inc.; Benson Cadillac Nissan, Inc., Benson Chrysler Plymouth, whose true name is Benson Chrysler Dodge Jeep, Inc., Benson Ford Mercury Inc., whose true name is Benson Ford Lincoln Mercury Volvo, Inc.; BMS, Inc. d/b/a Breakaway Honda;

At the heart of the pending litigation is the ability of South Carolina citizens to rely upon the central actor in a representative democracy to decide how much they must do to buy a car.³ Correspondingly, it is about the ability of businesses in South Carolina to rely upon the central actor's (the General Assembly's) policy decisions and directives in a clean and simple statute on how to properly charge a closing fee.

Specifically, the General Assembly has passed the Closing Fee Statute, S.C. Code Ann. § 37-2-307, placed it within the Consumer Protection Code, and tasked the Department of Consumer Affairs with its interpretation and enforcement. The General Assembly had two choices in passing this legislation: either get involved in setting what the amount of the closing fee should be (rate regulation), or make sure the consumers were put on notice that a closing fee would be charged (disclosure). The General Assembly clearly chose the disclosure route, and Consumer Affairs has agreed for over 14 years. Consumers and Businesses alike in South

Bradshaw Automotive Group, Inc.; D&D Motors, Inc.; Farrell Automotive, Inc.; Hilton Head Chrysler Jeep Dodge, whose true name is First Team SJD, LLC d/b/a Hilton Head Chrysler Jeep Dodge; Hilton Head Hyundai, whose true name is First Team Hyundai, LLC d/b/a Hilton Head Hyundai; Key Mazda, whose true name is Key Imports, LLC, d/b/a Key Mazda; Key Nissan, LLC.; John Finger Mazda, whose true name is John Finger Motors, Inc. d/b/a John Finger Mazda; Lake Keowee Chrysler-Dodge, LLC; Myrtle Beach Hyundai Isuzu, whose true name is Hyatt Automotive Group, LLC d/b/a Myrtle Beach Hyundai-Isuzu; Hyatt Buick-GMC-Trucks, whose true name is Neil Johnson Buick GMC, Inc., dba Hyatt Pontiac Buick GMC: Prestige Motorcars, whose true name is Prestige Motor Cars, LLC d/b/a Jaguar Hilton Head; MCE Automotive, Inc., d/b/a Toyota of Greer and MCE Cars, Inc., d/b/a Kia of Greer; Ralph Hayes Toyota, Inc., whose true name is Ralph Hayes Motors, Inc.; Saturn of Spartanburg, whose true name is Saturn of Greenville, Inc., d/b/a Saturn of Spartanburg; Upstate Automotive Chevrolet-Cadillac, whose true name is Rhino Automotive Group, LLC, d/b/a Upstate Chevrolet-Cadillac; Upstate Automotive Isuzu-Kia, whose true name is Rhino Automotive Group, LLC d/b/a Upstate Isuzu-Kia; Upstate Automotive Mitsubishi, whose true name is Rhino Automotive Group, LLC, d/b/a Upstate Mitsubishi; Upstate Automotive Nissan, whose true name is Rhino Automotive Group, LLC, d/b/a Upstate Nissan; Fred Caldwell Chevrolet (incorrectly named Fred Caudwell Chevrolet), whose true name is Caldwell Chevrolet, Inc., d/b/a Fred Caldwell Clover Chevrolet; Saturn of Greenville, Inc.; Gene Reed Toyota, a/k/a Gene Reed Imports and Lexus of Charleston; McDaniels Acura and McDaniels Porsche, whose true name is C.A., Inc., d/b/a McDaniels Acura-Porsche-Audi; McDaniels Acura of Charleston and McDaniels Audi of Charleston, whose true name is Birom Solutions, Inc.; Summerville Ford Mercury, Inc., whose true name is Low Country Ford-Mercury, Inc., d/b/a Summerville Ford-Mercury.

³ If the closing fee is as limited according to the lower court's order, then the consumer will likely be saddled with getting their own: (1) registration by standing in line at the Highway Department; (2) tags at the Highway Department; (3) finding a lender to loan money on the car (probably at a higher rate); (4) paying off the loan on the trade-in; (5) getting the title to the trade-in; and (6) dealing with the transition of the insurance to the new car, among others.

Carolina expect that the General Assembly has the constitutional authority to determine public policy when it writes statutes and expects them to be enforced as written.

As Chief Justice Toal recently wrote in a case involving the interpretation of the Workers Compensation Statute:

Although we are constrained to decide this case according to the standard mandated by the General Assembly, we offer our opinion that this standard should be updated to account for the scientific and technological progress in medicine and psychology, which have undermined the old public policy argument used to deny mental-mental recovery.

...

Nevertheless, we are interpreters not legislators and are bound by the language of Section 42-1-160 as written. *Citizens' Bank v. Heyward*, 135 S.C. 190, 204, 133 S.E. 709, 713 (1925) ("The primary source of the declaration of the public policy of the state is the General Assembly. . .")

Bentley v. Spartanburg County, 398 S.C. 418, 423-24, 26-27, 730 S.E.2d 296, 299, 301 (2012).

Here, however, the lower court has inserted its policy opinion by choosing rate regulation which the General Assembly rejected nearly 15 years ago when the statute was passed. This extrajudicial action exposes all consumers to increasing burdens when buying a car, and all businesses to the risk that they will learn, only after it is too late to comply, that the manner in which they operate their business (and oftentimes, the reasons for locating their businesses to South Carolina) are no longer permissible.

As more fully stated below, the Adams Businesses respectfully assert that the General Assembly is the proper place in a representative democracy for the public policy of the state to be set. The Adams Businesses further assert that consumers have a right to pay a fully disclosed, reasonable fee to free them from many time consuming burdens when buying a car. A copy of Adams Businesses' proposed *amicus curiae* brief is attached hereto, and is being filed with this Motion in accordance with Rule 213, SCACR.

The Adams Businesses would respectfully show unto this Court:

1. They are automobile dealers in the State of South Carolina. The new car and truck dealerships in South Carolina account for \$9.3 billion in sales, and provide 14,349 jobs that pay \$704 million in wages, and \$165.7 million in state and local taxes.⁴
2. In 2013, the revenue generated by the total sales of new car and truck dealerships represented 15% of the total retail sales in South Carolina.⁵
3. They are also involved in a lawsuit captioned *Howard Adams, et al. v. Action Ford Mercury, et al.*, which is currently stayed, but pending in Aiken County.
4. The issues raised on appeal by Hendrick Honda represent issues that could dramatically affect the approximate 324 automobile dealers in the *Adams* litigation and their ability to continue to conduct business throughout South Carolina.
5. The above-captioned case involves important questions in the area of statutory construction. The questions for this Court include, but are not limited to the General Assembly's ability to determine and announce public policy, delegate its interpretation, and expect the Courts to enforce it.
6. The Plaintiff in this case and the Plaintiffs in the *Adams* case have sought to create public policy decisions that have not been recognized in South Carolina. They have also sought to circumvent established rules of civil procedure. This expansion of legal theory and disregard for legal procedure is beyond established precedent upon which consumers and businesses rely; this would likely result in an increase of tort claims against the state's automobile dealers and other businesses, who would be

⁴ <http://www.nada.org/Publications/NADADATA/DrivingUSEconomy> (2013 National Automobile Dealers Association report). These numbers do not include the large number of dealerships who sell only used cars and trucks.

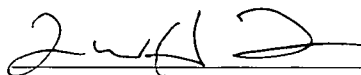
⁵ *Id.*

forced not only to defend these lawsuits, but also to face constantly changing legal theories to which they are later held. The issues in this case may alter well-principled tort law related to a South Carolina industry that could prevent new businesses from coming to South Carolina, threaten to have established businesses go out of business or leave South Carolina, and upset the balance between the industry and the consuming public. It would also greatly limit the ease in which a consumer in South Carolina could buy a car.

7. The submission of an amici curiae brief by the Adams Businesses will assist the Court in its decision on the state-wide impact of the questions currently before this Court.

WHEREFORE, the Adams Businesses respectfully move this Court for leave to file an amicus brief for these issues and to address the Court at oral argument. Alternatively, the Adams Businesses request permission to file an amicus brief.

January 29, 2015



Bradford N. Martin, Esq. (SC Bar No. 3658)
Laura W. H. Teer, Esq. (SC Bar No. 16698)
Brook Bristow, Esq. (SC Bar No. 76038)
BRADFORD NEAL MARTIN & ASSOCIATES, P.A.
Post Office Box 10410
Greenville, South Carolina 29603
864.552.9990
864.552.9992 (facsimile)

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**MEMORANDUM OF LAW IN SUPPORT OF
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PRELIMINARY STATEMENT

“[T]he legislative branch of government in the United States is a central actor in the drama of representative democracy.”¹

This brief of *amici curiae* is filed in support of Hendrick Honda’s appeal of March 26, 2014.

There was neither a statutory prohibition nor statutory endorsement of closing fees prior to the enactment of the Closing Fee Statute. This Court determined in 1996 that full disclosure of a closing fee prior to purchase made the fee permissible. *Fanning v. Fritz’s Cadillac-Pontiac-Buick, Inc.* 322 S.C. 399, 472 S.E.2d 242 (1996).² Then it was addressed by the General Assembly in 2000.

This same issue of an automobile closing fee was addressed by a number of states before it was considered by the General Assembly in South Carolina. During this same time frame, other states were determining the proper public policy with respect to closing fees and considered two schools of thought: control the amount charged for a closing fee (rate regulation),³ or require that the consumer be placed on notice of the fee without controlling the amount (disclosure).⁴

The General Assembly weighed the various options and subsequently passed the Closing Fee Statute in 2000.⁵ The General Assembly purposefully weighed what was best for South

¹ The South Carolina Legislature, by Charlie B. Tyer, Richard D. Young, Center for Governmental Services, Institute for Public Service and Policy Research, University of South Carolina.

² Four years later, the General Assembly codified the disclosure requirement, affirming the South Carolina Supreme Court’s recognition that disclosure of the fee was the primary concern. *See State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 525 S.E.2d 872 (2000) (noting the presumption that the legislature is aware of court interpretations of statutes).

³ *E.g.*, N.H. Rev. Stat. Ann. § 361-A:1(IV) (definition adopted in 1997, N.H. Laws 0944); Md. Code Ann. § 15-311.1 (originally enacted in 1993, Md. Laws 631); Mich. Comp. Laws § 492.113 (originally enacted in 1990, Mich. Legis. Serv. 27). Ohio Rev. Code Ann. § 1317.07 (originally enacted in 1973).

⁴ *E.g.*, Conn. Gen. Stat. Ann. § 14-62 (originally enacted in 1979); Va. Code Ann. § 46.2-1530 (originally enacted in 1988).

⁵ 2000 Act No. 387, 2000 S.C. Acts 3311, Part II § 82.

Carolina consumers and businesses, and concluded it would not place a monetary restriction on the fees. Instead, it would place the fee within the Consumer Protection Code, under the authority of the Department of Consumer Affairs, and provide further protection to consumers by requiring certification and notice of the fee. This choice for disclosure is evidenced by the laws' title:

Notice⁶ of closing fees on motor vehicle sales contract; registration fees.

It is "proper to consider the title or caption of an act in aid of construction to show the intent of the legislature." *University of South Carolina v. Elliott*, 248 S.C. 218, 221, 149 S.E.2d 433, 434 (1966).⁷

The General Assembly imposed four requirements: (1) pay a \$10 registration fee for each fiscal year to the Department of Consumer Affairs; (2) include the closing fee in the advertised price of the vehicle; (3) disclose the closing fee on the sales contract; and (4) display the closing fee in a conspicuous location at the dealership. The General Assembly, as the central actor in South Carolina's drama of representative democracy, made the decision on how the best public policy for closing fees would be handled in South Carolina: disclosure rather than rate regulation.

The Department of Consumer Affairs, as the agency appointed by the General Assembly, approves each fee and certifies the dealer's right to charge the fee. In 2001, Consumer Affairs issued an Administrative Interpretation, reiterating the four requirements. In reliance on the

⁶ In an analogous case, the Seventh Circuit found the argument that the Real Estate Settlement Procedures Act (RESPA) forbids a lender or closing agent to re-price any of the charges that it has incurred and is passing on to the borrower would only make sense if RESPA were a rate-regulating statute, which it found it was not. *Krzalic v. Republic Title Co.*, 314 F.3d 875, 879-81 (7th Cir. 2002). The court noted that RESPA placed no ceiling on the amount that a closing agent can charge for its services. *Id.* Likewise, the Closing Fee Statute is not a rate-regulating statute. It is a notice statute and places no limitation on the closing fee that dealers may charge, including profit.

⁷ See *Garner v. Houck*, 312 S.C. 481, 486, 435 S.E.2d 847, 849 (1993) (holding the title of a statute and heading of a section can be used to clarify ambiguity or doubt in a statute provided the interpretation does not undo or limit the plain meaning of the text).

General Assembly's decision and the Administrative Interpretation, dealers began charging, and consumers consented to paying, the closing fee for years.⁸

Every day in South Carolina, thousands of automobile purchases are being negotiated and closed. The burden imposed on businesses by state and federal regulations has grown dramatically. Businesses rely upon the General Assembly, the Department of Consumer Affairs, and the appellate courts to guide them through the maze of requirements.

Six years after the passage of the Closing Fee Statute, 324 South Carolina automobile dealers were sued for the manner in which they charged closing fees, not under the Consumer Protection Code, but under the Manufacturers, Distributors, and Dealers Act (hereinafter "Dealers Act"). Ten years after South Carolina public policy chose disclosure, as determined by the General Assembly and the Department of Consumer Affairs, the lower court retroactively imposed rate regulation, removed the safe harbors of the Consumer Protection Code, and allowed a dangerous expansion of the Dealers Act.

The lower court is an interpreter, not a legislator, and is bound by the statement of public policy by the General Assembly. The General Assembly has spoken and declared that disclosure is the key to consumer protection. Since 2001, the statute has been enforced and interpreted by Consumer Affairs this way.⁹ Consumers have been protected by requiring the 3 disclosures and Consumer Affairs' certification. The lower court has no power to declare a change. The lower court's actions raise specific due process issues for automobile consumers and businesses, but

⁸ The Dealers offer customers unaccustomed to dealing with banks and other lending sources the ability to obtain financing at the point of sale. The Dealers can work with multiple sources of credit, forcing them to compete for the volume business that Dealers generate. Dealers also take care of loan pay-offs and required paperwork for vehicle tags, title, and registration. This eliminates the need for consumers to make numerous phone calls to potential lenders and spend time in line at the Department of Motor Vehicles.

⁹ DCA Interpretation of Closing Fee Statute at p.1.

they also undermine the separation of the roles between the legislature and judiciary, and have a potential chilling effect on all business in the state.

INTEREST OF AMICI CURIAE

The legal issues presented cannot be properly considered in isolation from the adverse consequences the lower court's rulings will have on not only the automotive consumers, but also on all business interests in South Carolina.

Amici are various automobile businesses across the state with a direct interest in another case that may be materially affected by a decision in this case. While there is a great variety among *amici* as to their size and location, *amici* are united in asking this Court to protect the right of the General Assembly and the Department of Consumer Affairs to remain the central actor in the South Carolina democracy. *Amici* join together in this Brief to explain why the clear and straightforward business practices designed to protect automotive consumers should be allowed to continue. The lower court's decision creates substantial legal uncertainty and enormous potential financial exposure for hundreds of businesses in the state. There is a need for certainty in the law.¹⁰ *Amici* additionally join in informing this Court of the significant damage that the application of the lower court's rulings has already wrought, and the considerable danger it portends for businesses in the state of South Carolina.

STATEMENT OF THE CASE

The Adams Businesses, adopt by reference the Statement of the Case of Respondent-Appellant, Hendrick Honda of Easley. *See* Rule 208(b)(6), SCACR.

¹⁰ The doctrine of vested rights is based on the idea that suddenly changing the rules that govern behavior is unfair. This doctrine dictates that "legislation must by its nature be prospective in effect, reflecting a general philosophy that statutory law should provide forewarning or guidance in order that people may be able to plan their conduct with reasonable certainty of its legal consequences." Richard B. Cunningham & David H. Kremer, *Vested Rights, Estoppel, and the Land Development Process*, 29 HASTINGS L.J. 625, 660 (1978).

ARGUMENT

The General Assembly made a conscious decision not to regulate the amount that automobile dealerships could charge for closing fees. Instead, they decided to protect consumers by requiring disclosure of the fee prior to purchasing an automobile and by authorizing the Department of Consumer Affairs to monitor and guide the dealers in charging the fees. The lower court has ignored the clear intent of the Legislature, added additional requirements to the statute, and taken it out from under the Consumer Code and placed it under the Dealers Act.

A. Courts are interpreters, not legislators, and are bound by the primary source of the declaration of public policy.

For the last 85 years, this Court has been a champion of the concept that the legislative branch of government is the central actor in the drama of representative democracy. In *Citizens' Bank v. Heyward*, 135 S.C. 190, 133 S.E. 709 (1925), this Court stated the age-old rule:

The primary source of the declaration of the public policy of the state is the General Assembly; the courts assume this prerogative only in the absence of legislative declaration.

135. S.C. at 204, 133 S.E. at 713.

This rule was recently cited and relied upon in the case of *Bentley v. Spartanburg County*, 398 S.C. 418, 730 S.E. 2d 296 (2012) (Toal, C.J.). *Bentley* involved a policeman who suffered from post-traumatic stress disorder after shooting a suspect in the line of duty. The issue was whether he could obtain workers compensation payments for his mental injuries. This Court reviewed the language of Section 42-1-160, and reluctantly applied it as written. Chief Justice Toal wrote:

Although we are constrained to decide this case according to the standard mandated by the General Assembly, we offer our opinion that this standard should be updated to account for the scientific and technological progress in medicine and psychology, which have undermined the old public policy argument

used to deny mental-mental recovery. *Bentley v. Spartanburg County*, 398 S.C. 418, 423-34, 730 S.E.2d 296, 299 (2012).

Nevertheless, we are interpreters not legislators and are bound by the language of Section 42-1-160 as written. *Citizens' Bank v. Heyward*, 135 S.C. 190, 204, 133 S.E. 709, 713 (1925) ("The primary source of the declaration of the public policy of the state is the General Assembly. . .") *Bentley*, 398 S.C. at 426-27, 133 S.E.2d at 301.

Therefore, this Court needs to apply this principal in the *Hendrick Honda* case.

This same respect for the declaration of public policy by the General Assembly was also paid in the recent case of *Gladden v. Boyken*, 402 S.C. 140, 739 S.E. 2d 882 (2013) (Pleicones, J.). In a consumer case, the Plaintiff signed a contract with a home inspector that had a limitation of liability clause to the amount paid for the inspection. When her home allegedly had significant problems not caught by the inspection, her lawyers attempted to argue that the clause was unconscionable and against public policy. Again, applying the age old rule, this Court held:

Our courts must determine public policy by reference to legislative enactments wherever possible. *See Citizens' Bank v. Heyward*, 135 S.C. 190, 204, 133 S.E. 709, 713 (1925) ("The primary source of the declaration of the public policy of the state is the General Assembly; the courts assume this prerogative only in the absence of legislative declaration."); *Zerjal v. Daech & Bauer Constr., Inc.*, 405 Ill. App. 3d 907, 912, 939 N.E.2d 1067, 1072-73, 345 Ill. Dec. 887 (Ill. App. Ct. 2010) ("Since the legislature had the opportunity to prohibit or limit exculpatory clauses in home inspection contracts but did not, we decline the opportunity as well."). 402 S.C. at 148, 739 S.E.2d at 883.

The Court continued:

The General Assembly has spoken on the issue of home inspection and liability for undisclosed defects in the sale of residential property. Under the statutory scheme crafted by the General Assembly, purchasers are protected from unqualified home inspectors by licensure requirements. *See South Carolina Code § 40-59-800 et seq.* (2011). However, the General Assembly did not require home inspectors to carry errors and omissions liability insurance.

The Court then concluded that there is nothing in the legislation that prohibited home inspectors from including a limitation of liability clause. *Id.*

Like the home inspection situation, the General Assembly has spoken explicitly here with regard to the charging of a closing fee. The Act clearly and unequivocally has four specific requirements, dealing with certification and disclosure. This is the public policy of South Carolina with regard to closing fees, and consumers and businesses alike have the right to rely upon it. If the General Assembly had wanted to regulate the amount that could be charged for a closing fee, then it had an opportunity to do so in the legislation. Not only did the General Assembly make it clear that it was not interested in rate regulation, and Consumer Affairs likewise did not regulate the amount, but instead certified it. The primary source of the declaration of how closing fees are treated in South Carolina, therefore, needs to stay with the General Assembly, and not the lower court.

1. The Lower Court Misconstrued The Closing Fee Statute.

a. The Lower Court Impermissibly Ignored the Wording of the Closing Fee Statute.

The General Assembly is presumed to say what it means and to mean what it says. “What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.” *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., LLC*, 409 S.C. 331, 343, 762 S.E.2d 561, 567 (2014)(Beatty, J.).¹¹

The four requirements for the charging of a closing fee then define the notice that must be provided to the Department of Consumer Affairs, in the form of a registration fee, and the notice to be provided to customers. The General Assembly imposed no other requirements:

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

¹¹ The court’s role “is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain -- neither to add nor to subtract, neither to delete nor to distort.” - The Honorable Justice Frankfurter, *62 Cases of Jam v. United States*, 340 U.S. 593, 596 (1951).

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 (Supp. 2000). If the General Assembly had intended to impose additional requirements, then it would have done so. When determining the effect of statutory language, “the canon of construction ‘expressio unius est exclusio alterius’ or ‘inclusio unius exclusio alterius’ holds that ‘to express or include one thing implies the exclusion of another, or the alternative.’” *State v. Bolin*, 378 S.C. 96, 100, 662 S.E.2d 38, 40 (2008).¹²

Instead of enforcing the public policy decision to require disclosure only, the lower court added two requirements: (1) that the fee be “pre-determined” and (2) that the fee not include “Dealer profit” but instead be limited to “actual closing [costs] incurred.” (Order of Jan. 11, 2010 at pp. 9-11, R. at 35-37). The lower court thereby transformed an unambiguous disclosure statute into a rate-regulating statute. The addition of these requirements by the lower court is not permitted:

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).

The General Assembly clearly chose to not limit the closing fee to a dealer’s costs. *cf.* S.C. Code Ann. § 23-31-215(I) (providing SLED may charge a “fee not to exceed its costs in

¹² If the General Assembly had wanted to place a cap on the amount that could be charged, then it would have done so. *See* S.C. Code Ann. § 37-2-201 (providing that a credit service can only charge the greater of either 18% per year on unpaid balances of the amount financed or any rate filed in excess of 18% and posted pursuant to Section 37-2-305.)

releasing the information under this subsection.”). Rather than limit itself to the unambiguous language of the statute, the lower court replaced the term “closing fee” in the statute with the term “closing costs.” (R. at 37). A fee is a “payment asked or given for professional services, admissions, tuitions, etc.; charge.” *Webster’s New World Dictionary* at 512 (2d. ed. 1986). In contract, a cost is the “amount originally expended in performing a particular act or operation.” *Webster’s New World Dictionary* at 321 (2d ed. 1986). The lower court was 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.” *Ferguson Fire & Fabrication, Inc.*, 409 S.C. at 343, 762 S.E.2d at 567.

By imposing the requirement that the “fee” be limited to the Dealer’s “costs,” the lower court has given the term “closing fee” a meaning that destroys the intent of the statute as a notice and not a rate-regulating statute. *See Laurens County Sch. Dists. 55 & 56 v. Cox*, 308 S.C. 171, 417 S.E.2d 560 (1992) (“In applying the rule of strict construction the courts may not give to particular words a significance clearly repugnant to the meaning of the statute as a whole, or destructive of its obvious intent”). The effect of the lower court’s ruling is to reverse the public policy decision of the General Assembly, thereby making it impossible for consumers and businesses in South Carolina to rely upon the plain language of statutes to conduct business.

b. The Lower Court Ignored the Placement of the Closing Fee Statute within the Consumer Protection Code.

The lower court erred by ignoring the placement of the statute within the Consumer Protection Code and applying the constructs of the Dealers Act instead.¹³ It was not by accident that the General Assembly chose to place the Closing Fee Statute within the Consumer Protection Code.

¹³ The interpretation suggested by Freeman would allow plaintiffs, rather than the General Assembly, to determine what statute is intended to regulate certain conduct, to the exclusion of the Consumer Protection Code.

The lower court in this case determined that the charging of the closing fee should be addressed under the Manufacturers, Distributors, and Dealers Act rather than the specific Closing Fee Statute. The Supreme Court of Connecticut had the opportunity to address an almost identical argument in *Small v. Going Forward, Inc.*, 915 A.2d 298 (Conn. 2007). The plaintiff claimed the closing fee statute imposed a “reasonable cost” limitation on the amount an automobile business may charge. Section § 42-110b-28(b) of the Regulations of Connecticut State Agencies provides: “It shall be an unfair or deceptive act or practice for a new car dealer or a used car dealer to violate any provision of a federal or state statute or regulation concerning the sale or lease of motor vehicles.” The majority in *Going Forward* reasoned that it “puts the cart before the horse” to argue that this general regulation answers the question of whether a separate statute governs the amount that a dealer may charge as a conveyance fee.

Similarly in the present case, reference to the Dealers Act is not appropriate to determine whether the Closing Fee has been properly charged. By placing the Statute within the Consumer Code, the General Assembly clearly intended all of the requirements and protections of the Consumer Code to apply.¹⁴ Furthermore, the General Assembly intended the Consumer Protection Code to be the exclusive remedy for a closing fee violation.¹⁵

The Consumer Code provides a framework of rights and obligations upon which consumers and businesses should be able to rely when transacting business and provides that

¹⁴ The Consumer Protection Code contains safe harbor provisions in which there is no liability for a bona fide error (S.C. Code Ann. § 37-5-202(7)) and which limits a defendant’s liability to that of an “excess charge” if the defendant follows a rule or interpretation of the Administrator, even if that interpretation is subsequently changed by a court (S.C. Code Ann. § 37-6-104(4)). The Code contains a displacement provision, annulling other law to the extent it modifies a particular standard of care or changes limitations on liability established in the Code. S.C. Code Ann. § 37-1-103.

¹⁵ The Code contains a displacement provision, annulling other law to the extent it modifies a particular standard of care or changes limitations on liability established in the Code. S.C. Code Ann. § 37-1-103. Although certain remedy provisions of the Consumer Code state that they are not exclusive, the Closing Fee Statute contains no such language, indicating the General Assembly’s intention that it be the exclusive remedy for this specific type of violation.

there should be “due regard for the interests of legitimate and scrupulous creditors.” S.C. Code Ann. § 37-1-102(d). The Dealers Act, which was intended by the General Assembly primarily to protect Dealers,¹⁶ is not meant to be a panacea in lieu of more specific statutes enacted by the General Assembly. The lower court’s expansion of restrictions and eliminations of defenses for the Dealers turns this on its ear.¹⁷

The General Assembly’s intention must be enforced and the contrary rulings of the lower court overturned.

c. **The Lower Court Improperly Added Rate Regulation to the Closing Fee Statute Retroactively.**

The lower court retroactively added rate regulation to the Closing Fee Statute, creating liability for dealers where none existed previously. “Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions.” *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).

“The general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new

¹⁶ The Act has repeatedly been referred to as the “Dealer Day in Court” Act. See, e.g., *Magic Toyota, Inc. v. Southeast Toyota Distributors, Inc.*, 784 F. Supp. 306, 310 (D.S.C. 1992); *Chappell v. General Motors Corp.*, 511 F.Supp.2d 842, 843 (D.S.C. 1980); *Don Shevey & Spires, Inc. v. American Motors Realty Corp.*, 279 S.C. 58, 61, 301 S.E.2d 757, 759 (1983) (Harwell, J., dissenting).

¹⁷ Statutory construction requires the application of the Closing Fee Statute rather than the Dealers Act for the following reasons: (1) the Dealers Act refers only generally to “unfair methods of competition and unfair or deceptive acts or practices as defined in Section 56-15-40”, while the Consumer Code specifically addresses the charging of a closing fee. *Spartanburg County v. Pace*, 204 S.C. 322, 29 S.E.2d 333 (1944) (If there is a conflict between a general law and a specific law on the same subject, then the latter will prevail.); (2) in contrast to the Dealers Act, the Consumer Protection Code does not permit class or representative actions nor does it provide for automatic doubling of actual damages. S.C. Code Ann § 37-5-202(1),(3). *Murray v. W. O. W.*, 192 S.C. 101, 5 S.E.2d 560 (1939) (an inconsistent statute dealing with common subject matter in a minute way will prevail over a general statute relating to the same subject matter. . .); and (3) the Closing Fee Statute is more recent than the Dealers Act. The Dealers Act became effective on May 22, 1972. The Consumer Protection Code was originally adopted on January 1, 1975, and the Closing Fee Statute not until June 30, 2000. *I’On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 412-13, 526 S.E.2d 716, 719 (2000) (stating that “later legislation takes precedence over earlier legislation”).

remedies to vindicate existing rights are applied retrospectively.” *Toth v. Square D Co.*, 298 S.C. 6, 8, 377 S.E.2d 584, 585 (1989). “Prospective application is required when liability is created where formerly none existed.”¹⁸ Prospective application is also appropriate in cases in which immunities have been dissolved. *Id.* at 9, 377 S.E.2d at 586. This Court should not allow a lower court to retroactively dissolve the immunities provided by the Consumer Code and add new liabilities that did not previously exist.

The lower court’s decision to retroactively add rate regulation to the Closing Fee Statute will have a chilling effect on business in the state, and is not the stated public policy of this state.

B. Deference Must Be Given To The Department Of Consumer Affairs.

The General Assembly appointed the Department of Consumer Affairs to administer the Closing Fee Statute. As a general rule, “agencies charged with enforcing statutes . . . receive deference from the courts as to their interpretation of those laws.” *State v. Sweat*, 379 S.C. 367, 385, 665 S.E.2d 645, 655 (Ct.App.2008) (citation omitted). Thus, the reviewing tribunal will defer to the relevant administrative agency’s decision unless there is a compelling reason to differ. *S.C. Coastal Conservation League v. S.C. Dep’t of Health & Env’tl Control*, 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005).

A party subject to the Consumer Protection Code must be able to rely on Department interpretations so that it can in good faith structure its business operations to comply with the law. Car dealers who wish to charge a closing fee are instructed under S.C. Code Ann. § 37-2-307 to pay an annual filing fee with the Department of Consumer Affairs. The Department then requests that the dealer register the amount that it intends to charge. If that amount is approved

¹⁸ *Id.*; see also *Marcum v. Bowden*, 372 S.C. 452, 643 S.E.2d 85 (2007) (the holding that an adult social host who knowingly and intentionally serves an alcoholic beverage to a person between the ages of 18 and 20 created tort liability where formerly there was none; therefore, the Court’s decision should be applied prospectively).

by the DCA, it is certified and returned to the dealer.¹⁹ The dealer then begins charging the fee based on the certification of the DCA.²⁰

The DCA issued an Administrative Interpretation in 2001. It required four things related to the charging of a closing fee:

- 1.) The dealer must pay the Department a registration fee each state fiscal year in the amount of ten (\$10.00) dollars prior to the assessment of a closing fee; 2.) The existence of a closing fee must be disclosed on the sales contract; 3.) The closing fee must be disclosed in a statement displayed in a conspicuous location in the motor vehicle dealership; and 4.) If the closing fee is charged, and the vehicle is advertised, the closing fee must be included in the advertised price.

(Interpretation at p.1). Danny Collins, the DCA's General Counsel, testified that these were the only provisions the DCA considered when certifying a Dealers registration and amount to charge. (R. at 1545, ll. 19-25). Collins also testified that the DCA's interpretation does not have any requirements regarding the manner in which the fee is determined (R. at 1554, ll. 17-22). The DCA does not even address the amount that is charged unless it is extreme. (R. at 1547, ll. 15-19). This regulatory inaction by the agency charged with enforcing § 37-2-307 further supports the determination that the statute does not regulate the amount of the closing fee charged by car dealerships.

Freeman argues that the optional language on the registration form initially provided by the Department²¹ indicates that it imposes rate regulations on the closing fee statute. This

¹⁹ This Court has adopted the filed rate doctrine finding it "preserves the stability, uniformity, and finality inherent in rates filed with the regulatory agency and what has been determined to be a reasonable rate by that agency." *Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 519, 623 S.E.2d 387, 392 (2005).

²⁰ The Department has not enacted procedural or substantive regulations governing the amount of such fees, supporting the argument that the statute does not regulate the amount of closing fees charged by car dealerships. See *Small v. Going Forward, Inc.*, 915 A.2d 298, 306 (Conn 2007) (Regulatory inaction by the agency charged with enforcing closing fee statute to regulate the rate further supports that the statute is a disclosure statute.).

²¹ "This dealership charges closing fees as a means of reimbursing it for certain overhead costs such as document retrieval and document preparation. It is a charge that is permitted but not required by law. The full cash price charged at any dealership depends on many factors including all products and services bought with the vehicle."

approach ignores the content of the Administrative Interpretation and the actions taken by the Department in administering the statute.

The Department's suggested notice must be read in context with the unambiguous language of the statute and with the body of the Administrative Interpretation. "[W]ords in a statute must be construed in context." *Southern Mut. Church Ins. Co. v. South Carolina Windstorm and Hail Underwriting Ass'n*, 306 S.C. 339, 342, 412 S.E.2d 377, 379 (1991). Thus, "the Court may not, in order to give effect to particular words, virtually destroy the meaning of the entire context; that is, give the particular words a significance which would be clearly repugnant to the statute, looked at as a whole, and destructive of its obvious intent." *Id.* The use of the word "reimbursing" in the optional notice language should not be allowed to transform the clear intent of the Closing Fee Statute from disclosure to rate regulation. *See, e.g., Small v. Going Forward, supra* (finding that the use of words "reasonable costs" in the statute itself do not limit the amount a vehicle dealer can charge as a processing fee when viewed in the context as a whole of the chapter in which the statute was placed, the actions of the body appointed to govern the administration of the statute, and the legislative history.)

The language of the proposed registration form is *not* the Department's construction of the Closing Fee Disclosure Statute,²² as shown by the content of the Administrative Interpretation itself, the fact that the registration language was optional, and the Department's consistent refusal to regulate the amount of the fee.²³ Moreover, all references to reimbursement

²² If the lower court had determined the Department construed the closing fee statute as a rate regulating statute, that interpretation would not be entitled to deference. *See Brown v. S.C. Dep't of Health & Envi'l Control*, 348 S.C. 507, 516, 560 S.E.2d 410, 415 (2002) ("While the Court typically defers to the Board's construction of its own regulation, where, as here, the plain language of the regulation is contrary to the Board's interpretation, the Court will reject its interpretation."); *Richland County School Dist. Two v. South Carolina Dept. of Educ.*, 335 S.C. 491, 517 S.E.2d 444 (Ct.App.1999) (court rejected agency's statutory construction where plain meaning of statute provided compelling reason to reject agency's interpretation).

²³ *See Davis v. United States*, 495 U.S. 472, 484 (1990) (agency interpretations and "practices" given considerable weight); *W.G. Cosby Transfers Storage Corp. v. Froehlke*, 480 F.2d 498, 502 (4th Cir. 1973) (regulation interpreted

in the optional form were *removed* by the Department years in advance of the lower court's ruling. (R. at pp. 33).²⁴

The lower court's rulings have undermined the authority granted to the DCA by the General Assembly and effectively mean that businesses in South Carolina cannot rely upon the decisions of the DCA. Therefore, it is appropriate for this Court to overturn the rulings of the lower court and find that the Closing Fee Statute is a disclosure statute only.

C. The Lower Court Failed To Apply The Procedures Of Rule 23, SCRPC.

The requirements of Rule 23 should apply to motor vehicle dealers in the same way as they would to other businesses. The lower court and Hair would deprive the automotive industry of the procedural requirements of Rule 23 granted by the General Assembly and applied to all other defendants.²⁵

In 1985, the South Carolina Rules of Civil Procedure were adopted and the General Assembly simultaneously repealed various Code portions relating to procedural rules. Act No. 100, 1985 S.C. Acts 277 (effective July 1, 1985); Rule 86, SCRPC (Rules effective July 1, 1985). The General Assembly explicitly provided that, after the Rules took effect, the Rules – not former or existing statutes – controlled procedures in a civil lawsuit in the event of any conflicts between the new rules and statutes. As provided in Act No. 100:

In the event of conflict between any provision of the South Carolina Rules of Civil Procedure and *any other statutory provisions as to practice and procedure not repealed by this act, the provision of the rules shall control*. However, neither the promulgation of the rules nor this act may be construed to affect the

in accord with agency practice); see *Montefiore Medical Center v. Leavitt*, 578 F.Supp.2d 129, 134 (D.D.C. 2008) (length and consistency of agency's practice constituted agency interpretation of statute).

²⁴ The registration form now reads: "This dealership charges closing fees on a motor vehicle sales contract. It is a charge that is permitted but not required by law (Section 37-2-307). The full cash price charged at any dealership depends on many factors, including all products and services bought with the vehicle."

²⁵ See *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 703 S.E.2d 197 (2010) (holding that Rule 23 did not conflict with the Notice and Opportunity to Cure Construction Dwelling Defect Act because Rule 23 was merely the procedural mechanism through which claims under the Act could be brought).

substantive legal rights of any party to any civil litigation in the courts of this State but shall affect only matters of practice and procedure.²⁶

Act No. 100, § 3, 1985 S.C. Acts at 280 (emphasis added).

Section 56-15-110(2) of the Dealers Act is a pre-Rules statute that allowed the filing of a class action against a manufacturer, dealer, or distributor in appropriate circumstances. The particular requirements for pleading and proving a class action are now governed by Rule 23, SCRCF, and case law interpreting it. *See McGann v. Mungo*, 287 S.C. 561, 568, 340 S.E.2d 154, 156 (1986) (new civil procedure rules, not former statutes, applied in lawsuit); *accord Gardner v. Newsome Chevrolet-Buick*, 304 S.C. 328, 404 S.E.2d 200 (1991) (addressing amount in controversy in Rule 23 class action in which plaintiff alleged he was charged an illegal motor vehicle closing fee).

The effect of the lower court's ruling is that businesses in South Carolina cannot rely upon the State's procedural rules in conducting business.

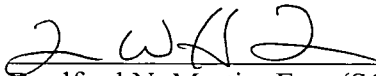
CONCLUSION

The lower court's rulings undermine the General Assembly's pronouncement of South Carolina's public policy to make the Closing Fee Statute a disclosure statute under the regulations and protections of the Consumer Protection Code. By adding rate regulation requirements to the Closing Fee Statute, the lower court reverses the state's public policy and allows a jury to penalize a business for charging a fee that the General Assembly and the Department of Consumer Affairs expressly permit. Such a result creates substantial legal uncertainty and enormous potential financial exposure for hundreds of businesses in the state. This could lead to lost jobs and the potential bankruptcy of a business that has served this state well. The right of

²⁶ Class representation is a procedural, rather than a substantive right. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980); *Knowles v. Standard Savings & Loan Assoc.*, 274 S.C. 58, 261 S.E.2d 49 (1979).

consumers to have significant time consuming services taken care of at the point of sale is at risk. *Amici* urge this Court to provide certainty in the law both for Dealers and for businesses both in South Carolina and outside of South Carolina looking to conduct business here. *Amici* respectfully request that this Court overturn the lower court's prior rulings.

January 29, 2015



Bradford N. Martin, Esq. (SC Bar No. 3658)
Laura W. H. Teer, Esq. (SC Bar No. 16698)
Brook Bristow, Esq. (SC Bar No. 76038)
BRADFORD NEAL MARTIN & ASSOCIATES, P.A.
Post Office Box 10410
Greenville, South Carolina 29603
864.552.9990
864.552.9992 (facsimile)

**ATTORNEYS FOR THE ADAMS
DEFENDANTS**

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2012-CP-39-01554

Julie Freeman Hair. Appellant-Respondent,

v.

J.L.H. Investments, LP a/k/a Hendrick Honda of Easley Respondent-Appellant.

PROOF OF SERVICE

I certify that I have served Motion for Leave to File Amicus Curiae Brief and Brief in Support of Motion of the Adams Businesses by depositing a copy in the U.S. Mail, postage prepaid, on January 29, 2015, addressed to Terry E. Richardson, Jr., Esq., Brady R. Thomas, Esq., James David Butler, Esq., Richardson, Patrick, Westbrook & Brickman, LLC, P.O. Box 1368, Barnwell, South Carolina 29812; A. Camden Lewis, Esq., Lewis & Babcock, LLP, PO Box 11208, Columbia, SC 29211; Gedney M. Howe, III, Esq., Gedney M. Howe, III, PA, Post Office Box 1034, Charleston, South Carolina 29402; Michael E. Spears, Esq., Michael E. Spears, PA, Post Office Box 5806, Spartanburg, South Carolina 29304; and Richard A. Harpootlian, Esq., Richard A. Harpootlian, PA, Post Office Box 1090, Columbia, South Carolina 29211, James Y. Becker, Esq., Mary Caskey, Esq., Sarah P. Spruill, Esq., Haynsworth Sinkler Boyd, PA, PO Box 11889, Columbia, SC 29211; Marvin Infinger, Esq., Nexsen Pruet, LLC, P.O. Box 486, Charleston, SC 29402; and John T. Lay, Esq., Gallivan, White & Boyd, PA, 1201 Main St., Ste. 1200, Columbia, SC 29201.

January 27, 2015



Bradford N. Martin, SC Bar #3658

Laura W. H. Teer, SC Bar #16698

Brook Bristow, SC Bar # 76038

BRADFORD NEAL MARTIN & ASSOCIATES, PA

Post Office Box 10410

Greenville, South Carolina 29603

864.552.9990



The Supreme Court of South Carolina

Bradford Neal Martin

02/04/2015

RECEIPT #74935

Case No: 2014-000642
Case Short Title: Julie Freeman v. J.L.H. Investments
Event:
Fee Type: Motion Fee
Amount: \$25.00
Payment Type: Check
Reference No: 5122
Check/Money Order Date: 01/27/2015
Comments: