THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2013-000417

Latoya Brown, ..... Petitioner,

v.

Dick Smith Nissan, Inc. and
Old Republic Surety Company, ..... Respondents.

# PETITION FOR REHEARING

The Respondents, by and through their undersigned counsel, and pursuant to Rule 221 of the South Carolina Rules of Appellate Procedure, respectfully petition the Court for a rehearing of the above-captioned matter, an opinion of which was filed on August 5, 2015. This opinion has the effect of finally deciding Respondents' appeal. The points overlooked or misapprehended by the Court are as follows:

(1) Dick Smith assigned the retail installment contract to Sovereign and Sovereign paid Dick Smith for its right to collect installment payments from Brown.

(2) The record reflects an error on the part of Sovereign Bank.

(3) Dick Smith made no false statements to Brown regarding financing for the Mazda.

(4) Dick Smith did notify Sovereign that Brown wanted a Mazda instead of the Nissan for which Sovereign had given preliminary approval.

(5) Neither Brown nor anyone else is required to pay the purchase price for something he or she has not agreed to buy.

(6) Repossession is a creditor's remedy that arises only after default and notice to cure.

(7) There is overwhelming evidence that Dick Smith notified Sovereign that Brown wanted to purchase the Mazda and that Dick Smith sold and assigned its rights to collect installment payments on the Mazda to Sovereign.

(8) Dick Smith notified Sovereign that Brown wanted to purchase the Mazda instead of a Nissan before Brown returned it.

(9) Dick Smith did not arrange financing on a car Brown did not agree to purchase.

(10) Brown was not damaged by Sovereign's collection efforts and suffered no injury that is compensable under the Dealers Act.

(11) Brown was not expected to pay for a car for which she would not be able to obtain title.

(12) Even though Guthrie referred to Hiller, Brown's big brother from a fraternity at college as family to Sovereign, there was no evidence that Brown was in any way injured in her business or property by that statement.

(13) Dick Smith fulfilled all of its obligations and submitted appropriate loan documents.

(14) Dick Smith did not receive financing for a Nissan Altima.

(15) The only mistake to be corrected was that of Sovereign in sending out letters to Dick Smith and Brown on the same day relating to the same subject matter with different information in them.

(16) Dick Smith's finance manager did call Sovereign to advise that Brown wanted to purchase the Mazda instead of a Nissan and faxed a copy of the installment contract to Sovereign.

(17) Brown suffered no damages compensable under the Dealers Act.

Respectfully submitted,

August 19, 2015

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**MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING**

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Respondents submit this memorandum in support of their petition for rehearing and would respectfully show the following:

## INTRODUCTION

*Things are not always as they seem; the first appearance deceives many.* Plato's *Phaedrus.*

## BACKGROUND

Brown signed a retail installment contract to purchase a car from Dick Smith. After the contract was assigned by Dick Smith to Sovereign Bank and Sovereign had paid Dick Smith for its right to receive installment payments, Brown brought the car back to Dick Smith and left it against the advice of Dick Smith. Sovereign sent Brown a notice to cure before repossessing and selling the car and sending Brown a letter claiming a deficiency upon the sale.

The lower court concluded that Dick Smith engaged in bad faith. The Court of Appeals reversed in a unanimous decision. This Court reversed the Court of Appeals and reinstated the lower court's decision awarding judgment in favor of Brown for double the amount of the deficiency and interest on the deficiency, none of which was ever pursued by Sovereign or reduced to judgment, and on which the statute of limitations expired before the lower court issued its decision.

## FACTS

Brown and Robert Hiller ("Hiller") met one another while attending Allen University ("Allen"). (R. p. 42, lines 4-7). Hiller was Brown's "big brother" in a fraternity at Allen. (R. p. 90, lines 8-12). Brown, a Math major, was to begin working at Allen as a Math tutor on June 9, 2007. (R. p. 41, lines 12-13, p. 42, lines 13-18 and p. 211).

Hiller had been employed by Dick Smith for almost 15 years (R. p. 89, line 8 – p. 90, line 2) and Brown knew that Hiller was working at Dick Smith as a car salesman. (R. p. 42, lines 10-12). Brown had already considered purchasing a used Saturn from Dodgeland, knew that her credit was limited, and was concerned about qualifying for financing. (R. p. 46, lines 9-18).

On May 31, 2007, Brown visited Hiller at Dick Smith. (R. p. 42, line 19 – p. 43, line 9). At that time, Hiller asked Brown questions about what type of car she wanted and how much she could afford to pay. (R. p. 50, lines 1-11). Brown told Hiller that she wanted payments of no more than $250.00 per month. (R. p. 50, lines 9-14 and p. 91, lines 7-9).

Hiller believed that a used Nissan Altima would fit Brown's budget but recognized that he first needed to determine if Brown could qualify for financing at all. He also knew that if Brown could qualify for financing, another vehicle could always be substituted. (R. pp. 91-93).

Brown and Hiller discussed arranging financing through BB&T. (R. pp. 53-55). Hiller believed that Brown might qualify for a financing program offered to recent college graduates. (R. –p. 91, lines 21-24).

Hiller provided information to Kent Guthrie ("Guthrie"), a finance manager for Dick Smith, in an effort to pre-qualify Brown for financing. (R. p. 91, line 5 – p. 93, line 25). Guthrie then submitted the information to several lenders for preliminary *approval* using a 2004 Nissan Altima as a general type of collateral for which financing was sought. (R. p. 121, line 21 – p. 123, line 7, p. 124, line 17 – p. 125, line 4).

Guthrie also recognized that a different vehicle could be substituted once he obtained a preliminary *approval* from a lender. (R. p. 135, lines 11-15). Guthrie submitted Brown's information to a number of lenders, including BB&T, in an effort to arrange financing for Brown. (R. p. 122, line 23 – p. 124, line 16). Brown qualified for up to $13,545.00 in financing on a 2004 Nissan Altima through Sovereign Bank. (R. p. 135, lines 9-11 and p. 196).

Brown wanted a Mazda 6. (R. p. 50, lines 15-19). Hiller determined that Dick Smith had a 2005 Mazda 6 at a different location and printed out a photograph of the car with certain information about it and gave it to Brown. (R. p. 43, line 14 – p. 44, line 2).

The 2005 Mazda was the only car that Brown ever considered at Dick Smith. (R. p. 45, lines 8-12). Brown really wanted the Mazda and it was a car that she could afford to purchase. (R. p. 53, lines 18-22).

On June 1, 2007, Brown agreed to purchase the 2005 Mazda. (R. p. 49, lines 5-7). Brown signed a buyer's order for the Mazda (R. p. 201) which provided as follows:

> This contract is not binding upon Dealer unless accepted in writing by an officer or a sales manager or assistant sales manager of Dealer and until a retail installment contract for any deferred balance has been approved and funded by a third party financing source.

The buyer's order was accepted in writing by Dick Smith. (R. p. 48, lines 15-17 and p. 61, lines 14-16). Brown then met with Guthrie. (R. p. 51, lines 17-22).

Brown was willing to cooperate with Dick Smith to arrange financing for the Mazda and placed no restrictions upon Dick Smith as to which lenders it might contact to accomplish that purpose. (R. p. 49, lines 21-23 and p. 55, lines 10-13). Brown signed one, and only one, retail installment contract ("contract") to purchase a car from Dick Smith. (R. p. 56, lines 3-25; p. 120, lines 13-20; and p. 128, line 22 – p. 129, line 7). The contract clearly identified the car as a Mazda. (R. p. 204). The contract incorporated by reference the terms and conditions of the buyer's order and set forth Federal Truth-In-Lending Disclosures including the Amount Financed of $13,091.00. (R. p. 204).

The contract identified Dick Smith as Creditor – Seller and provided for 63 monthly payments of $286.15 beginning July 16, 2007. A condition precedent to Dick Smith's obligation to perform was approval and funding of the contract by a third party financing source. (R. pp. 201 and 204).

The contract was stamped with the following language.

> THIS INSTRUMENT IS CONDITIONED UPON APPROVAL AND FUNDING BY A THIRD-PARTY FINANCING SOURCE. I AGREE THAT THE BUYER'S ORDER EXECUTED BY ME IN CONNECTION WITH THIS TRANSACTION IS THE CONTRACT BETWEEN DEALER AND ME AND THAT THIS INSTRUMENT IS SIMPLY AN EFFORT TO SATISFY MY OBLIGATIONS UNDER THE BUYER'S ORDER. THE ADDITIONAL TERMS AND CONDITIONS PRINTED ON THE REVERSE SIDE OF THE BUYER'S ORDER ARE INCORPORATED HEREIN BY REFERENCE.

Brown also signed below the stamped language. Brown knew on the date that she signed the contract that there was a financing contingency. (R. p. 57, line 20 – p. 58, line 1).

Brown took possession of the Mazda on June 1, 2007. (R. p. 58, lines 8-11). Thereafter, Brown received a letter from BB&T indicating that her request for financing had been declined. (R. p. 31, lines 20-21).

Brown called Hiller to find out why BB&T had declined. (R. p. 31, lines 21-24). Hiller explained that Dick Smith was trying to arrange financing through another lender and Brown acquiesced. (R. p. 31, line 25 – p. 32, line 2).

Thereafter, Brown received a number of letters from various lenders declining to provide financing for her purchase of the Mazda. (R. p. 32, lines 3-4 and pp. 190-195). Brown called Hiller and Hiller told her that Dick Smith was still trying to find someone to finance the Mazda. (R. p. 32, lines 5-8). Brown told Hiller that if he didn't find someone to finance the Mazda, she was going to bring it back. (R. p. 32, lines 14-17). Later that evening, Brown received a telephone call from Hiller indicating that "I was financed through Sovereign". (R. p. 32, lines 22-25). Brown responded, "OK, no problem". (R. p. 32, line 25).

Dick Smith assigned the contract to Sovereign. (R. p. 143, lines 2-7). Guthrie faxed a copy of the contract to Sovereign to advise that the 2005 Mazda had been substituted for the 2004 Nissan Altima. (R. pp. 140-141). The documents signed by Brown were then transmitted by Guthrie to another department at Dick Smith. There, the appropriate documents were forwarded to Sovereign for funding. (R. p. 111, line 10 – p. 112, line 5 and p. 130, lines 6 – 16). No contract on a Nissan was ever submitted by Dick Smith to Sovereign for funding. (R. p. 120, lines 18-20).

On June 25, 2007, Dick Smith received a letter by fax from Sovereign. (R. p. 113, lines 11-22 and p. 207). The letter confirmed that Brown's contract had been funded.

Dick Smith actually received $13,091.00 from Sovereign for the contract on the Mazda by a wire transfer on June 26, 2007. (R. p. 118, line 8 – p. 119, line 2). Dick Smith's receipt of the money was reflected by an accounting entry on that date at 10:22 a.m. (R. p. 111, line 10 – p. 115, line 19 and pp. 208-209) and on a bank statement dated June 29, 2007, that Dick Smith subsequently received. (R. p. 116, line 7 – p. 117, line 3 and p. 210).

Three days after Dick Smith received funding for the contract on the Mazda, Brown received a letter in the mail from Sovereign dated June 25, 2007. (R. p. 34, lines 7-15 and p. 195). That letter erroneously stated:

> Thank you for your application. We regret that we are unable to approve your request for credit through DICK SMITH NISSAN BELT-LINE at this time for the following reason(s):
>
> Insufficient credit file

(R. p. 34, lines 7-15 and p. 195). (emphasis added).

Brown then called Hiller. Hiller assured Brown that financing had been completed through Sovereign and if she brought the car back, it would result in a repossession. (R. p. 63, lines 13-16 and p. 152, lines 15-17).

Brown called Sovereign. A representative of Sovereign indicated that Sovereign's records reflected a transaction involving a Nissan Altima and in the event of a default, Sovereign would seek to repossess a Nissan Altima. (R. p. 64, lines 16-23).

Brown came back to Dick Smith to return the Mazda and asked to speak with the general manager. She was asked to speak with Hiller first. (R. p. 35, lines 7-13).

Hiller showed Brown a Sovereign Bank Application Status reflecting preliminary approval for financing. (R. p. 35, lines 20-23, p. 124, line 17 – p. 126, line 2 and p. 196). Actually, Hiller gave her a copy. (Brief of Petitioner p. 2 and R. pp. 14, 103, and 150, lines 23-25).

Hiller took Brown to an office and called Sovereign on a speaker phone. A representative of Sovereign confirmed that financing had been completed on the Mazda. (R. pp. 96 and 108).

Brown recognized the confusion created by her receipt of the letter from Sovereign and the assurance provided by Hiller. (R. p. 64, lines 6-13). Brown only bought one car and she wasn't confused about which car she bought. (R. p. 69, lines 3-14).

Hiller assured Brown that financing had already been arranged. (R. p. 63, lines 23-24). Hiller told the Plaintiff not to leave the Mazda at Dick Smith because it would result in repossession. (R. p. 63, lines 13-16, p. 65, lines 2-4, p. 68, lines 16-23, and p. 74, lines 6-9). Brown didn't believe Hiller. (R. p. 70, lines 6-8).

Although Brown knew that Guthrie was the finance manager and that it was his job to arrange financing for her (R. p. 51, lines 20 – 25), Brown did not show the letter she received from Sovereign to Guthrie or anyone else in the finance department. (R. p. 151, lines 16-21). Brown did not renew her request to speak with the general manager or any other supervisor.

Notwithstanding all of her conversations with Hiller by telephone and in-person, Brown returned 29 days after taking possession, left the keys to the Mazda with a receptionist, and abandoned the Mazda at Dick Smith. (R. p. 74, lines 19-25; p. 149, line 25, - p. 150, line 2; and Brief of Petitioner p. 7). Brown's decision to return the Mazda was based upon the letter she received from Sovereign and the conversations she had with representatives of Sovereign. (R. p. 74, lines 22-25, and p. 75, lines 8-13).

Thereafter, just as Hiller had predicted (R. p. 68, line 16 – p. 69, line 7) Brown received a NOTICE OF INTENT TO REPOSSESS (notice to cure) from Sovereign dated September 1, 2007. (R. p. 66, line 24 – p. 67, line 5). Brown understood what the notice to cure meant when she received it. (R. p. 71, lines 9-11). At that time, Brown could have cured her default for $600.90, i.e., two delinquent payments totaling $572.30 and late charges of $28.20. (R. p. 71, lines 23 – 25 and p. 206). Brown did not attempt to cure but rather took the letter to her lawyer. (R. p. 68, lines 8-15).

Dick Smith received a letter from Sovereign dated November 1, 2007, indicating that the Mazda purchased by Brown on June 1, 2007, had been repossessed on September 28, 2007. (R. p. 131, lines 8-14 and p. 213).

Thereafter, Brown received a letter from Sovereign dated November 16, 2007, indicating that the car had been sold resulting in a deficiency of $3,843.00. (R. p. 38, lines 4-13 and p. 197). Thereafter, Brown received a collection letter from C.L.X. Recovery Systems dated November 21, 2007. (R. p. 38, lines 14-17 and p. 198).

Brown never paid Sovereign anything but did not dispute the validity of the debt. (R. p. 73, lines 6 – 18). Sovereign never brought an action against Brown to recover the deficiency and the statute of limitations on that claim expired. Brown sued Dick Smith, not Sovereign, the author of the erroneous letter.

## ARGUMENT

The Factual/Procedural History section of the opinion beginning on p. 23 omits undisputed facts as well as findings of the lower court that place Dick Smith in a false light. For instance, the opinion suggests that Brown just showed up, picked out a Mazda, and was off to the races. The opinion completely overlooked the pre-qualification process that explains how Sovereign's blunder created the confusion in this case.

As the lower court found:

> Hiller provided information to Guthrie in an effort to pre-qualify Brown for financing. Guthrie then submitted the information to several lenders for preliminary approval using a Nissan Altima as the type of collateral for which financing was sought.

(R. p. 8, par. 4).

While the opinion clearly reflects that the installment contract included some of the information required by the TILA such as the payment amount, the total number of payments, and when the first monthly payment would be due, that recitation was incomplete. The installment contract also included the amount financed, a federal requirement that is critical to an understanding of the facts.

Additionally, the Factual/Procedural History section contains statements that are just flat wrong. For instance, at the top of page 24, the opinion suggests:

> Because his initial attempts were not successful, Guthrie again contacted Sovereign Bank.

There is no evidence in the record that Sovereign ever communicated to Guthrie or anyone else at Dick Smith that Brown's application for financing had been declined. None. As reflected in the Sovereign Bank Application Status, Guthrie's comments to Sovereign's credit analyst were in writing and were made at 4:57 PM on May 31, 2007. (R. p. 196).

As the lower court found,

> On May 31, 2007, Brown visited Hiller at Dick Smith in order to discuss buying a car.

(R. p. 7, par. 3).

All of Brown's rejection letters from other prospective lenders are dated on May 31, 2007, June 9, 2007, and June 10, 2007. (R. pp. 190 – 194). Although the opinion suggests that Guthrie was going back for a second bite at the apple with Sovereign, the record does not support that suggestion. While the opinion includes speculation in footnote 2 about the significance of different application numbers in

the funding notice sent by Sovereign to Dick Smith and the denial letter sent by Sovereign to Brown, this issue is addressed in greater detail below.

The opinion also suggests that Dick Smith misrepresented Brown's income to Sovereign. As set forth in greater detail below, that was simply not true. Brown testified and provided proof of income for two jobs. The opinion overlooked Brown's income from her second job.

The opinion also suggests that the Sovereign Bank Application Status indicated that Brown was Hiller's relative. That statement is not accurate. Hiller's name does not appear anywhere on that document. (R. p. 196).

The opinion also suggests that when Brown contacted Dick Smith after someone from Sovereign refused to change her paperwork, Dick Smith refused to take any corrective action and that Dick Smith had accepted payment from Sovereign Bank for the Nissan Altima. As set forth in greater detail below, those statements are not accurate.

Without a grasp of these undisputed facts, the flawed conclusions addressed hereafter were inevitable. This was an appeal, not a trial de novo. Since this was an action at law, this Court was not authorized to make findings of fact based upon its own view of the preponderance of the evidence.

The Respondents respectfully submit that the justification for reversal of the Court of Appeals beginning on page 27, indicates that this Court overlooked or misapprehended a number of matters.

(1) DICK SMITH ASSIGNED THE RETAIL INSTALLMENT CONTRACT TO SOVEREIGN AND SOVEREIGN PAID DICK SMITH FOR ITS RIGHT TO COLLECT INSTALLMENT PAYMENTS FROM BROWN.

This Court concluded that, "The factual findings of the trial judge, which are supported by the record, demonstrate that Sovereign Bank received a credit application to finance a Nissan Altima and approved financing for a Nissan **Altima**". (emphasis added).

It is true that Sovereign *initially* approved financing for a 2004 Nissan Altima in the amount of **$13,545.00.** (R. p. 196). However, as the lower court recognized, the information submitted to Sovereign

on the Nissan was only submitted to pre-qualify Brown for financing. (R. p. 8, par. 4). That finding could have only been based upon the testimony of Dick Smith's finance manager, Guthrie. (R. p. 122, lines 7 – 25).

Brown offered no testimony on this issue. Thus, the lower court found Guthrie's testimony credible.

This Court recognized that Brown signed an installment contract for the **Mazda**. Dick Smith received a different amount, i.e., **$13,091.00**, from Sovereign, the Amount Financed listed on the installment contract for the **Mazda.** Thus, Sovereign subsequently approved financing for the **Mazda** and paid Dick Smith for its right to collect payments on the installment contract on the Mazda from Brown.

(2) THE RECORD REFLECTS AN ERROR ON THE PART OF SOVEREIGN BANK.

An error is defined in Merriam-Webster as something that is not correct, a wrong action or statement. Common synonyms for error are mistake, inaccuracy, miscalculation, blunder, oversight, fallacy, misconception, delusion, misprint, and erratum. Informal synonyms include slip-up, boo-boo, and goof.

This Court concluded that the record does not reflect an error on the part of Sovereign Bank.

Sovereign issued a letter to Dick Smith dated June 25, 2007. The phone number listed by Sovereign on the letter was 1-800-879-2265. The letter referenced Application # **2497943**, stating, "The above contract has been funded for proceeds".

The amount listed on the letter to Dick Smith was $13,091.00. (R. p. 207). This was the same amount listed as the Amount Financed on the installment contract for the Mazda (R. p. 204). This amount was never associated with the preliminary approval for the Nissan. (R. p. 196).

On the very same day, Sovereign issued a letter to Brown. The phone number listed by Sovereign

on Brown's letter was (800) 333-6421.

The letter referenced an application number with a higher sequence, i.e., Application No. **2520051**, stating, "We regret that we are unable to approve your request for credit through Dick Smith". (R. p. 195). Sovereign even referred to the numbers differently, i.e., Application # (R. p. 207) vs. Application No. (R. p. 195).

Obviously, Sovereign's right hand didn't know what its left hand was doing. As Guthrie explained, Sovereign was new on the scene in South Carolina and was working from a hotel lobby. (R. p. 145, lines 5-13). It's no wonder that Sovereign was hobbled in 2009. "Sovereign Bank Starts Over as Santander," American Banker, August 26, 2013, www.americanbanker.com/magazine/123-91. As Hiller explained, after Brown received conflicting information in her phone conversation with Sovereign, Hiller placed a call to Sovereign's dealer finance department in Brown's presence and confirmed that financing for the Mazda had been completed. (R. p. 96, lines 3-15).

How can it not be an error to advise Dick Smith that the contract for the purchase of the Mazda had been funded for proceeds and on the same date, tell Brown that she had been denied credit? The Respondents respectfully submit that the record reflects an error on the part of Sovereign in advising Dick Smith by letter dated June 25, 2007, that Brown's contract had been funded for proceeds and subsequently advising Brown in a letter dated on the same date that her request for credit had been declined. Regardless of which synonym above is inserted, i.e., slip-up, boo-boo, or goof, Sovereign could not have intended to send out two letters on the same date to Dick Smith and Brown conveying a different message about the same subject.

(3) DICK SMITH MADE NO FALSE STATEMENTS TO BROWN REGARDING FINANCING FOR THE MAZDA.

This Court concluded that Dick Smith made false statements to Sovereign Bank and Brown regarding the financing for the Mazda 6.

Guthrie sought to address the interest rate Brown would be required to pay. Brown chose not to purchase a car from Dodgeland because of a high interest rate that had been quoted. (R. p. 46, line 19 – p. 47, line 2). Hiller wanted to help his "little sister" by getting her the best financing available. (R. p. 90, lines 16-20).

As Guthrie explained, he could have easily submitted Brown's application to a secondary or subprime lender that would have charged Brown between 19 and 24 percent. (R. p. 135, lines 9-14). The "favor" that Guthrie requested was approval at a bank rate and what Sovereign ultimately approved and funded on the Mazda was financing at 12.54 percent. Guthrie's intention was to assure Sovereign that in the event of default, Dick Smith would be able to locate Brown. (R. p. 125, lines 5 – 10).

Guthrie's request to Sovereign for a favor can hardly be characterized as the opposite of good faith, generally implying or involving actual or constructive fraud, or a design to deceive or mislead another, or a neglect or refusal to [fulfill] some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. State v. Griffin, 100 S.C. 331, 333, 84 S.E. 876, 877 (1915). Moreover, Guthrie's request for a favor was made to Sovereign, not Brown. Guthrie made no representations to Brown and Brown did nothing in reliance upon any statements by him. Therefore, the elements of fraud, which underpin an action under the Dealers Act, are absent. Moore v. Dew, 208 S.C. 355, 38, S.E.2d 258 (1946); Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 564 S.E.2d 94 (2002).

Hiller's name does not appear on the Sovereign Bank Application Status. Guthrie did not specify if the relationship with an employee of Dick Smith was that of a long lost cousin from Utah or any other degree of kinship.

No one from Sovereign testified that Sovereign relied in any way upon that information. Credit approval is based upon trust demonstrated by credit history. Certainly, this Court can take judicial notice that credit scores are not affected by family relationships.

If we look close enough, all of us can identify family members who may be lacking in some area of their life that would prevent others from trusting them, no matter what family they came from. Before his execution, Larry Gene Bell was related to a distinguished member of the Bar. The now infamous Dillon Roof is also related to a distinguished member of the Bar. Other examples include Roger Clinton, Jr.; William Kennedy Smith; Al Gore, III; Michael Skakel; Onyango Obama; and Noelle Bush. However, without a personal guarantee from their respective distinguished relative, it is unlikely that any of these persons could be trusted based solely on their family affiliation.

The statement on p. 24 of the Opinion that Brown's monthly income was approximately $1,800 is not accurate. Brown testified that she earned $800 every two weeks at Allen University. (R. p. 41, line 18 – p. 42, line 3) and provided a letter on Allen University letterhead to prove her income. This Court can take judicial notice there are 26 two week pay periods per year. (26 times 800 equals $20,800 divided by 12 equals $1,733.33 per month).

This Court overlooked Brown's testimony that in addition to her income from Allen University, she was also working at Shoney's. (R. p. 36, line 5 and p. 212). Brown represented that she earned about a thousand dollars per month at Shoney's in tips and wages. (R. p. 126, lines 16 – 23). Thus, Brown's monthly income was approximately $2,733.33. As Guthrie explained, Sovereign purchased the retail installment contract from Dick Smith for a newer car (2005 Mazda vs. a 2004 Nissan) with a lower amount financed ($13,091.00 vs. $13,545.00) based upon the proof of income provided by Brown. (R. p. 139, line 25 – p. 140, line 15).

There is nothing in the record to support the conclusion that Dick Smith made false statements to Brown regarding financing for the Mazda. Even if Hiller told Brown that she had been financed through BB&T rather than that Dick Smith was *going to try to secure financing through BB&T* (R. p. 31, lines 17 - 18), Brown did not rely upon that statement and could not have been damaged by it. Curiously, while the record contains denial letters from several lenders, none of them is from BB&T. (R. pp. 190-

195).

(4) DICK SMITH DID NOTIFY SOVEREIGN THAT BROWN WANTED A MAZDA INSTEAD OF THE NISSAN FOR WHICH SOVEREIGN HAD GIVEN PRELIMINARY APPROVAL.

This Court concluded that Dick Smith made no effort to correct the problem after receiving the credit application approval that listed the Nissan Altima instead of the Mazda 6. This Court also concluded that, in fact, even after Brown advised Dick Smith that Sovereign had refused to substitute the Mazda 6 for the Nissan Altima, Dick Smith took no corrective action.

As set forth above, the preliminary approval was not "the problem". The problem was that Sovereign issued letters to Dick Smith and Brown on the same date about the same subject matter with different information.

In any event, as Guthrie explained,

> But the system when you send it in, which is DealerTrack where this [Sovereign Bank Application Status] (R. p. 196) was printed up, the DealerTrack does not change the collateral. The bank changes it internally. (R. p. 135, lines 15 – 18).

Guthrie further explained,

> I called them [Sovereign] and told them I was faxing it [retail installment contract] over and told them that we're switching from a 2004 Nissan Altima to the Mazda . . .] (R. p. 140, lines 9 – 11).
>
> I have a copy in the file. There's a copy to Kelly where I faxed over to them some of the information, yes. We have to fax over the contract and the proof of income and everything. (R. p. 137, line 18 – p. 138, line 5).

Not only did Guthrie, call Sovereign to advise that Brown had agreed to purchase a Mazda instead of a Nissan, he also faxed a copy of the installment contract which this Court acknowledged identifies the Mazda. In addition, after the installment contract was transmitted to Sovereign, Dick Smith received payment for it. Thus, the record reflects that Dick Smith communicated with Sovereign on three separate occasions concerning Brown's decision to purchase the Mazda, i.e., once by phone, once by fax, and

once by delivery.

There is nothing in the record to support the conclusion that Dick Smith took no corrective action. Brown did not testify on direct, cross-examination, or redirect examination that she brought the denial letter from Sovereign (R. p. 195) to anyone at Dick Smith. In fact, it wasn't until the lower court suggested in a leading question, after Brown testified in rebuttal, that Brown ever mentioned bringing the denial letter to Dick Smith. Hiller testified that Brown never showed him any such letter. (R. p. 105, line 24 – p. 106, line 2) and Guthrie had no communications with Brown after she took possession of the Mazda. (R. p. 112, lines 5 – 8).

Brown testified that she returned to Dick Smith on June 29, 2007. (R. p. 34, lines 16 – 17). She explained that when she went back, and was given a copy of the Sovereign Bank Application Status (R. p. 196) by Hiller, she said that he would be hearing from her lawyer. (R. p. 35, line 7 – p. 37, line 17).

Sometime thereafter, Brown called Sovereign after receiving a letter from it. (R. p. 37, lines 18 – 25). However, nothing in the record supports the conclusion that Brown ever returned to Dick Smith after leaving the car.

As set forth in the record, Brown did not request corrective action or provide Dick Smith with an opportunity to address her concerns. She never returned after speaking with representatives of Sovereign. Rather, she hired a lawyer.

Assuming without conceding that corrective action was required, nothing in the record supports the conclusion that Dick Smith refused to take corrective action.

## (5) NEITHER BROWN NOR ANYONE ELSE IS REQUIRED TO PAY THE PURCHASE PRICE FOR SOMETHING HE OR SHE HAS NOT AGREED TO BUY.

This Court concluded that Brown was erroneously required to pay Sovereign Bank for a car that she did not agree to buy and did not possess. This conclusion is bewildering.

This Court acknowledged that Brown signed an installment contract and took possession of the

Mazda. Opinion at p. 23. Thus, Brown agreed to buy and had possession of the Mazda.

What bank would demand payment on a car from a customer that did not agree to purchase a car? What court would require a customer to pay a bank for a car that he or she had not agreed to purchase?

If there is any rule of law that requires a person to pay for something that they have not agreed to purchase, that rule of law has evaded the attention of the undersigned for nearly 33 years. The only car that Brown was required to pay for was the car that she contracted to buy.

Submitting a credit application does not constitute a commitment to accept financing on anything. Certainly, this Court is familiar with unsolicited and pre-approved credit offers circulated by lenders. Unless the recipient accepts the offer by signing an agreement, the recipient has no obligation to pay anything.

The commitment to pay is reflected in a promissory note on a loan or on a security agreement in a credit sale. In this case, Brown's commitment to pay was set forth in the installment contract.

There was no testimony that Sovereign ever demanded payment from Brown for a Nissan, a Subaru, a Toyota, or any car other than the Mazda. This Court acknowledges that Brown signed an installment contract, which identified the Mazda 6, and took possession of the Mazda 6. Opinion at p. 23, 2nd paragraph. This Court also recognizes that the Mazda was repossessed and sold by Sovereign. Opinion at p. 23, 1st paragraph.

The letter from Sovereign to Brown advising that the car had been sold (R. p. 197) bears the same account number as the notice to cure (R. p. 206) from Sovereign to Brown. The total of the delinquent payments listed on the notice to cure corresponds with the monthly payments listed on the installment contract for the Mazda. (R. p. 204). The Mazda that Brown contracted to buy was the only car for which Brown was required to pay.

(6) REPOSSESSION IS A CREDITOR'S REMEDY THAT ARISES ONLY AFTER DEFAULT AND NOTICE TO CURE.

This Court concluded that the subsequent repossession of the Mazda 6 and deficiency against Brown were the result of Dick Smith' failure to timely take corrective action to ensure that the Mazda 6 (versus the Nissan Altima) was financed by Sovereign Bank. Had Brown made her payments to Sovereign as agreed, Sovereign would not have repossessed the Mazda, even if corrective action were required that Dick Smith failed to take.

Respectfully, under Article 9 of the UCC, a creditor's right to repossess and to a deficiency after a commercially reasonable sale arises only upon default on a secured transaction. S.C. Code Ann. §36-9-601, et seq.

The notice to cure from Sovereign (R. 206) clearly advised Brown, "If you do not cure your default within the time allowed, Sovereign Bank may sue you to obtain a judgment for the amount of the debt or may take possession of the collateral". The notice to cure did not refer to a Nissan. Rather, the notice to cure referred to Loan No. 68227061499, the same loan number reflected on the collection letters from Sovereign and Sovereign's collection agency (R. pp. 197 and 198) and the letter from Sovereign to Dick Smith requesting cancellation of Brown's service contract on the Mazda (R. p. 213). None of these letters refer to a Nissan. The Respondents respectfully submit that it was Brown's default in payment that triggered the repossession and sale of the Mazda, not anything that Dick Smith did or failed to do.

(7) THERE IS OVERWHELMING EVIDENCE THAT DICK SMITH NOTIFIED SOVEREIGN THAT BROWN WANTED TO PURCHASE THE MAZDA AND THAT DICK SMITH SOLD AND ASSIGNED ITS RIGHTS TO COLLECT INSTALLMENT PAYMENTS ON THE MAZDA TO SOVEREIGN.

This Court concluded that there was no evidence that there was ever an attempt by Dick Smith to substitute collateral prior to Brown returning the vehicle. The Respondents incorporate by reference the arguments set forth in arguments 1 and 4 above.

Moreover, "substitution of collateral" contemplates a pre-existing contract secured by different collateral. Brown signed one, and only one, installment contract to buy a car from Dick Smith. (R. p.

56, lines 3 – 25; p. 120, lines 13 – 20; and p. 128, line 22 – p. 129, line 7). This Court acknowledges that Brown signed an installment contract, which identified the Mazda 6, and took possession of the Mazda 6. Opinion at p. 23.

(8) DICK SMITH NOTIFIED SOVEREIGN THAT BROWN WANTED TO PURCHASE THE MAZDA INSTEAD OF A NISSAN BEFORE BROWN RETURNED IT.

This Court concluded, "The likely conclusion is that the collateral was not substituted until the Mazda 6 was repossessed months after Brown returned it to Dick Smith. There is no basis whatsoever for this conclusion. Allowing a verdict to rest on conjecture and speculation is prohibited. Horton v. Greyhound Corp., 241 S.C. 430, 128 S.E.2d 776 (1962).

As set forth above, Dick Smith sold and assigned its rights to collect payments on the Mazda to Sovereign. Dick Smith received a wire transfer for the purchase price from Sovereign on June 26, 2007 (R. p. 111, lines 10 – 18). Brown returned the car to Dick Smith three days later. (R. p. 74, lines 19 – 25; p. 149, line 25 – p. 150, line 2; and Brief of Petitioner, p. 7).

The past due payments listed in the notice to cure correspond with the payments listed on the installment contract. The loan number on the notice to cure corresponds with the loan number listed on the collection letters from Sovereign and its collection agency and the letter from Sovereign to Dick Smith requesting cancellation of Brown's service contract on the Mazda.

(9) DICK SMITH DID NOT ARRANGE FINANCING ON A CAR BROWN DID NOT AGREE TO PURCHASE.

This Court concluded that financing a car that Brown did not purchase was neither "puffing" nor helpful to Brown. As set forth above, there is no evidence to support the conclusion that Dick Smith financed a car that Brown did not purchase.

The only car that Brown agreed to buy was the Mazda. The only car that was financed was the

Mazda. The only car that Brown received a notice to cure on was the Mazda. The only car that was repossessed and sold by Sovereign was the Mazda. The only car on which Sovereign demanded a deficiency after the sale was the Mazda. The only car that Sovereign requested Dick Smith to cancel a service contract on was the Mazda.

(10) BROWN WAS NOT DAMAGED BY SOVEREIGN'S COLLECTION EFFORTS AND SUFFERED NO INJURY THAT IS COMPENSABLE UNDER THE DEALERS ACT.

Brown received a single letter from Sovereign demanding a deficiency and a subsequent letter from Sovereign's collection agency. (R. p. 38, lines 4 – p. 39, line 3 and pp.197 – 198). Brown admits that she never paid Sovereign anything. R. p. 73. The statute of limitations on any claim for a deficiency arising out of the sale of the Mazda on October 23, 2007, (R. p. 197) expired before the lower court ever issued an order. Sovereign no longer exists. "Sovereign Bank Starts Over as Santander," American Banker, August 26, 2013, www.americanbanker.com/magazine/123_9/. There is no deficiency.

The Dealers Act provides in S.C. Code Ann. §56-15-110(1):

> In addition to temporary or permanent injunctive relief as provided in §56-15-40(3)(c), **any person who shall be injured in his business or property** by reason of anything forbidden in this chapter may sue therefor in the court of common pleas . . .

Brown submitted no proof of injury to her business or property. Receipt of two collection letters is damage to neither business nor property.

(11) BROWN WAS NOT EXPECTED TO PAY FOR A CAR FOR WHICH SHE WOULD NOT BE ABLE TO OBTAIN TITLE.

This Court concluded that Brown was expected to pay for a car for which she would not be able to obtain title. There is no basis for this conclusion. The Respondents incorporate by reference the arguments set forth in argument 9 above.

No one expected Brown to pay for a car for which she would not be able to obtain title. The only

car that Brown was expected to pay for was the Mazda. Since Sovereign repossessed and sold the Mazda, it is self-evident that Sovereign had the ability to provide title to the Mazda to Brown upon satisfaction of her indebtedness.

(12) EVEN THOUGH GUTHRIE REFERRED TO HILLER, BROWN'S BIG BROTHER FROM A FRATERNITY AT COLLEGE AS FAMILY TO SOVEREIGN, THERE WAS NO EVIDENCE THAT BROWN WAS IN ANY WAY INJURED IN HER BUSINESS OR PROPERTY BY THAT STATEMENT.

This Court concluded that the violation of the Dealers Act occurred in the methods it [Dick Smith] employed to procure financing for Brown and the fact that it failed to assist Brown in correcting its mistakes that caused the issues with the Mazda 6. There is no basis for this conclusion. The Respondents incorporate by reference their arguments set forth in arguments 3, 4, 7, 8, and 9 above.

(13) DICK SMITH FULFILLED ALL OF ITS OBLIGATIONS AND SUBMITTED APPROPRIATE LOAN DOCUMENTS.

This Court concluded that Dick Smith failed to fulfill its obligation to timely arrange for substituting collateral or correcting Brown's loan documents. There is no basis for this conclusion. The Respondents incorporate the arguments set forth above in arguments 3, 4, 7, 8, and 9 by reference.

There was no previous contract on which collateral could be substituted. The only loan document that Dick Smith submitted was the installment contract for the Mazda. While Sovereign appeared to have had some blunders in its records, there was nothing for Dick Smith to correct.

(14) DICK SMITH DID NOT RECEIVE FINANCING FOR A NISSAN ALTIMA

This Court concluded that Dick Smith knowingly applied for, and received financing for a Nissan Altima and not a Mazda 6. While Dick Smith submitted an application for preliminary approval referring to a Nissan as the anticipated collateral, the only financing that Dick Smith ever received was payment for the installment contract on the Mazda.

Respectfully, nothing in the record establishes that Dick Smith received financing for a Nissan

Altima. Brown admitted that she had no information about funding received by Dick Smith. (R. p. 61, line 17 – p. 62, line 3). As expected, the only witnesses with any knowledge of what kind of vehicle Dick Smith received funding for were Dick Smith's treasurer and finance manager, both of whom testified that Dick Smith received funding for the Mazda. (R. p. 118, line 8 – p. 119, line 2 and R. p. 129, lines 15-17).

(15) THE ONLY MISTAKE TO BE CORRECTED WAS THAT OF SOVEREIGN IN SENDING OUT LETTERS TO DICK SMITH AND BROWN ON THE SAME DAY RELATING TO THE SAME SUBJECT MATTER WITH DIFFERENT INFORMATION IN THEM.

This Court concluded that Dick Smith refused to assist in correcting the alleged mistake even after being advised that their assistance was necessary. There is no basis for this conclusion. The Respondents incorporate by reference the arguments set forth in arguments 3, 4, 7, 8, and 9 above.

Although Hiller's testimony appears to have been ignored, Hiller testified that he took Brown into an office and called Sovereign on a speaker phone and that a representative from Sovereign confirmed that financing had been completed on the Mazda. (R. pp. 96 and 108). Brown admitted in rebuttal that she went to an office with Hiller to discuss the matter (R. p. 149, lines 16-17).

(16) DICK SMITH'S FINANCE MANAGER DID CALL SOVEREIGN TO ADVISE THAT BROWN WANTED TO PURCHASE THE MAZDA INSTEAD OF A NISSAN AND FAXED A COPY OF THE INSTALLMENT CONTRACT TO SOVEREIGN.

This Court concluded that Dick Smith's finance manager failed to make a telephone call to Sovereign to advise of Brown's decision to buy a Mazda rather than a Nissan. There is no basis for this conclusion. The Respondents incorporate the arguments set forth in arguments 3, 4, 7, 8, and 9 by reference.

Respectfully, Guthrie testified:

> I called them [Sovereign] and told them I was faxing it over and told them that we're switching from a 2004 Nissan Altima to the Mazda. (R. p. 140, lines 9 – 11).

> I copied this [the installment contract] and faxed it to them with the pay stubs with this page as the cover page and this shows the Mazda VIN number, the terms of the contract. (R. p. 141, lines 7 – 9).

As previously set forth, after Dick Smith transmitted the installment contract to Sovereign, Dick Smith received payment from Sovereign. Thus, Dick Smith communicated with Sovereign about the matter on multiple occasions.

(17) BROWN SUFFERED NO DAMAGES COMPENSABLE UNDER THE DEALERS ACT.

This Court concluded that Brown was damaged by Dick Smith's violation of the Dealers Act. There is no basis for this conclusion. The Respondents incorporate by reference the arguments set forth in argument 10 above.

Although the lower court awarded Brown two times the amount of a deficiency claimed by Sovereign that Brown never paid and will never have to pay, as well as interest on the expired deficiency, an unliquidated claim for a deficiency which was never reduced to judgment and which is barred by the statute of limitations is not an injury to a person's business or property that is compensable under S.C. Code Ann. §56-15-110(1).

## CONCLUSION

"Facts are stubborn things," John Adams once said, "and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence." The Respondents' Petition For Rehearing should be granted.

Respectfully submitted,

August 19, 2015

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

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Appellate Case No. 2013-000417

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Latoya Brown, ..... Petitioner,

v.

Dick Smith Nissan, Inc. and
Old Republic Surety Company, ..... Respondents.

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PROOF OF SERVICE

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I certify that I have served copies of the Petition for Rehearing and Memorandum in Support of Petition for Rehearing on Latoya Brown by hand-delivery on August 19, 2015, to her attorney of record, William T. Toal, Esq., Johnson Toal & Battiste, PA, 1615 Barnwell Street, Columbia, SC 29201.

August 19, 2015

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