VIRGINIA:

In the Court of Appeals of Virginia on **Tuesday** *the* **3rd** *day of* **March, 2020**.

Virginia Automobile Dealers Association,
Asgard Automotive, Inc. and
Page Auto Group, Inc., Appellants,

against Record No. 1110-19-2
Circuit Court No. CL17-0283

Richard D. Holcomb, Commissioner of the
Virginia Department of Motor Vehicles and
Tesla Motors, Inc., Appellees.

Tesla, Inc., Appellant,

against Record No. 1165-19-2
Circuit Court No. CL17-0283

Virginia Automobile Dealers Association,
Asgard Automotive, Inc. and
Page Auto Group, Inc., Appellees.

Richard D. Holcomb, Commissioner,
Virginia Department of Motor Vehicles, Appellant,

against Record No. 1166-19-2
Circuit Court No. CL17-0283

Virginia Automobile Dealers Association,
Asgard Automotive, Inc. and
Page Auto Group, Inc., Appellees.

From the Circuit Court of the City of Richmond

Before Judges Humphreys, Beales and AtLee

These companion cases concern an appeal, pursuant to the Administrative Process Act ("APA"), of a decision by Department of Motor Vehicles ("DMV") Commissioner Richard D. Holcomb ("Commissioner") that Tesla was eligible to operate a dealership in the Richmond "community or trade area," pursuant to the language of Code § 46.2-1572(4).

I. PROCEDURAL BACKGROUND

On January 13, 2016, Tesla Motors, Inc. ("Tesla") submitted a request to Commissioner Holcomb requesting a hearing for the purpose of determining whether it met the exception in Code § 46.2-1572(4) for a vehicle manufacturer to obtain a license to operate a dealership in Richmond, Virginia. Daniel Small was then appointed as the hearing officer at DMV for the matter. On March 9, 2016, the Virginia Automobile Dealers Association ("VADA"), an association representing franchised motor vehicle dealers in Virginia, submitted to DMV a request to intervene and to stay the proceedings. On March 23, 2016, Small granted VADA's request to intervene; however, Small did not stay the proceedings. After issuing public notices and notifying dealers who had expressed interest in selling Tesla vehicles, Small conducted evidentiary hearings on March 31, 2016, April 25, 2016, and July 1, 2016. Small ultimately issued a recommendation to the Commissioner, dated September 6, 2016, that Tesla's request for a license should be denied based on his conclusion that Tesla failed to meet its burden of proving "that there is no dealer independent of Tesla available in the community or trade area of Richmond, Virginia to own and operate a Tesla franchise in a manner consistent with the public interest."

Notwithstanding Small's recommendation, on November 30, 2016, the Commissioner issued a hearing decision concluding that, pursuant to Code § 46.2-1572(4), Tesla was eligible to operate both as a dealer and a manufacturer in the Richmond, Virginia community or trade area. The Commissioner's decision stated, "Pursuant to the statute, my determination rests on two primary factors: (1) whether any dealer independent of the manufacturer is available in the community and (2) whether such an 'available' dealer can own and operate a dealership in a manner consistent with the public interest." The Commissioner found that although eleven dealers wrote letters expressing interest in opening a Tesla franchised dealership, only five of those dealers (including Asgard Automotive, Inc. and Page Auto Group) presented any further evidence at the hearings. Furthermore, he stated that all of those five dealers "admitted that they had not performed any economic analysis to establish whether or not a Tesla dealership would be financially possible." As a result, the Commissioner found under the first factor that there were no dealers available in the community. He also

found that, under the second factor, even if the remaining five dealers were "available," none of them could own and operate a Tesla dealership in "the public interest." The Commissioner considered a dealer's profitability under the second factor, stating that a "dealership must be capable of remaining in business in order to service existing customers and provide product for future customers." He found that "it would be very hard or impossible for a dealership to be profitable" because Tesla "could not or would not offer 'dealer discounts' or 'wholesale pricing' on new cars to a prospective dealership."

Pursuant to the APA, VADA timely filed a notice of appeal of the Commissioner's decision to the Circuit Court of the City of Richmond on December 22, 2016, and also subsequently filed its petition for appeal with the circuit court. The Commissioner and Tesla both filed demurrers, arguing that VADA lacked standing to appeal. On April 20, 2017, VADA filed a motion for leave to amend the petition for appeal, as well as an amended petition for appeal, which sought to add Asgard and Page as parties to the appeal. On June 26, 2017, after conducting a hearing on the motions, the circuit court overruled the Commissioner's and Tesla's demurrers and granted the motion to amend the petition for appeal to allow Asgard and Page to be added as parties.

The Commissioner and Tesla subsequently filed interlocutory appeals to this Court challenging the circuit court's order finding VADA had standing and allowing Asgard and Page to join the suit as additional appellants. In an order dated February 20, 2018, this Court dismissed the Commissioner's appeal and Tesla's appeal, holding that the "circuit court's order overruling the demurrers filed by the Commissioner and Tesla and granting leave for the Virginia Automobile Dealers Association to amend its petition for appeal did not adjudicate the principles of the cause [and] was thus not an appealable interlocutory order." The Supreme Court also subsequently dismissed the Commissioner's and Tesla's appeals to that Court "for lack of jurisdiction."

The circuit court resumed its proceedings and conducted a hearing on June 18, 2019, and issued an opinion letter on June 21, 2019. In its opinion letter, the court stated that it adhered to its prior ruling that

VADA, Page, and Asgard had standing to file an appeal. The court found "no error in the agency record and affirm[ed] the determination of the Commissioner."

VADA timely filed a notice of appeal to this Court, and the Commissioner and Tesla filed cross appeals. Because the parties' appeals arise out of the same order, we resolve all the parties' appeals and cross appeals in this order.

II. STANDING OF VADA TO FILE AN APPEAL

Before we can reach the parties' arguments concerning the merits of the circuit court's decision, we must address the contention, made by the Commissioner and Tesla, that VADA lacked standing to appeal the Commissioner's decision. "[S]tanding to maintain an action is a preliminary jurisdictional issue having no relation to the substantive merits of an action." Biddison v. Marine Res. Comm'n, 54 Va. App. 521, 527 (2009) (quoting Andrews v. Am. Health & Life Ins. Co., 236 Va. 221, 226 (1988)). "[I]n evaluating whether a party has standing, we are 'not concerned with whether or not a party will ultimately prevail on the legal merits of an issue.'" Reston Hosp. Center, LLC v. Remley, 59 Va. App. 96, 105 (2011) (quoting Biddison, 54 Va. App. at 527). "Rather, the only question is 'the ability of a party to seek redress through the courts in the first place by demonstrating sufficient connection to, and actual or potential harm from, the law or action challenged.'" Id. (quoting Biddison, 54 Va. App. at 527). "The question of whether or not a litigant has standing is a 'question[] of law subject to *de novo* review on appeal.'" Biddison, 54 Va. App. at 527 (alteration in original) (quoting Moreau v. Fuller, 276 Va. 127, 133 (2008)).

Code § 46.2-1573 provides that decisions of the Commissioner of the DMV are subject to the rights of judicial review and appeal as provided under the APA. The APA provides in pertinent part:

> Any person affected by and claiming the unlawfulness of any regulation or party aggrieved by and claiming unlawfulness of a case decision . . . shall have a right to the direct review thereof by an appropriate and timely court action against the agency or its officers or agents in the manner provided by the Rules of the Supreme Court of Virginia.

Code § 2.2-4026(A). This language "expressly provides two actions that allow agencies to be sued: (1) the adoption of rules, and (2) case decisions." Virginia Bd. of Medicine v. Virginia Physical Therapy Ass'n, 13 Va. App. 458, 465 (1991), aff'd, 245 Va. 125 (1993).[1]

Code § 2.2-4001 defines "case" or "case decision" as

> any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit.[2]

The appeals now before us arise out of a proceeding determining whether Tesla could obtain a license to operate a dealership, and that proceeding clearly meets the definition of a "case decision" as defined in Code § 2.2-4001 – and is therefore subject to review under Code § 2.2-4026(A) as a case decision.

To appeal a case decision pursuant to Code § 2.2-4026(A), an appellant must be a "party aggrieved by and claiming unlawfulness of a case decision."

> The term "aggrieved" has a settled meaning in Virginia when it becomes necessary to determine who is a proper party to seek court relief from an adverse decision. In order for a petitioner to be "aggrieved," it must affirmatively appear that such person had some direct interest in the subject matter of the proceeding that he seeks to attack. Nicholas v. Lawrence, 161 Va. 589, 592 (1933). The petitioner "must show that he has an immediate, pecuniary and substantial interest in the litigation, and not a remote or indirect interest." Id. at 593. Thus, it is not sufficient that the sole interest of the petitioner is to advance some perceived public right or to redress some anticipated public injury when the only wrong he has suffered is in common with other persons similarly situated. The word "aggrieved" in a statute contemplates a substantial grievance and means a denial of some personal or property right, legal or equitable, or imposition of a burden or

[1] In Virginia Physical Therapy, the Court was analyzing language from Code § 9-6.14:16, which was replaced by and is now codified as Code § 2.2-4026. See 2001 Va. Acts ch. 844. The pertinent language from the statute – "Any person affected by and claiming the unlawfulness of any regulation or party aggrieved by and claiming unlawfulness of a case decision" – has not changed.

[2] Code § 2.2-4001 has been amended a number of times since these proceedings began in 2016. See 2017 Acts ch. 488; 2018 Acts ch. 820; 2019 Acts ch. 362. However, the definitions of "'case' or 'case decision'" and "'rule' or 'regulation'" have not changed.

> obligation upon the petitioner different from that suffered by the public generally.

Virginia Beach Beautification Comm'n v. Bd. of Zoning Appeals, 231 Va. 415, 419-20 (1986).

VADA makes several arguments in support of its contention that it was aggrieved, and thus, has standing. First, VADA argues that it has standing because it was a party to a September 18, 2013 settlement agreement with Tesla and the Commissioner concerning a Tesla dealership in Tysons Corner, Virginia. VADA contends that the 2013 settlement agreement "provides rights to VADA that are personal, equitable, and cause an imposition and burden upon VADA suffered by VADA and not the public generally." However, the parties previously litigated VADA's contention that Tesla and the Commissioner breached terms of the 2013 settlement agreement by Tesla's filing of a request with DMV for a hearing concerning operating a dealership in Richmond. A Fairfax County Circuit Court opinion letter dated September 9, 2016 dismissed VADA's case with prejudice, holding, among other things, that "nothing in the [settlement] agreement prohibits a *request* for a hearing, nor an *application* for a second dealership." (Emphases in original.) That decision of the Fairfax County Circuit Court was not appealed. The fact that VADA was party to a prior settlement agreement with Tesla and the Commissioner does not give it standing here in an appeal from a separate proceeding before the DMV about a different city or market, especially where the question of breach of the agreement has already been decided. See Virginia Beach Beautification Comm'n, 231 Va. at 419 ("The petitioner 'must show that he has an immediate, pecuniary and substantial interest in the litigation, and not a remote or indirect interest.'" (quoting Nicholas, 161 Va. at 593)).

Next, VADA argues that it has standing because it "suffered a procedural injury" during proceedings before the DMV. However, a review of the record shows there was no procedural injury here sufficient to confer standing. See Biddison, 54 Va. App. at 531.

VADA argues that it suffered procedural injury in two ways. First, VADA asserts that the Commissioner "improperly transferred the burden of proof from Tesla, the party with the [statutory burden], to the VADA and its dealer members." However, the Commissioner acknowledged in his decision that

"Tesla bears the burden of demonstrating that there is no dealer independent of Tesla in the community or trade area of Richmond, Virginia, to own and operate a Tesla franchise in a manner consistent with the public interest." In short, the Commissioner actually found that Tesla had the burden of proof and that Tesla had met that burden. Therefore, contrary to VADA's assertion, the record does not show that the Commissioner improperly shifted the burden of proof.

VADA's second assertion of procedural injury arises from VADA's discovery request seeking documents pertaining to Tesla's operations in Tysons Corner, Virginia. Although Tesla produced over 2,500 pages of discovery, it did not produce documents related to its operations in Tysons Corner. When VADA moved to compel production of these documents, Hearing Officer Small denied the motion, finding the documents to be irrelevant. VADA argues that this refusal to compel that production of documents during discovery constituted a violation of due process of law. VADA's contention fails for two reasons. First, as noted by Hearing Officer Small, the proceedings pertained to a request for a Tesla dealership in *Richmond*; documents pertaining to Tesla's running of a dealership completely outside of the Richmond "community or trade area" were not relevant. Second, there is no general constitutional due process right to discovery. Gunter v. Virginia State Bar, 241 Va. 186, 190 (1991) ("If '[t]here is no general constitutional right to discovery in a criminal case', there is none in a civil case." (alteration in original) (quoting Weatherford v. Bursey, 429 U.S. 545, 559 (1977))).

Finally, VADA argues that the Commissioner's decision "is, in fact, a 'rule' or 'regulation.'" VADA further argues that, consequently, pursuant to Code § 2.2-4026(A), VADA has standing not only as a "party aggrieved by and claiming unlawfulness of a case decision," but also as "[a]ny person affected by and claiming the unlawfulness of any regulation." Code § 2.2-4001 – the same statute that defines "case" or "case decision," quoted *supra* – defines "rule" or "regulation" as "any statement of general application, having the force of law, affecting the rights or conduct of any person, adopted by an agency in accordance with the authority conferred on it by applicable basic laws." The plain language of Code § 2.2-4026 makes clear that the General Assembly distinguished between an appeal of a "regulation" on the one hand (which may be

appealed by "*[a]ny person* affected by and claiming the unlawfulness of any regulation") and a "case decision" on the other hand (which may be appealed by a "*party* aggrieved by and claiming unlawfulness of a case decision"). (Emphases added.) Code § 2.2-4001 affirms the distinction between a regulation and a case decision.

"[W]hen analyzing a statute, we must assume that 'the legislature chose, with care, the words it used when it enacted the relevant statute, and we are bound by those words as we interpret the statute.'" City of Virginia Beach v. ESG Enterprises, Inc., 243 Va. 149, 153 (1992) (quoting Barr v. Town and Country Properties, 240 Va. 292, 295 (1990)). "When interpreting a statute, courts 'are required to "ascertain and give effect to the intention of the legislature," which is usually self-evident from the statutory language.'" Virginia Baptist Homes, Inc. v. Botetourt Cty., 276 Va. 656, 665 (2008) (quoting Virginia Polytechnic Inst. v. Interactive Return Service, Inc., 271 Va. 304, 309 (2006)). "Words in a statute should be interpreted, if possible, to avoid rendering words superfluous." Cook v. Commonwealth, 268 Va. 111, 114 (2004).

This appeal arises out of a "Hearing Decision" by the Commissioner at the conclusion of proceedings to determine whether Tesla would or would not be "in compliance with any existing requirement for obtaining or retaining a license." See Code § 2.2-4001. The agency's underlying action clearly fits within the statutory definition of "case decision." Accepting VADA's argument that the underlying decision was a regulation – i.e., a "statement of *general* application" (emphasis added) – would require this Court to disregard the plain meaning of the statutes and render superfluous the language in the statutes that makes a distinction between a regulation and a case decision.

Despite VADA's arguments claiming it is aggrieved, each of those arguments fails to demonstrate "an immediate, pecuniary and substantial interest" in the Commissioner's decision that Tesla could obtain a dealer's license. In Pearsall v. Virginia Racing Comm'n, 26 Va. App. 376 (1998), this Court considered the question of whether the Monument Avenue Park Association had standing to appeal a decision from the Virginia Racing Commission. Noting that the Association did not own or occupy property affected by the decision, noting that the Association was not ordered to act or refrain from acting, and noting that nothing in

the record suggested that any right of the Association would be affected by the outcome of the case, the Court affirmed the trial court's finding that the Association did not have standing. Id. at 381. In the case now before us, VADA does not assert that it operates a dealership and does not point to any specific ownership interest that VADA itself has that is affected by the Commissioner's decision. VADA was not ordered to act or refrain from acting. Just like the Association in Pearsall, VADA itself is not aggrieved under the statutes and the binding precedent of this Court and, consequently, does not have standing.

In addition to not having its own independent standing, VADA also does not have representational standing, as counsel for VADA acknowledged at oral argument before this Court. "Virginia recognizes representational standing only when it is specifically authorized by the legislature." Id. at 383. See also Philip Morris USA Inc. v. Chesapeake Bay Foundation, 273 Va. 564, 573-80 (2007); W.S. Carnes, Inc. v. Bd. of Supervisors, 252 Va. 377, 383 (1996) ("An individual or entity does not acquire standing to sue in a representative capacity by asserting the rights of another, unless authorized by statute to do so."). VADA does not argue that there is any statute that gives it representational standing and allows it to assert the rights of another in this case.[3]

Because VADA is not aggrieved as a party itself and, therefore, does not have standing, its ability to appeal the Commissioner's decision is also limited under the doctrine of sovereign immunity. Agencies of the Commonwealth like DMV have the privilege of sovereign immunity. Virginia Physical Therapy, 13 Va. App. at 464. "[T]he General Assembly has chosen to waive explicitly the sovereign immunity of agencies in general, but only for certain suits brought pursuant to the VAPA." Id. at 465. As noted *supra*, appeals of case decisions of the DMV are limited to a "party aggrieved by and claiming unlawfulness of a case decision." Code § 2.2-4026(A). See also Code § 46.2-1573. Because VADA is not such an aggrieved party, the Commonwealth has not waived its sovereign immunity to enable VADA to appeal the

[3] For example, the Supreme Court has held that Code § 62.1-44.29 "authorizes representational standing to a corporate person to seek judicial review of a decision of the State Water Control Board." Philip Morris USA, 273 Va. at 580.

Commissioner's decision. See Afzall v. Commonwealth, 273 Va. 226, 230-34 (2007); Health Systems Agency of Northern Virginia, Inc. v. Stroube, 47 Va. App. 299, 313-15 (2005); Virginia Physical Therapy, 13 Va. App. at 464-66.

For all of these reasons, VADA does not have standing to appeal the Commissioner's decision to the circuit court or to this Court.

III. Standing of Page and Asgard

We next consider whether Asgard and Page, parties which the circuit court allowed to be added as appellants during the appeal, have standing. Neither Asgard nor Page filed a notice of appeal of the Commissioner's decision. Their first filing before the circuit court was in joining VADA's April 20, 2017 motion for leave to amend the petition for appeal, which sought to add them as parties. The motion Asgard and Page filed on April 20, 2017 was well beyond the deadline for filing a notice of appeal – which was thirty-three days from the Commissioner's November 30, 2016 decision (or January 3, 2017). See Rule 2A:2(a) (providing that "3 days shall be added to the 30-day period" when a case decision is served by mail upon a party, as required by Code § 2.2-4023). Thus, assuming without deciding that Asgard and Page were parties capable of filing a notice of appeal, they did not meet the deadline for filing a notice of appeal. Therefore, their ability to be added as appellants in the appeal was entirely dependent upon VADA's filings.

The Supreme Court has stated, "Our jurisprudence is clear that when a party without standing brings a legal action, the action so instituted is, in effect, a legal nullity." Johnston Memorial Hosp. v. Bazemore, 277 Va. 308, 312 (2009) (quoting Harmon v. Sadjadi, 273 Va. 184, 193 (2007)). The Supreme Court has also noted that, although leave to amend should be liberally granted pursuant to Rule 1:8, "the foregoing rule has always been subject to the limitation that a new plaintiff may not be substituted for an original plaintiff who lacked standing to bring the suit." Chesapeake House on the Bay, Inc. v. Virginia National Bank, 231 Va. 440, 442-43 (1986). See also Ricketts v. Strange, 293 Va. 101, 111-12 (2017).

In Braddock, L.C. v. Bd. of Supervisors, 268 Va. 420 (2004), Braddock timely filed suit challenging the Loudoun County Board of Supervisors' denial of an application. Id. at 422-23. Months after the deadline

to file an appeal, Braddock made a motion to add "necessary parties" as plaintiffs. Id. at 423. The Supreme Court, citing its decision in Chesapeake House on the Bay, stated that "the introduction of those new parties into the suit would be unavailing if Braddock had no standing initially to bring the suit." Id. The Supreme Court concluded that since the "case was brought by a party lacking standing," the "suit was therefore a 'nullity' that could not be resurrected by the addition of parties after the expiration of the 30-day statutory limitation period." Id. at 426.

Similarly, in light of our holding that VADA did not have standing to file an appeal, and being bound by the Supreme Court's decision in Braddock, we hold that VADA's appeal to the circuit court was, in effect, likewise a nullity and that, consequently, Asgard and Page cannot rely on VADA's notice of appeal or motion to amend in order to appeal the Commissioner's decision because VADA itself did not have standing to appeal. In summary, the circuit court erred here in holding that VADA had standing to appeal and consequently also erred in allowing Asgard and Page to join VADA's appeal as additional appellants. Furthermore, because the circuit court erred in holding it had jurisdiction to hear this appeal, the circuit court's decision must be vacated, leaving in place the Commissioner's decision.

IV. CONCLUSION

In short, because VADA lacked standing to appeal to the circuit court, based on the Supreme Court's decisions in Bazemore and Braddock, its filing of an appeal was, in effect, a nullity. Consequently, Asgard and Page, which did not timely file notices of appeal of the Commissioner's decision themselves, were not able to rely on VADA's appeal and join that appeal as additional appellants. Because VADA had no standing before the circuit court or this Court, we dismiss VADA's appeal and vacate the circuit court's decision, which leaves in place the decision of the Commissioner.

This order shall be certified to the circuit court.

A Copy,
Teste:

Cynthia L. McCoy, Clerk

By: Deputy Clerk