THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Master in Equity

Case No.: 2016-CP-49-6794

Mathes Auto Sales, Inc. Respondent/Appellant

v.

Otis Morris, Jr., Pro Bowl Motors, Inc., Travelers Casualty & Surety Co., of America, Inc.; Gerald Scott Dixon, Michael Tyrone Moore, and Dixon's Automotive, LLC, Defendants, of whom Otis Moore, Jr., Pro Bowl Motors, Inc., Gerald Scott Dixon, Michael Tyrone Moore, and Dixon's Automotive, LLC are the Appellants/Respondents.

PETITION FOR REHEARING ON BEHALF OF DIXON'S AUTOMOTIVE, LLC; GERALD SCOTT DIXON, INDIVIDUALLY; AND MICHAEL TYRONE MOORE, INDIVIDUALLY.

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Attorney for Otis Morris, Jr., and Pro Bowl Motors.

COMES NOW the Appellants/ Respondents Dixon Automotive, LLC, Gerald Scott Dixon and Michael Tryone Moore and do hereby petition this Court to (1) rehear the matters and issues identified in paragraph 2 and 3 of the unpublished opinion dated June 8, 2022; and to (2) find error in the rulings made by the Master in Equity regarding those matters in that the motion for a nonsuit should have been granted, and Plaintiff's motion to amend the pleadings by adding Gerald Scott Dixon and Michael Tyrone Moore as individual defendants should have been denied.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

Statement of the Case

Mathes Auto Sales, Inc. (MAS) filed this action against Otis Morris, Jr., Pro Bowl Motors, Inc. (Pro Bowl), Travelers Casualty & Surety Co. of America, Inc. (Travelers), and Dixon Automotive, LLC. At no time did MAS file an action against Gerald Scott Dixon and Michael Tyrone Moore, individually. The only individual it filed and maintained an action against was Otis Morris, Jr. In the Complaint MAS alleged conversion, negligence, and violations of the South Carolina Unfair Trade Practices Act (UTPA) and the Regulation of Manufacturers, Distributors, and Dealers Act (Dealers Act) against the Defendants. A bench trial took place. At the end of the bench trial, Defendant Dixon Automotive, LLC moved for a nonsuit. The Plaintiff then moved to amend the Complaint to add the individuals Gerald Scott Dixon and Michael Tyrone Moore. The Court took the whole matter under advisement.

Subsequently the Court issued an Order allowing the Complaint to be amended adding Dixon and Moore as individual defendants, and awarded Plaintiff $70,736 in actual damages, $212, 208 in punitive damages, and $102,489 in attorney's fees against individual defendant Morris, Pro Bowl, Dixon Automotive, LLC, as well as newly added individual defendants Dixon and Moore. Morris and Pro Bowl Motors, Inc. appealed asserting the Master failed in applying a set off against the award. Dixon Automotive, LLC and Dixon and Moore all asserted the Master erred in not granting a nonsuit. Dixon and Moore both argued the Master erred in granting the amendment to the pleadings by adding them as defendants at the time the award to the Plaintiff was made. MAS, Inc. appealed the Court's ruling for not awarding alleged lost profits.

On June 8, 2022 this Court issued an unpublished opinion affirming the Order of the Master.

Discussion

I. Whether this Court has erred in the affirmation of the Master's Order denying the motion for a nonsuit.

The verdict of a Judge, as a jury verdict, must be supported by competent evidence. *Shepherd v. South Carolina Department of Corrections*, 299 S.C. 370, 372. 385 S.E.2d 35, 36 (Ct. App. 1989). But there must be evidence. And it must reasonably support a finding of "arbitrary acts" and "in bad faith" or "unconscionable." *Taylor v. Nix*, 307 S.C. 551, 555, 416 S.E. 2d 619, 621 (1992).

This court cited in its address of the granted motion to amend the case of *Collins Ent. Inc. v. White,* 363 S.C. 546, 611 S.E.2d 262, (App. 2005). Ironically, that case dealt also with the issue of a directed verdict being granted by the Court in favor of Collins. In that case, this Court stated that [we] "find the record is devoid of evidence from which the jury could calculate

damages without resulting to speculation or conjecture." *Collins* at 611 S.E.2d 262, 363 S.C. 546 (S.C. 2005).

It is respectfully submitted that the Order of the Master as to Dixon Automotive, LLC is based at most on speculation and conjecture for there is no evidence in the record which supports a finding that Dixon Automotive, LLC committed actions against the Plaintiff that were arbitrary, in bad faith, or unconscionable. The numbered findings of fact as to Dixon Automotive LLC show no actions which could be construed as bad faith, arbitrary or unconscionable toward the Plaintiff and the analysis of those facts in the Order are mere speculation and conjecture.

There was no evidence that Dixon Automotive, LLC had any knowledge of the alleged theft by Mr. Morris. There was no evidence of any communication between the Plaintiff and Dixon Automotive, LLC of there being a sale of the vehicle prior to the sale to the Plaintiff. Therefore, any finding by the Master as to alleged unconscionable, bad faith, or arbitrary actions by Dixon Automotive, LLC is based on speculation and conjecture at best. There is no evidence that Dixon Automotive, LLC ever knew of Morris selling the car to Worthy and pocketing the money. (R. App. p. 118 l. 5 – p. 119, ln. 11) Morris had said he would buy the car from Dixon Automotive, LLC but eventually said he didn't have the funds to buy it and so Dixon Automotive, LLC decided to send it to the auction. (R. App. p.127 ls. 15-20).

For these reasons, it is respectfully requested for this Court to rehear the issue of whether the Master should have granted the motion for nonsuit and find that him not granting such motion was error.

II. Whether this Court has erred in the affirmation of allowing the Plaintiff to amend the Complaint at the conclusion of the trial by adding two parties, Gerald Scott Dixon and Michael Tyrone Moore, as individual defendants.

This Court in its Opinion of June 8, 2022 relied on the case *Collins Ent. Inc. v. White,* 363 S.C. 546, 611 S.E.2d 262, (App. 2005) for the proposition that "It is well established that a motion to amend is addressed to the discretion of the trial judge, and the party opposing the motion has the burden of establishing prejudice". However, in that case the trial judge refused to allow the Defendant to amend the Answer at the end of the trial to assert an additional affirmative defense and the Court found that it was not error for the trial court to refuse the amendment. The Court wrote "It is well established that a motion to amend is addressed to the discretion of the trial judge, and the party opposing the motion has the burden of establishing prejudice. *Tanner v. Florence County Treasurer*, 336 S.C. 552, 558-59, 521 S.E.2d 153, 156 (1999). The prejudice that Rule 15 envisions is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it." *Collins Entertainment, Inc. v. White*, 611 S.E.2d 262, 363 S.C. 546 (S.C. 2005). Thus, the Court found the trial court was correct in not allowing the amendment because the Plaintiff Collins had no notice of an additional defense, thus no opportunity to refute it. Therefore, when no notice provides no opportunity, there is prejudice.

Based on that standard there was extreme prejudice to Gerald Scott Dixon and Michael Tyrone Moore being added as individual party defendants after the trial had ended. At the time they were given notice that they were parties to the matter, they were also given notice that the Master levied a six-figure judgment against each of them. Thus, it is submitted that at the time they were given notice they were parties:

1. They had no opportunity to demand their constitutional right to have the matter heard by a jury of their peers (7th Amendment, Constitution of the United States);

2. They had no opportunity to consult with and retain their own attorneys to defend them individually against the allegations which were turned against them at the end (5th Amendment, United State Constitution; Section 3, South Carolina Constitititution);
3. They had no opportunity to demand that they be sued in their home county of York County where they may have been known to a jury panel, especially due to Mr. Dixon having played for the National Football League for several years.
4. They had no opportunity to due process for they were not parties to the action and thus lacked standing to participate in the matter at all but were only included at the time the Court assigned blame and judgment. (Section 3, South Carolina Constitution).

Thus, it is respectfully submitted that the prejudice existing in this matter caused by the Master allowing the amendment to the Complaint in adding Mr. Dixon and Mr. Moore as individual defendants is clear. If the Supreme Court found prejudice existed in *Collins* due to the lack of notice and opportunity to adequately address an added single affirmative defense, then the existence of prejudice in this case where an individual is made a party to the action and handed a judgment with no notice or opportunity to address and defend in any way is unquestionable.

For these reasons, it is respectfully requested for this Court to rehear the issue of whether the Master should have denied the motion to add Mr. Dixon and Mr. Moore as individual defendants and find that him granting such motion was error.

Respectfully submitted,

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June 22, 2022.

Rock Hill, South Carolina 29730.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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SC Court of Appeals

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PROOF OF SERVICE OF PETITION FOR REHEARING

The undersigned hereby certifies that he is the attorney for the Appellants/Respondents in the within matter and that the Petition for Rehearing and this Proof of Service were served on the below date upon the Attorneys for Respondent/Appellant and other Appellants/Respondents by depositing a copy of the same in the United States Mail with sufficient postage annexed thereto, addressed as follows:

MR. J. GREGORY STUDEMEYER, ESQ.
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And,

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June 22, 2022

HAND DELIVERED

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P. O. Box 11629
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RE: Mathes Auto Sales, Inc. v. Otis Morris, Jr, et al..
22019-000297

Dear Ms. Kitchings:

Please find enclosed the original and six (6) copies of Appellants' Dixon, Moore, and Dixon Automotive, LLC Petition for Rehearing as well as the applicable motion fee, and Proof of Service to opposing counsel.

With kindest regards, I remain

Very truly yours,

Leland B. Greeley

Enclosures

cc: J. Gregory Studemeyer; H. Ronald Stanley