THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Master In Equity

The Honorable Joseph M. Strickland

Appellate Case No. 2022-001160

Mathes Auto Sales, Inc., Respondent,

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 Gerald Scott Dixon, Michael Tyrone Moore, and Dixon's Automotive, LLC are the Petitioners.

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COUNTER-STATEMENT OF THE CASE

This action was initiated by the filing of a summons and complaint on November 4, 2016. Therein, Mathes Auto Sales, Inc. ("MAS") alleged that its account with NextGear Capital, Inc. ("NextGear") had been inappropriately charged the sum of $35,368.00 for a 2014 Infiniti QX60 ("Infiniti"), purchased in its name but without its consent by Otis Morris, Jr. ("Morris") from Dixon's Automotive, LLC ("Dixon's Automotive"). MAS further alleged that Morris had previously sold the same vehicle to Tarica Worthy ("Worthy") and that she was the rightful owner.[1] MAS sought a declaratory judgment that it had no liability to NextGear for any sums advanced to anyone in connection with the fraudulent transaction between Dixon's Automotive and Morris.

On February 1, 2017, MAS filed an amended complaint. Therein, MAS added Morris, Pro Bowl Motors, Inc. ("Pro Bowl"), Travelers Casualty & Surety Co. of America, Inc. ("Travelers"), Worthy, S.C. State Credit Union ("State Credit Union"), Dixon's Automotive, Auto-Owners Insurance, Inc. ("Auto-Owners"), and Manheim Remarketing, Inc. ("Manheim Remarketing") as additional Defendants.

In addition to declaratory relief, MAS sought an award of actual, treble, and punitive damages against Morris, Pro Bowl, Dixon's Automotive and their respective statutory sureties, Travelers and Auto-Owners, and against Manheim Remarketing. MAS asserted causes of action for violation of the Unfair Trade Practices Act, the Act Regulating Manufacturers, Distributors and Dealers ("the Dealers Act"), conversion, and negligence.

Morris, Pro Bowl, State Credit Union, Worthy, and Dixon's Automotive all filed answers

[1] Although an affidavit submitted by Worthy to NextGear suggested otherwise, Worthy's testimony at trial revealed that she was not a buyer in the ordinary course of business.

denying the material allegations of the amended complaint. Thereafter, MAS settled its claims with NextGear and Manheim Remarketing and dismissed its claims against Worthy, State Credit Union, and Auto-Owners without prejudice. MAS also agreed to settle its claims against Travelers shortly before trial.

This matter came before the Honorable Joseph M. Strickland for a bench trial on February 8, 2018, pursuant to an order of reference issued by the Honorable L. Casey Manning on October 30, 2017. The trial began on February 8, 2018, recessed for February 9, 2018, and resumed and concluded on February 12, 2018.

Before taking any testimony, counsel for Dixon's Automotive moved (orally and without prior notice) for summary judgment, suggesting that Dixon's Automotive had done nothing wrong. Over the objection of counsel for MAS, the Master agreed to entertain the motion. However, after considering arguments of counsel, the Master determined that the motion was premature and, instead, could be presented under Rule 41(b), SCRCP at the appropriate stage of trial.

MAS then presented testimony from Worthy, Daniel Harms ("Harms") a representative of State Credit Union, excerpts of the deposition of Morris, testimony from Donald W. Deese ("Deese"), excerpts of the depositions of Gerald Scott Dixon ("Dixon") and Michael Tyrone Moore ("Moore") (collectively, "the Dixon partners"), and testimony from Investigator C.B. Duckett ("Duckett") of the Columbia Police Department. John Mathes ("Mathes") testified as the final witness and was cross-examined by counsel for Morris and Pro Bowl. Numerous exhibits were admitted, many of which were premarked and admitted without objection.

Before MAS rested its case, its counsel moved to amend to conform to the evidence pursuant to Rule 15(b), SCRCP to add Dixon and Moore as Defendants. The motion was taken

under advisement and counsel for MAS and counsel for Dixon's Automotive were directed to brief the issue.

Counsel for Dixon's Automotive then moved for dismissal pursuant to Rule 41(b), SCRCP. (R. p. 328, line 8-25 and Second App. p.1). Counsel for Morris and Pro Bowl joined in the motion for nonsuit by Dixon's Automotive. (Second App. p. 1). After considering the arguments of counsel, the motion was denied.

Neither Morris nor Dixon nor Moore offered a single word of testimony. The Master specifically asked the Appellants/Respondents if they wished to defend the case. (R. p. 327, lines 16-18). Morris, Dixon, and Moore all chose to remain silent.

On February 16, 2018, MAS filed a supplemental motion to amend to conform to the evidence to add Dixon and Moore as parties. In addition to reiterating the grounds argued before resting at trial, MAS raised an alternative basis for adding Dixon and Moore; both are "dealers" as defined by S.C. Code Ann. § 56-15-10(h) and "persons" as defined by S.C. Code Ann. § 56-15-10(n). On February 23, 2018, MAS filed a memorandum in support of its motions.

On June 20, 2018, an order for judgment was issued.

Judgment was entered in favor of MAS against Morris, Pro Bowl, Dixon, Moore, and Dixon's Automotive for the sum of $70,736.00 in actual damages and the sum of $212,208.00 in punitive damages. On January 28, 2019, the Master issued an order on post-trial motions and an order granting motion for attorney's fees and costs.

On February 21, 2019, Dixon, Moore, and Dixon's Automotive served notice of appeal. On February 22, 2019, Morris and Pro Bowl served notice of appeal. On February 26, 2019, MAS served notice of appeal.

The Court of Appeals affirmed the Master in an opinion filed on June 8, 2022.

On June 22, 2022, Dixon, Moore, and Dixon's Automotive filed a petition for rehearing.

On July 20, 2022, the Court of Appeals issued an order, *inter alia*, denying the petition. On the same date the Court of Appeals issued an opinion affirming as modified.

On August 18, 2022, Dixon, Moore, and Dixon Automotive filed a petition for writ of certiorari.

ARGUMENTS

I. THE MASTER PROPERLY DENIED THE MOTION FOR NONSUIT BY DIXON'S AUTOMOTIVE BECAUSE THE PLAINTIFF PRESENTED RELEVANT, COMPETENT EVIDENCE REASONABLY TENDING TO ESTABLISH THE MATERIAL ELEMENTS OF ITS CASE.

Rule 41(b), SCRCP provides, in pertinent part:

> After the plaintiff in an action tried by the court without a jury has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.
>
> The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

"In deciding whether to grant or deny a motion for involuntary nonsuit, the trial court must view the evidence and all reasonable inferences in the light most favorable to the plaintiff. If there is no relevant competent evidence reasonably tending to establish the material elements of plaintiff's case a motion for nonsuit must be granted." *Bullard v. Ehrhardt*, 283 S.C. 557, 324 S.E.2d 61 (1984). If, on the other hand, there is any relevant, competent evidence reasonably tending to establish the material elements of a plaintiff's case, the motion for nonsuit must be denied. If there is any evidence which reasonably tends to support the judge's findings, the judgment must be affirmed by an appellate court. *Shepard v. S.C. Dep't of Corr.*, 299 S.C. 370, 372, 385 S.E.2d 35, 36 (Ct. App. 1989)

Although the Petitioners argue that the record is "devoid of any evidence" that connects Dixon's Automotive with the fraud Morris perpetrated on MAS, 49 of the 120 findings of fact made by the Master in the Order for Judgment are addressed to the actions of Dixon's Automotive or the Dixon partners. The evidence in the record, paired with all reasonable inferences that may be drawn from that evidence, leads any reasonable person to the same conclusion: that "Dixon and Moore, both of whom described themselves as partners in their depositions[,] were complicit in Morris' serial acts of fraud." (App. p. 25).

MAS' Final Respondent's Brief Of Respondent/Appellant addresses the overwhelming relevant, competent evidence reasonably tending to establish the material elements of its case on pp. 15-25 which need not be repeated here.

All that MAS was required to produce in order to survive the motion for nonsuit was *any* relevant, competent evidence reasonably tending to establish the material elements of its case. MAS presented enough direct and circumstantial evidence to exceed this threshold many times over. Based upon the facts and the law, and viewing the evidence and all reasonable inferences in a light most favorable to the Plaintiff, the Master properly denied the motion for non-suit by Dixon's Automotive.

II. THE MASTER PROPERLY GRANTED THE PLAINTIFF'S MOTION TO AMEND TO CONFORM TO THE PROOF TO ADD DIXON AND MOORE AS DEFENDANTS BECAUSE THEY SUFFERED NO PREJUDICE AS A RESULT.

Rule 15(b), SCRCP provides in pertinent part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party *at any time*, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

Notwithstanding the Petitioners' argument to the contrary, the Plaintiff moved to amend to conform to the proof *before* resting its case (R. p. 320, line 13- p. 328, line 16 and App. p. 3). Even if MAS had not moved to amend until *after* resting its case, the amendment would still have been proper.

The record makes it clear that the issues were tried by the "express or implied consent of the parties." Rule 15(b), SCRCP. Dixon's Automotive and the Dixon partners were integral to MAS's presentation of its case. Dixon's Automotive and the Dixon partners were represented by capable counsel who, at the time of trial, had been in practice for 31 years (R. p. 328, lines 17-18). Counsel for Dixon's Automotive appeared with Dixon and Moore at their respective depositions. Counsel knew that both Dixon and Moore were engaged in the sale of automobiles and repeatedly described themselves as partners who shared profits and losses (R. p. 135, lines 10 – 22; p. 206, lines 21 – 22; and p. 218, line 13 – p. 219, line 14).

Excerpts of the depositions of Dixon and Moore were furnished to the Master and all opposing counsel (by page and line number) more than one day prior to offering them in the Plaintiff's case in chief in accordance with Rule 32(a)(5), SCRCP. Opposing counsel knew exactly what would be introduced, including testimony about Dixon and Moore's partnership. The depositions were taken months before trial. There should have been no surprise.

Additionally, during his oral motion for summary judgment at the commencement of the trial, counsel for Dixon's Automotive repeatedly referred to his *clients* rather than *client*. (R. p. 18, lines 13 – 16; p. 20, lines 13 – 20; p. 21, line 20; and p. 22, lines 9, 16, 20, and 21).

Excerpts of the depositions of Dixon and Moore were offered at trial. No objections were made pursuant to Rule 32(a)(5), SCRCP.

Rule 15(c), SCRCP provides in pertinent part:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

There can be no doubt that MAS's claims against Dixon and Moore arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading. Nor can there be any doubt that Dixon and Moore had notice of the institution of the action and were not prejudiced in maintaining their respective defenses. Moreover, they knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against them.

Dixon and Moore knew that Morris, an officer and agent of Pro Bowl, had been named as a Defendant along with Pro Bowl. It should not have come as a surprise that MAS would seek to establish liability against the individual officers, directors and other persons in active control of the activities of Dixon's Automotive under S.C. Code Ann. § 56-15-10(n) as it had against the individual officers, directors and other persons in active control of the activities of Pro Bowl.

CONCLUSION

A writ of certiorari is not a matter of right, but of sound discretion, and will be granted only when there are special and important reasons. Rule 242(b), SCRCP. Such reasons are absent in this case. At the end of the day, the petition is simply the latest challenge to the denial of a motion for nonsuit and the grant of a motion to amend to conform to the evidence.

Dixon Automotive waived its right to cross-examine the Plaintiff's witnesses. It chose to

offer no testimony. Instead, it chose to remain silent.

The Plaintiff had already presented relevant, competent evidence reasonably tending to establish the material elements of its case without Dixon Automotive's further participation. Dixon Automotive's miscalculations do not constitute errors by the Master overlooked by the Court of Appeals and do not entitle the Petitioners to a do over.

This dead horse has been beaten unmercifully. Based upon the foregoing, the Respondent implores this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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