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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY CIRCUIT COURT
Letitia H. Verdin, Circuit Court Judge
Case No. 2019-CP-23-7116

Appellate Case No.: 2022-00011

Jessie J. Carter,Appellant,

v.

Oscar Quirroga d/b/a Oscar Auto Sales and
Marco A. Quiroga d/b/a Oscar Auto Sales and
Palmetto Surety Corporation, Respondents.

RECORD ON APPEAL

Respectfully submitted,

s/Matthew J. Kappel
Matthew J. Kappel, 15390
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Greenville, SC 29601
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matt@kappellaw.com
Counsel for Appellant

September 19, 2022

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF GREENVILLE)	THIRTEENTH JUDICIAL CIRCUIT
)	
Jessie J. Carter,	)	C.A. NO. 2019-CP-23-07116
)	
Plaintiff,)	
)	
vs.	)	ORDER
)	
Marco A. Quiroga, et al)	
)	
Defendants.)	
)	
_____)	

This matter was before the Court on November 9, 2021 for Defendant Palmetto Surety Corporation’s (“PSC’s”) Motion to Dismiss and Plaintiff Jessie Carter’s (“Plaintiff’s”) Motion for Summary Judgment. This matter concerns a dispute regarding the attempted purchase of an automobile at Oscar’s Auto Sales (“OAS”) owned by Defendant Marco Quiroga (“MQ”) and run by Oscar Quiroga (“OQ”). Plaintiff alleges that that the Defendants OAS, MQ, and OQ defrauded the Plaintiff by wrongfully keeping money paid to them by the United States Automobile Association (“USAA”) as part of a loan to Plaintiff after Plaintiff attempted to cancel the transaction. Plaintiff has similarly brought a claim under S.C. Code 56-15-320 against PSC, who is the surety for OAS.

I. DISCUSSION

A. The Claim against PSC is Dismissed for Failure to State a Claim

The claim against PSC is rooted in S.C. Code 56-15-320(b), which states that

Each applicant for licensure as a dealer or wholesaler shall furnish a surety bond in the penal amount of thirty thousand dollars on a form prescribed by the director of the department. The bond must be given to the department and executed by the applicant, as principal, and by a corporate surety company authorized to do business in this State, as surety. The bond must be conditioned upon the applicant or licensee complying with the statutes applicable to the license and as indemnification for loss or damage suffered **by an owner of a motor vehicle**, or his legal representative, by reason of fraud practiced or fraudulent representation made in connection with the sale or transfer of a motor vehicle by a licensed dealer or wholesaler or the dealer's or wholesaler's agent acting for the dealer or wholesaler or within the scope of employment of the agent or loss or damage suffered by reason of the violation by the dealer or wholesaler or his agent of this chapter. **An owner or his legal representative who suffers the loss or damage has a right of action against the dealer or wholesaler and against the dealer's or wholesaler's surety upon the bond and may recover damages as provided in this chapter.** (emphasis added)

PSC argues that Plaintiff's claim cannot stand because Plaintiff was never the owner of this motor vehicle. The Court agrees. "It is clear the legislature intended to provide only the owner of a motor vehicle . . . with a cause of action against the surety on a bond issued pursuant to that statute. *Mid-State Auto Auction of Lexington v. Altman* 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996).

Plaintiff argues that he was an owner in the sense that he acquired an ownership interest when he paid the deposit for the vehicle. The Court need not address that contention. Whether the Plaintiff was or wasn't an owner at the time he paid the deposit, he was not an owner after he rescinded the contract. The Plaintiff's own complaint stated that he "became frustrated and determined to cancel the transaction." Pl's 3rd Amended Complaint, paragraph 12. He would certainly have been more frustrated if, after OAS agreed to cancel the sale, they had brought a suit for the price of the vehicle with the argument that Plaintiff had taken ownership. Similarly, Plaintiff

cannot now argue that he retains an ownership interest today even after the sale contract has been rescinded by both parties.

In conclusion, any alleged fraud that occurred would have occurred after the Plaintiff had already cancelled the purchase, and thus after the Plaintiff had rescinded any ownership interest he may have had. Therefore, the Court finds that Plaintiff was not an owner of an automobile at the time of the alleged fraud for the purposes of S.C. Code 56-15-320(b), and PSC's Motion to Dismiss the claim against it is GRANTED.

B. There Exist Genuine Issues of Material Fact Such that Summary Judgment is Inappropriate at this Time.

Plaintiff also moves for Summary Judgment against all Defendants. Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56(c). SCRPC. “The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder.” *Matsell v. Crowfield Plantation Cmty. Servs. Ass’n, Inc.*, 393 S.C. 65, 70, 710 S.E.2d 90, 93 (Ct. App. 2011) (citing *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)).

An adverse party may not rely on the mere allegations in the pleadings to withstand a summary judgment motion but must set forth specific facts showing there is a genuine issue for trial. *Strickland v. Madden*, 323 S.C. 63, 68, 448 S.E.,2d 581, 584 (Ct. App. 1994). “However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.” *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013). “[W]hen

the evidence is susceptible of only one reasonable interpretation, summary judgment may be granted.” *Brooks v. Northwood Little League, Inc.*, 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct. App. 1997).

Here, there exist genuine issues of material fact which preclude summary judgment at this time. Several remaining factual disputes are that: The Defendants argue that the Plaintiff is to blame for the USAA loan going to OAS because he failed to follow up with his own finance company; OQ argues that he is not the owner or operator of OAS; OAS denies that they have kept the Plaintiff’s money and contend that they do not owe him any refund. Therefore, genuine issues of material fact remain and Plaintiffs Motion for Summary Judgment is DENIED.

II. CONCLUSION

In conclusion, Palmetto Surety Corporation’s Motion to Dismiss is GRANTED and Jessie Carter’s Motion for Summary Judgment is DENIED.

IT IS SO ORDERED.

Letitia H. Verdin
Thirteenth Circuit Court Judge

November ____, 2021

Greenville, South Carolina



Greenville Common Pleas

Case Caption: Jessie J Carter vs. Marco A Quiroga, defendant, et al

Case Number: 2019CP2307116

Type: Order/Summary Judgment

So Ordered

s/Letitia H. Verdin, SC Judge 2162

Electronically signed on 2021-11-17 11:04:23 page 5 of 5

Jessie J Carter
PLAINTIFF(S)

Oscar Auto Sales et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled);
 Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

This matter is before the Court on Plaintiff Jessie Carter's ("Plaintiff's") Motion to Alter/Amend the Court's order issued on November 17, 2021. Plaintiff argues that the Court erred because it failed to consider that the contract was not rescinded. The Court did consider this argument when issuing its previous order and found that the contract was properly rescinded. Notably, the Plaintiff is not asking for the car or arguing that the contract should be reinstated. Rather, Plaintiff is asking for a sum of money related to a separate dispute over loan funds. Therefore, after another reading of the relevant files in the record and relevant case law, the Court comes to the same conclusions as stated in its original order, including that Plaintiff was not the owner of a motor vehicle at the time of the alleged fraud as defined in SC Code 56-15-320 (b). Plaintiff's Motion to Alter/Amend is DENIED.

ORDER INFORMATION

This order ends does not end the case. See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 12/06/2021 .

Marco A Quiroga

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Greenville Common Pleas

Case Caption: Jessie J Carter vs. Oscar Quirroga , defendant, et al

Case Number: 2019CP2307116

Type: Order/Electronic Form 4

So Ordered

s/Letitia H. Verdin, SC Judge 2162

Electronically signed on 2021-12-06 13:00:04 page 3 of 3

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE)	
	)	Case No.: 2019-CP-23-_____
Jessie J. Carter,)	
)	
Plaintiff)	
)	
v.)	
	)	COMPLAINT
Oscar Quirroga d/b/a)	
Oscar Auto Sales,	)	Jury Trial Demanded
)	
Defendant.)	
_____)	

The Plaintiff would respectfully allege as follows:

Background

1. The Plaintiff is a citizen and resident of Greenville County, State of South Carolina.
2. The Defendant Oscar Quirroga d/b/a/ Oscar Auto Sales (hereinafter “OAS”) is located in Greenville County at 3501 White Horse Road, Greenville, SC 29611 and is in the business and trade of selling used vehicles. OAS is also in the business of directly financing the purchase of used vehicles or assisting customers with financing the purchase through third party lending institution.
3. Oscar Quirroga (“ Quirroga”) is the sole owner and operator of OAS and upon information and belief is citizen and resident of Greenville County State of South Carolina.
4. The parties and subject of this action are properly before this court.
5. Plaintiff entered into a contract with the Defendants on or about July 31, 2019 to purchase a 1999 Ford Mustang Cobra automobile for \$5,500.00. Plaintiff paid OAS a deposit of earnest money in the amount of \$500.00 leaving a balance of \$5,000.00 which the parties agreed

would be financed by United Services Automobile Association (“USAA”) as lender to Plaintiff. USAA was to pay OAS \$5,000.00 upon receipt of various documents from OAS.

6. OAS agreed to accept payment of the \$5,000.00 balance from USAA and to document the sale of the vehicle and provide USAA with the necessary transactional documents including the “Funding Request.”

7. OAS faxed the Funding Request for disbursement of loan proceeds to USAA on or about August 2, 2019. In the meantime, OAS contacted the Plaintiff and indicated to him that the “Funding Request” had a deficiency and that Plaintiff needed to return to OAS to sign a new and properly completed “Funding Request” to be faxed to USAA.

8. After several unproductive phone calls with OAS, Plaintiff became frustrated and he determined to cancel the transaction. OAS accepted Plaintiff’s termination of the contract and refunded to Plaintiff his \$500.00 earnest money deposit on August 5, 2019. OAS, however, never informed Plaintiff that OAS had in fact faxed the Funding Request to USAA prior to the termination of the transaction.

9. Plaintiff, having canceled the contract and having received back his earnest money deposit, reasonably and rightfully presumed the transaction to be a closed matter. Plaintiff further reasonably believed that the financing paperwork created by OAS was no longer needed and that it had not been delivered to USAA.

10. Approximately two months later, Plaintiff learned the \$5,000.00 loan proceeds had in fact been delivered to OAS and that Plaintiff had a \$5,000.00 loan for an automobile that Plaintiff did not purchase and of which Plaintiff had never taken possession. Moreover, USAA notified Plaintiff to start servicing the loan by making the monthly payments to cover principal and interest, as if Plaintiff had closed the transaction for the vehicle with OAS.

11. For more than 30 days, Plaintiff attempted to resolve this matter with OAS by simply having OAS return the \$5,000.00 to USAA or directly to Plaintiff. OAS was unresponsive and did not return the money.

12. Some time after the cancellation of Plaintiff's contract and before Plaintiff became aware of the USAA loan obligation, OAS sold the vehicle to another customer and as it stands today, OAS sold the automobile twice with only one customer taking possession.

FOR A FIRST CAUSE OF ACTION
South Carolina Unfair Trade Practices Act
§ 35-5-10, et seq.

13. Paragraphs 1-12 are incorporated herein as if repeated verbatim.

14. OAS and Quirroga are in the business of selling used vehicles. OAS and Quirroga also provide services when they assist their customers with direct financing through OAS or indirect financing through a lending institution.

15. OAS and Quirroga are persons as defined in § 35-5-10(a) and are engaged in trade and commerce as defined in §35-5-10(b).

16. With regard to the transaction with the Plaintiff, OAS and Quirroga have committed an unfair, deceptive act and practice which constitutes a fraudulent deceptive practice which is capable of replication and therefore is a threat to fair dealing.

17. The Plaintiff has suffered a monetary loss as defined by §39-5-140 that resulted from the use and employment of an unfair and deceptive act by the Defendants and the Plaintiff requests this court award three times the actual damages and award reasonable attorney's fees and costs.

FOR A SECOND CAUSE OF ACTION
Breach of Fiduciary Duty

18. Paragraphs 1-17 are incorporated herein as if repeated verbatim.

19. In the course of conducting the transaction, Plaintiff reposed trust and confidence in the Defendant to properly and lawfully close the transaction including using due care, fair dealing and open and complete honesty.

20. Plaintiff alleges Defendant breached its fiduciary duty to Plaintiff by acting negligently, willfully, and recklessly causing actual and punitive damages to Plaintiff.

FOR A THIRD CAUSE OF ACTION

Breach of Contract

21. Paragraphs 1-20 are incorporated herein as if repeated verbatim.

22. Plaintiff and Defendant entered into a contract to purchase an automobile.

23. Plaintiff canceled the contract and Defendant acted in a manner consistent thereto by returning Plaintiff his earnest money.

24. The parties should be returned to the status they enjoyed prior to entering the contract.

25. The Defendant breached the contract by accepting the purchase money of \$5000.00 after the transaction had been canceled and refusing to return the money.

26. As a result of Defendant's breach, Plaintiff has not been returned to his prior status and has suffered actual and punitive damages.

FOR A THIRD CAUSE OF ACTION

Conversion

27. Paragraphs 1-26 are incorporated herein as if repeated verbatim.

28. Defendant is in possession of \$5,000.00 which it received from USAA as payment for an automobile that was never transferred to Plaintiff.

29. Defendant has refused to return the \$5,000.00 to Plaintiff and is therefore wrongfully excising dominion and control over the money.

30. Defendants assumption and exercise of rights of ownership of the money and to the exclusion of Plaintiff is unauthorized.

31. As a result of Defendant's conversion, Plaintiff has suffered actual and punitive damages.

FOR A THIRD CAUSE OF ACTION
Breach of Trust Accompanied by Fraudulent Act

32. Paragraphs 1-31 are incorporated herein as if repeated verbatim.

33. Plaintiff alleges the parties entered into a contract with the Defendant. The Defendant breached the contract with a fraudulent intention and the breach was accompanied by a fraudulent act.

34. The Defendant's breach was an act of dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design.

35. As a result of Defendant's breach of contract accompanied by fraudulent act, Plaintiff has suffered actual and punitive damages.

remainder of page left intentionally blank

THEREFORE, Plaintiff prays for the following relief:

- a) Treble damages;
- b) Reasonable attorney's fees and costs associated with prosecution of this action;
- c) Actual and punitive damages;
- d) Prejudgment interest as allowed by law; and
- e) For such other and further relief as the court may deem just and proper.

Respectfully submitted,

s/Matthew J. Kappel
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S.C. Bar Number: 15390

Greenville, South Carolina
December 3, 2019

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Jessie J. Carter,)
)
)
Plaintiff)
)
v.)
)
Marco A. Quiroga d/b/a)
Oscar Auto Sales and Oscar)
Quiroga d/b/a/ Oscar Auto Sales,)
)
Defendant.)
_____)

COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-23-07116

AMENDED COMPLAINT

Jury Trial Demanded

The Plaintiff would respectfully allege as follows:

Background

1. The Plaintiff is a citizen and resident of Greenville County, State of South Carolina.
2. The Defendant Oscar Quiroga d/b/a/ Oscar Auto Sales (hereinafter “OAS”) is located in Greenville County at 3501 White Horse Road, Greenville, SC 29611 and is in the business and trade of selling used vehicles. OAS is also in the business of directly financing the purchase of used vehicles or assisting customers with financing the purchase through third party lending institution.
3. The Defendant Marco A. Quiroga is also d/b/a/ Oscar Auto Sales (hereinafter “OAS”) which is the same business in paragraph 3 above which is located in Greenville County at 3501 White Horse Road, Greenville, SC 29611 and is in the business and trade of selling used vehicles. OAS is also in the business of directly financing the purchase of used vehicles or assisting customers with financing the purchase through third party lending institution.

4. Marco and Oscar Quiroga (“ Quiroga”) are the owners and operators of OAS and upon information and belief are citizens and residents of Greenville County State of South Carolina.

5. The parties and subject of this action are properly before this court.

6. Plaintiff entered into a contract with the Defendants on or about July 31, 2019 to purchase a 1999 Ford Mustang Cobra automobile for \$5,500.00. Plaintiff paid OAS a deposit of earnest money in the amount of \$500.00 leaving a balance of \$5,000.00 which would be financed by United Services Automobile Association (“USAA”) as lender to Plaintiff. USAA who had preapproved the Plaintiff for the loan was to pay OAS \$5,000.00 upon receipt of various documents from OAS.

7. OAS agreed to accept payment of the \$5,000.00 balance from USAA and provide USAA with the necessary transactional documents including the “Funding Request.”

8. OAS faxed the Funding Request for disbursement of loan proceeds to USAA on or about August 2, 2019. In the meantime, a few days passed and OAS had not contacted the Plaintiff about completion of the sale. Plaintiff appeared at OAS to see about the delay. An OAS employee informed the Plaintiff that there was a problem with his financing from USAA. OAS instructed Plaintiff to wait for another OAS employee to discuss it further. Plaintiff waited for over an hour without speaking with anyone else.

9. Plaintiff became frustrated and determined to cancel the transaction. OAS accepted Plaintiff’s termination of the contract and refunded Plaintiff his \$500.00 earnest money deposit on August 5, 2019. OAS, however, never informed Plaintiff that OAS had in fact faxed the Funding Request to USAA prior to the termination of the transaction.

10. Plaintiff, having canceled the contract and having received back his earnest money deposit, reasonably and rightfully presumed the transaction to be a closed matter.

11. Approximately one month later, Plaintiff learned the \$5,000.00 loan proceeds had in fact been delivered to OAS and that Plaintiff had a \$5,000.00 loan for an automobile that Plaintiff did not purchase and of which Plaintiff had never taken possession. Moreover, USAA notified Plaintiff to start servicing the loan by making the monthly payments to cover principal and interest, as if Plaintiff had closed the transaction for the vehicle with OAS.

12. For more than 30 days, Plaintiff attempted to resolve this matter with OAS by simply having OAS return the \$5,000.00 to USAA or directly to Plaintiff. OAS was unresponsive and did not return the money.

13. After approximately 1 month to trying to resolve the matter, the Plaintiff hired counsel. Counsel drafted a demand letter requesting the Defendants return the \$5,000.00 plus interest and attorney's fees and costs which totaled \$5,909.37 (Exhibit 1). The demand letter was personally delivered to OAS on October 18, 2019. The demand was ignored. The Plaintiff has now incurred more than \$6,500.00 in attorney's fees and costs.

14. On or before November 1, 2019, OAS sold the vehicle to another customer and as it stands today, OAS sold the automobile twice with only one customer taking possession (Exhibit 2).

15. OAS bank records indicate from June 30, 2019 to May 31, 2020, OAS average ending statement balance was \$25,692.53 (Exhibit 3). The ending balance July 31, 2019, August 31, 2019, September 30, 2019 and October 31, 2019 was \$50,837.68, \$9,636.56, \$85,101.08 and \$4,820.71 respectively (Exhibits 4, 5, 6, and 7). OAS October 31, 2019 balance was offset by

\$51,300.00 in withdrawals, \$15,500.00 in cash and \$35,800.00 by way of cashier's check.
(Exhibit 8).

16. The Defendants continue to refuse to refund the \$5,000.00 to the Plaintiff or to USAA.

FOR A FIRST CAUSE OF ACTION
South Carolina Unfair Trade Practices Act
§ 39-5-10, et seq.

17. Paragraphs 1-16 are incorporated herein as if repeated verbatim.

18. The Defendants are in the business of selling used vehicles. OAS and Quirroga also provide services when they assist their customers with direct financing through OAS or indirect financing through a lending institution.

19. The Defendants are persons as defined in § 39-5-10(a) and are engaged in trade and commerce as defined in § 39-5-10(b).

20. With regard to the transaction with the Plaintiff, the Defendants have committed an unfair, deceptive act and practice which constitutes a fraudulent deceptive practice which is capable of replication and therefore is a threat to fair dealing.

21. The Plaintiff has suffered a monetary loss as defined by §39-5-140 that resulted from the use and employment of an unfair and deceptive act by the Defendants and the Plaintiff requests this court award three times the actual damages and award reasonable attorney's fees and costs.

FOR A SECOND CAUSE OF ACTION
Breach of Fiduciary Duty

22. Paragraphs 1-21 are incorporated herein as if repeated verbatim.

23. In the course of conducting the transaction, Plaintiff reposed trust and confidence in the Defendants to properly and lawfully close the transaction including using due care, fair dealing and open and complete honesty.

24. Plaintiff alleges Defendants breached its fiduciary duty to Plaintiff by acting negligently, willfully, and recklessly causing actual and punitive damages to Plaintiff.

FOR A THIRD CAUSE OF ACTION

Breach of Contract

25. Paragraphs 1-24 are incorporated herein as if repeated verbatim.

26. Plaintiff and Defendants entered into a contract to purchase an automobile.

27. Plaintiff canceled the contract and Defendants acted in a manner consistent thereto by returning Plaintiff his earnest money.

28. The parties should be returned to the status they enjoyed prior to entering the contract.

29. The Defendants breached the contract by accepting the purchase money of \$5000.00 after the transaction had been canceled and refusing to return the money.

30. As a result of Defendants' breach, Plaintiff has not been returned to his prior status and has suffered actual and punitive damages.

FOR A THIRD CAUSE OF ACTION

Conversion

31. Paragraphs 1-30 are incorporated herein as if repeated verbatim.

32. Defendants are in possession of \$5,000.00 which it received from USAA as payment for an automobile that was never transferred to Plaintiff.

33. Defendants have refused to return the \$5,000.00 to Plaintiff and is therefore wrongfully excising dominion and control over the money.

34. Defendants' assumption and exercise of rights of ownership of the money and to the exclusion of Plaintiff is unauthorized.

35. As a result of Defendants' conversion, Plaintiff has suffered actual and punitive damages.

FOR A THIRD CAUSE OF ACTION

Breach of Contract Accompanied by Fraudulent Act

36. Paragraphs 1-35 are incorporated herein as if repeated verbatim.

37. Plaintiff alleges the parties entered into a contract with the Defendants. The Defendants breached the contract with a fraudulent intention and the breach was accompanied by a fraudulent act.

38. The Defendants' breach was an act of dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design.

39. As a result of Defendants' breach of contract accompanied by fraudulent act, Plaintiff has suffered actual and punitive damages.

THEREFORE, Plaintiff prays for the following relief:

- a) Treble damages;
- b) Reasonable attorney's fees and costs associated with prosecution of this action;
- c) Actual and punitive damages;
- d) Prejudgment interest as allowed by law; and

- e) For such other and further relief as the court may deem just and proper.

Respectfully submitted,

s/Matthew J. Kappel
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(864) 467-1945 (fax)
S.C. Bar Number: 15390

Greenville, South Carolina
September 25, 2020

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Jessie J. Carter,)
)
)
Plaintiff)
)
v.)
)
Marco A. Quiroga d/b/a)
Oscar Auto Sales and Oscar)
Quiroga d/b/a/ Oscar Auto Sales,)
)
Defendant.)
_____)

COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-23-07116

SECOND AMENDED COMPLAINT

Jury Trial Demanded

The Plaintiff would respectfully allege as follows:

Background

1. The Plaintiff is a citizen and resident of Greenville County, State of South Carolina.
2. The Defendant Oscar Quiroga d/b/a/ Oscar Auto Sales (hereinafter “OAS”) is located in Greenville County at 3501 White Horse Road, Greenville, SC 29611 and is in the business and trade of selling used vehicles. OAS is also in the business of directly financing the purchase of used vehicles or assisting customers with financing the purchase through third party lending institution.
3. The Defendant Marco A. Quiroga is also d/b/a/ Oscar Auto Sales (hereinafter “OAS”) which is the same business in paragraph 2 above which is located in Greenville County at 3501 White Horse Road, Greenville, SC 29611 and is in the business and trade of selling used vehicles. OAS is also in the business of directly financing the purchase of used vehicles or assisting customers with financing the purchase through third party lending institution.

4. Marco and Oscar Quiroga are the owners and operators of OAS and upon information and belief are citizens and residents of Greenville County State of South Carolina.

5. The parties and subject of this action are properly before this court.

6. Plaintiff entered into a contract with the Defendants on or about July 31, 2019 to purchase a 1999 Ford Mustang Cobra automobile for \$5,500.00. Plaintiff paid OAS a deposit of earnest money in the amount of \$500.00 leaving a balance of \$5,000.00 which would be financed by United Services Automobile Association (“USAA”) as lender to Plaintiff. USAA who had preapproved the Plaintiff for the loan was to pay OAS \$5,000.00 upon receipt of various documents from OAS.

7. OAS agreed to accept payment of the \$5,000.00 balance from USAA and provide USAA with the necessary transactional documents including the “Funding Request.”

8. OAS faxed the Funding Request for disbursement of loan proceeds to USAA on or about August 2, 2019. In the meantime, a few days passed and OAS had not contacted the Plaintiff about completion of the sale. Plaintiff appeared at OAS to see about the delay. An OAS employee informed the Plaintiff that there was a problem with his financing from USAA. OAS instructed Plaintiff to wait for another OAS employee to discuss it further. Plaintiff waited for over an hour without speaking with anyone else.

9. Plaintiff became frustrated and determined to cancel the transaction. OAS accepted Plaintiff’s termination of the contract and refunded Plaintiff his \$500.00 earnest money deposit on August 5, 2019. OAS, however, never informed Plaintiff that OAS had in fact faxed the Funding Request to USAA on August 2d.

10. Plaintiff, having canceled the contract and having received back his earnest money deposit, reasonably and rightfully presumed the transaction to be a closed matter.

11. Approximately one month later, Plaintiff learned the \$5,000.00 loan proceeds had in fact been delivered to OAS and that Plaintiff had a \$5,000.00 loan for an automobile that Plaintiff did not purchase and of which Plaintiff had never taken possession. Moreover, USAA notified Plaintiff to start servicing the loan by making the monthly payments to cover principal and interest, as if Plaintiff had closed the transaction for the vehicle with OAS.

12. For more than 30 days, Plaintiff attempted to resolve this matter with OAS by simply having OAS return the \$5,000.00 to USAA or directly to Plaintiff. OAS was unresponsive and did not return the money.

13. After approximately 1 month to trying to resolve the matter, the Plaintiff hired counsel. Counsel drafted a demand letter requesting the Defendants return the \$5,000.00 plus interest and attorney's fees and costs which totaled \$5,909.37 (Exhibit 1). The demand letter was personally delivered to OAS on October 18, 2019. The demand was ignored. The Plaintiff has now incurred more than \$6,500.00 in attorney's fees and costs.

14. On or before November 1, 2019, OAS sold the vehicle to another customer and as it stands today, OAS sold the automobile twice with only one customer taking possession (Exhibit 2).

15. OAS bank records indicate from June 30, 2019 to May 31, 2020, OAS average ending statement balance was \$25,692.53 (Exhibit 3). The ending balance July 31, 2019, August 31, 2019, September 30, 2019 and October 31, 2019 was \$50,837.68, \$9,636.56, \$85,101.08 and \$4,820.71 respectively (Exhibits 4, 5, 6, and 7). OAS October 31, 2019 balance was offset by

\$51,300.00 in withdrawals, \$15,500.00 in cash and \$35,800.00 by way of cashier's check.
(Exhibit 8).

16. The Defendants continue to refuse to refund the \$5,000.00 to the Plaintiff or to USAA.

FOR A FIRST CAUSE OF ACTION
South Carolina Unfair Trade Practices Act
§ 39-5-10, et seq.

17. Paragraphs 1-16 are incorporated herein as if repeated verbatim.

18. The Defendants are in the business of selling used vehicles. OAS and Quirroga also provide services when they assist their customers with direct financing through OAS or indirect financing through a lending institution.

19. The Defendants are persons as defined in § 39-5-10(a) and are engaged in trade and commerce as defined in § 39-5-10(b).

20. With regard to the transaction with the Plaintiff, the Defendants have committed an unfair, deceptive act and practice which constitutes a fraudulent deceptive practice which is capable of replication and therefore is a threat to fair dealing.

21. The Plaintiff has suffered a monetary loss as defined by § 39-5-140 that resulted from the use and employment of an unfair and deceptive act by the Defendants and the Plaintiff requests this court award three times the actual damages and award reasonable attorney's fees and costs.

FOR A SECOND CAUSE OF ACTION
Breach of Fiduciary Duty

22. Paragraphs 1-21 are incorporated herein as if repeated verbatim.

23. In the course of conducting the transaction, Plaintiff reposed trust and confidence in the Defendants to properly and lawfully close the transaction including using due care, fair dealing and open and complete honesty.

24. Plaintiff alleges Defendants breached its fiduciary duty to Plaintiff by acting negligently, willfully, and recklessly causing actual and punitive damages to Plaintiff.

FOR A THIRD CAUSE OF ACTION

Breach of Contract

25. Paragraphs 1-24 are incorporated herein as if repeated verbatim.

26. Plaintiff and Defendants entered into a contract to purchase an automobile.

27. Plaintiff canceled the contract and Defendants acted in a manner consistent thereto by returning Plaintiff his earnest money.

28. The parties should be returned to the status they enjoyed prior to entering the contract.

29. The Defendants breached the contract by accepting the purchase money of \$5000.00 after the transaction had been canceled and refusing to return the money.

30. As a result of Defendants' breach, Plaintiff has not been returned to his prior status and has suffered actual and punitive damages.

FOR A FOURTH CAUSE OF ACTION

Conversion

31. Paragraphs 1-30 are incorporated herein as if repeated verbatim.

32. Defendants are in possession of \$5,000.00 which it received from USAA as payment for an automobile that was never transferred to Plaintiff.

33. Defendants have refused to return the \$5,000.00 to Plaintiff and is therefore wrongfully excising dominion and control over the money.

34. Defendants' assumption and exercise of rights of ownership of the money and to the exclusion of Plaintiff is unauthorized.

35. As a result of Defendants' conversion, Plaintiff has suffered actual and punitive damages.

FOR A FIFTH CAUSE OF ACTION
Breach of Contract Accompanied by Fraudulent Act

36. Paragraphs 1-35 are incorporated herein as if repeated verbatim.

37. Plaintiff alleges the parties entered into a contract with the Defendants. The Defendants breached the contract with a fraudulent intention and the breach was accompanied by a fraudulent act.

38. The Defendants' breach was an act of dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design.

39. As a result of Defendants' breach of contract accompanied by fraudulent act, Plaintiff has suffered actual and punitive damages.

THEREFORE, Plaintiff prays for the following relief:

- a) Treble damages;
- b) Reasonable attorney's fees and costs associated with prosecution of this action;
- c) Actual and punitive damages;
- d) Prejudgment interest as allowed by law; and

- e) For such other and further relief as the court may deem just and proper.

Respectfully submitted,

s/Matthew J. Kappel
Matthew J. Kappel
Law Office of Matthew J. Kappel, P.C.
114 Whitsett Street
Greenville, South Carolina 29601
(864) 467-9595
(864) 467-1945 (fax)
S.C. Bar Number: 15390

Greenville, South Carolina
September 25, 2020

3. Oscar Quiroga and Marco Quiroga are the owners and operators of OAS and upon information and belief are citizens and residents of Greenville County State of South Carolina.

4. Plaintiff entered into a contract with the Defendants on or about July 31, 2019 to purchase a 1999 Ford Mustang Cobra automobile (hereinafter "Cobra") for \$5,500.00 (Exhibit 1)¹. Plaintiff paid OAS a deposit of earnest money in the amount of \$500.00 leaving a balance of \$5,000.00 (Exhibit 2). The parties agreed the remaining balance would be financed by United Services Automobile Association ("USAA") as lender to Plaintiff. OAS agreed to produce necessary funding documents and that would direct to USAA to pay \$5,000.00 directly to OAS (Exhibit 3) and faxed the funding request on August 2, 2020.

5. A few days passed and OAS had not contacted the Plaintiff about completion of the sale. Plaintiff appeared at OAS to see about the delay. An OAS employee informed the Plaintiff that there was a problem with his financing from USAA. OAS instructed Plaintiff to wait for another OAS employee to discuss it further. Plaintiff waited for over an hour without speaking with anyone else. Plaintiff became frustrated and determined to cancel the transaction.

6. OAS accepted Plaintiff's termination of the contract and refunded Plaintiff his \$500.00 earnest money deposit on August 5, 2019 (Exhibit 4). OAS, however, never informed Plaintiff that OAS had in fact faxed the Funding Request to USAA on June 2, 2019.

7. Plaintiff, having canceled the contract and having received back his earnest money deposit, reasonably and rightfully presumed the transaction to be a closed matter.

¹ Plaintiff's only copy of the Sales Contract is difficult to read. Plaintiff has requested discovery from the Defendant which would include Defendant's copy of the original sales contract which presumably would be more legible. Defendant has refused to provide the documents and a motion to compel is forthcoming.

Plaintiff further reasonably believed that the financing paperwork created by OAS was no longer needed and that it had not been delivered to USAA.

8. USAA, however, accepted the Funding Request sent by OAS and electronically transferred \$5,000.00 to OAS as indicated on OAS's August 2019 bank statement (Exhibit 5). OAS did not inform the Plaintiff they received \$5,000.00.

9. Approximately one month later, USAA notified the Plaintiff that his first loan payment was due. Plaintiff realized the loan proceeds had in fact been delivered to OAS and that he now had a \$5,000.00 loan for an automobile that he had not purchased.

10. For more than 30 days, Plaintiff attempted to resolve this matter with OAS by simply having OAS return the \$5,000.00 to USAA or directly to Plaintiff. OAS was unresponsive and did not return the money.

11. Some time after the cancellation of Plaintiff's contract OAS sold the vehicle to another customer (Exhibit 6) and as it stands today, OAS sold the automobile twice with only one customer taking possession.

12. OAS bank records indicate from June 30, 2019 to May 31, 2020, OAS average ending statement balance was \$25,692.53 (Exhibit 11). The ending balance July 31, 2019, August 31, 2019, September 30, 2019 and October 31, 2019 was \$50,837.68, \$9,636.56, \$85,101.08 and \$4,820.71 respectively (Exhibits 5, 7, 8, and 9). Interestingly, OAS' October 31, 2019 balance was offset by \$51,300.00 in withdrawals, \$15,500.00 in cash and \$35,800.00 by way of cashier's check. (See Exhibit 9.1).

13. The Defendant refused to refund the \$5,000.00 to the Plaintiff or to USAA. After approximately 1 month to trying to resolve the matter, the Plaintiff hired counsel. Counsel drafted a demand letter requesting the Defendant return the \$5,000.00 plus interest and attorneys

fees and costs which totaled \$5,909.37 (Exhibit 10). The demand letter was personally delivered to the Defendant on October 18, 2019. The demand was ignored.

14. The Plaintiff has now incurred more than \$6,500.00 in attorney's fees and costs.

CAUSES OF ACTION

The Plaintiff filed this suit in the Court of Common Pleas and alleged the following causes of action: Violation of the South Carolina Unfair Trade Practices Act; Breach of Contract; Breach of Fiduciary Duty; Conversion; and Breach of Contract Accompanied by Fraudulent Act. The Plaintiff prayed for treble damages, reasonable attorney's fees and costs, actual and punitive damages and prejudgment interest as allowed by law.

LAW

The judgment sought pursuant to Rule 56(c) shall be rendered when the pleadings, affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether any triable issues of material fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Fleming v. Rose, 350 S.C. 488, 493–94; 567 S.E.2d 857, 860.

Upon review of the exhibits as well as the Plaintiff's affidavit in the light most favorable to the Defendant, seven issues are incontrovertible:

(1) The parties entered into a contract for the sale/purchase of an automobile and the contract was canceled on August 5, 2019 when OAS returned the Plaintiff his \$500 deposit for the vehicle;

(2) USAA paid OAS \$5,000.00 as is indicated in their August 2019 bank statement wherein \$5,000.00 was deposited into the Defendant's bank account on August 5, 2019;

(3) OAS did not return the \$5,000.00 to either to the Plaintiff or USAA;

(4) OAS sold the vehicle to another buyer on or before 11-1-2019 as is indicated by the Greenville County Tax Receipt in the name of Norris Don Franklin who is not related to or otherwise known to the Plaintiff;

(5) The Defendant's bank account had more than sufficient funds to reimburse the Plaintiff or USAA.

(6) OAS who is engaged in a trade and commerce breached the contract and committed an unfair, deceptive act and practice by selling the same vehicle to two different individuals and failing to return the purchase proceeds to the Plaintiff who never took possession of the vehicle, all constituting fraudulent deceptive practices and capable of replication.

(7) The Plaintiff incurred attorney's fees and costs and has suffered otherwise a monetary loss that resulted from the use and employment of an unfair and deceptive act by the Defendant.

THEREFORE, the Plaintiff moves for an Order of this Court for Summary Judgement as to all causes of action.

Respectfully submitted,

September 28, 2020

s/ Matthew J. Kappel

Matthew J. Kappel
114 Whitsett Street
Greenville, SC, 29601
864-467-9595 (voice)
864-467-1945 (fax)
SCBar # 15390

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Jessie J. Carter,)
)
Plaintiff)
)
v.)
)
Oscar Quirroga d/b/a)
Oscar Auto Sales,)
)
Defendant.)
)
_____)

COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-23-07116

AFFIDAVIT FROM THE PLAINTIFF

1. I am the named Plaintiff in the above entitled action.
2. I went to Oscar Auto Sales because OAS is a used car dealer and I noticed a used car that was on their lot that I was interested in buying. I ultimately agreed to buy the car and entered into a contact with OAS on July 31, 2019 to purchase a 1999 Ford Mustang VIN # 1FAFP46V6XF199472 for \$5,500.00 and paid them a \$500 deposit.
3. I agreed to finance the \$5,000.00 balance through my account with USAA which was preapproved. OAS agreed to furnish USAA all the necessary paperwork including a “funding request” so that USAA could send the \$5,000.00 balance directly to OAS.
4. After a few days without hearing anything from OAS, I drove to the car lot to see about the delay. An OAS employee told me there was a problem with the funding from USAA and that I had to wait to speak with someone about it. After waiting more than 1 hour and listening to comments made by the OAS employee about the funding issue, I became frustrated and decided to cancel the purchase. I spoke with Oscar directly and he agreed to cancel the transaction.

5. OAS refunded my \$500 deposit on August 5, 2019. At this point, I thought everything was over. Since OAS told me there was a problem with the funds, I didn't think USAA was going to send the money to OAS. Unfortunately, I was wrong. USAA sent OAS \$5,000 on August 5, 2019 – the same day OAS refunded my deposit.

6. OAS never informed me the loan proceeds from USAA had been delivered to them by accident. I only found out about it when USAA contacted me two weeks later about servicing the loan. I am now obligated to pay \$102 per month in principal and interest for a car I did not buy.

7. After learning from USAA that the money was actually paid to OAS, I drove directly to the OAS lot with my wife to sort out the problem and spoke with Oscar. Oscar wanted proof that USAA made the payment. My wife and I left and contacted USAA for paperwork proving payment had been made to OAS. I returned to OAS a week or so later with the paperwork and Oscar was not there. I left the paperwork with an employee who promised to give it all to Oscar and that he would call me, but he never did. My wife and I called OAS for approximately a week to ten days – all without a response from OAS. Basically, I got nowhere with OAS for more than 30 days.


8. I finally realized, that OAS wanted to keep the money – even though they didn't sell me a car. My wife and I decided to hire a lawyer to send a letter to OAS and thought the prospect of a lawsuit might inspire them to do the right thing. OAS ignored my lawyer's letter too.

9. I am not pleased that I had to file this lawsuit. I had to pay my lawyer a \$5,000.00 retainer to file the case for something OAS should have resolved on August 5th when the \$5,000 wire from USAA was deposited into their account. In addition, I am still paying principal and interest on the loan. A loan for a car I did not buy.

10. I have also learned that OAS sold the 1999 Mustang to another person sometime before November 1, 2019. So basically, OAS sold the same car twice.

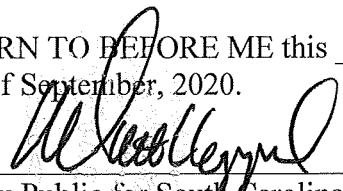
11. I have also reviewed through my lawyer OAS bank statements that show OAS has had plenty of money in their account to refund money that is not rightfully theirs. I am particularly frustrated when I see OAS withdrawing \$51,300.00 in cash in October 2019. Obviously, OAS does not care at all about resolving this matter.

12. Finally, I believe OAS is acting in bad faith, using deceit and unfair dealing to keep the \$5000 payment from USAA that is not rightfully theirs.



Jessie Carter

SWORN TO BEFORE ME this 24
Day of September, 2020.



Notary Public for South Carolina
My Commission Expires: 9/26/2029

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Jessie J. Carter,)
)
)
Plaintiff)
)
v.)
)
Marco Quiroga, Oscar Quiroga)
d/b/a Oscar Auto Sales,)
)
)
Defendant.)
_____)

COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-23-07116

AFFIDAVIT FROM THE PLAINTIFF

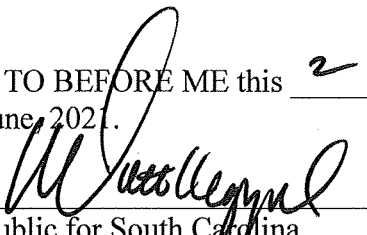
1. I am the named Plaintiff in the above entitled action.
2. I went to Oscar Auto Sales (hereinafter "OAS") because OAS is a used car dealer and I noticed a used car that was on their lot that I was interested in buying, a Ford 1999 Mustang. I worked with "Sam" who was a salesman at OAS but any discussion regarding the price of the vehicle required Oscar. Oscar was very much involved with the sale of the Ford.
3. When I settled on a price with Oscar, I paid the \$500 deposit directly to him.
4. When I canceled the contract on August 5, 2019, I cancelled the contract with Oscar.
5. Oscar returned the \$500 deposit. I watched Oscar sign the check which had an account ending in 2452.
6. When I learned USAA paid OAS \$5000, I drove directly to OAS lot with my fiancé to sort out the problem and spoke with Oscar. Oscar wanted proof that USAA made the payment. My wife and I left and contacted USAA for paperwork proving payment had been made to OAS. I returned to OAS a week or so later with the paperwork and Oscar was not there. I left the paperwork with an employee who promised to give it all to Oscar and that he would call me, but

he never did. My fiancé and I called OAS for approximately a week to ten days – all without a response from OAS. Basically, I got nowhere with OAS for more than 30 days. I tried to contact Oscar about refunding the money and Oscar refused to speak with me.

7. The sign out front of the dealership was called Oscar Auto Sales. Oscar very much appeared to me that he was running the business. Oscar nor anyone else at the business ever mentioned the name Marco to me. I also never saw anyone there named Marco.


Jessie Carter

SWORN TO BEFORE ME this 2
Day of June, 2021.


Notary Public for South Carolina
My Commission Expires: 9/26/2029

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
Jessie J. Carter,)
)
)
Plaintiff)
)
v.)
)
Marco A. Quiroga d/b/a)
Oscar Auto Sales, Oscar Quiroga)
d/b/a/ Oscar Auto Sales and)
Palmetto Surety Corporation,)
)
Defendants.)
_____)

COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-23-07116

THIRD AMENDED COMPLAINT

Jury Trial Demanded

COMES NOW the Plaintiff, by and through counsel files this 3d Amended Complaint and without objection from the Defendants Marco A. Quiroga d/b/a Oscar Auto Sales and Oscar Quiroga d/b/a Oscar Auto Sales and alleges as follows:

Background

1. The Plaintiff is a citizen and resident of Greenville County, State of South Carolina.
2. The Defendant Oscar Quiroga (hereinafter "OQ") d/b/a/ Oscar Auto Sales (hereinafter "OAS") was located in Greenville County at 3501 White Horse Road, Greenville, SC 29611 and was in the business and trade of selling used vehicles and licensed by the SCDMV. OAS was also in the business of directly financing the purchase of used vehicles or assisting customers with financing the purchase through third party lending institutions.
3. The Defendant Marco A. Quiroga (hereinafter "MQ") was also d/b/a/ OAS which was the same business in paragraph 2 above which was located in Greenville County at 3501 White Horse Road, Greenville, SC 29611 and was in the business and trade of selling used vehicles and licensed by the SCDMV. OAS was also in the business of directly financing the purchase of used vehicles or assisting customers with financing the purchase through third party

lending institutions.

4. MQ and OQ were the owners and operators of OAS and upon information and belief are citizens and residents of Greenville County State of South Carolina.

5. The Defendant Palmetto Surety Corporation (hereinafter "PSC") is a South Carolina Corporation that provides, *inter alia*, the surety bonds that all automobile dealers are required to obtain under the South Carolina Dealer Bond Statute (S.C. Code § 56-15-320 (B)) "as an indemnification for loss or damage suffered by an owner of a motor vehicle, or his legal representative."

6. PSC maintains its primary place of business at 75 Port City Landing, Suite 130, Mt. Pleasant, South Carolina, 29464.

7. PSC did provide such a bond to OAS through bond number PS1-18517 effective May 29, 2019.

8. The parties and subject of this action are properly before this court.

9. Plaintiff entered into a contract with OAS on or about July 31, 2019 to purchase a 1999 Ford Mustang Cobra automobile for \$5,500.00. Plaintiff paid OAS a deposit of earnest money in the amount of \$500.00 leaving a balance of \$5,000.00 which would be financed by United Services Automobile Association ("USAA") as lender to Plaintiff. USAA who had preapproved the Plaintiff for the loan was to pay OAS \$5,000.00 upon receipt of various documents from OAS.

10. OAS agreed to accept payment of the \$5,000.00 balance from USAA and provide USAA with the necessary transactional documents including the "Funding Request."

11. OAS faxed the Funding Request for disbursement of loan proceeds to USAA on or about August 2, 2019. In the meantime, a few days passed and OAS had not contacted the Plaintiff about taking possession of the vehicle. Plaintiff appeared at OAS to see about the delay.

An OAS employee informed the Plaintiff that there was a problem with his financing from USAA. OAS instructed Plaintiff to wait for another OAS employee to discuss it further. Plaintiff waited for over an hour without speaking with anyone else.

12. Plaintiff became frustrated and determined to cancel the transaction. OAS accepted Plaintiff's termination of the contract and refunded Plaintiff his \$500.00 earnest money deposit on August 5, 2019. OAS, however, never informed Plaintiff that OAS had in fact faxed the Funding Request to USAA on August 2d.

13. Plaintiff, having canceled the contract and having received back his earnest money deposit, reasonably and rightfully presumed the transaction to be a closed matter.

14. Approximately one month later, Plaintiff learned the \$5,000.00 loan proceeds had in fact been delivered to OAS (Exhibit 5) and that Plaintiff had a \$5,000.00 loan for an automobile that Plaintiff did not purchase and of which Plaintiff had never taken possession. Moreover, USAA notified Plaintiff to start servicing the loan by making the monthly payments to cover principal and interest, as if Plaintiff had closed the transaction for the vehicle with OAS.

15. For more than 30 days, Plaintiff attempted to resolve this matter with OAS, MQ and OQ by simply having OAS return the \$5,000.00 to USAA or directly to Plaintiff. OAS, MQ and OQ were unresponsive and did not return the money.

16. After approximately 1 month of trying to resolve the matter, the Plaintiff hired counsel. Counsel drafted a demand letter requesting the Defendants return the \$5,000.00 plus interest and attorney's fees and costs which totaled \$5,909.37 (Exhibit 1). The demand letter was personally delivered to OAS on October 18, 2019. The demand was ignored. The Plaintiff has now incurred more than \$10,000.00 in attorney's fees and costs.

17. On or before November 1, 2019, OAS sold the vehicle to another customer and as it stands today, OAS sold the automobile twice with only one customer taking possession (Exhibit 2).

18. OAS bank records indicate from June 30, 2019 to May 31, 2020, OAS average ending statement balance was \$25,692.53 (Exhibit 3). From June 30, 2019 to May 31, 2020, OAS average ending statement balance was \$25,692.53 (Exhibit 3). The ending balance July 31, 2019, August 31, 2019, September 30, 2019 and October 31, 2019 was \$50,837.68, \$9,636.56, \$85,101.08 and \$4,820.71 respectively (Exhibits 4, 5, 6, and 7). OAS's October 31, 2019 balance was offset by \$51,300.00 in withdrawals, \$15,500.00 in cash and \$35,800.00 by way of cashier's check. (Exhibit 8).

19. OAS, MQ and OQ have refused to refund the \$5,000.00 to the Plaintiff or to USAA.

20. During the course of this litigation, Defendants MQ and OQ closed OAS on or before August 3, 2020.

21. PSC is by virtue of the surety bond the indemnitor of MQ, OQ and OAS.

FOR A FIRST CAUSE OF ACTION
South Carolina Unfair Trade Practices Act
§ 39-5-10, et seq.

22. Paragraphs 1-21 are incorporated herein as if repeated verbatim.

23. MQ, OQ and OAS were in the business of selling used vehicles and they also provided services when they assisted their customers with direct financing through OAS or indirect financing through a lending institution. PSC is by virtue of the surety bond is the indemnitor of MQ, OQ and OAS.

24. MQ, OQ and OAS are persons as defined in § 39-5-10(a) and were at all times relevant to this case engaged in trade and commerce as defined in § 39-5-10(b).

25. With regard to the transaction with the Plaintiff, MQ, OQ and OAS engaged in an unlawful trade practice which had an adverse impact on the public interest.

26. The Plaintiff has suffered actual, ascertainable damages that resulted from the use and employment of the unlawful trade practice by MQ, OQ and OAS and the Plaintiff requests this
ROA 000042

court award three times the actual damages and award reasonable attorney's fees and costs.

FOR A SECOND CAUSE OF ACTION
Breach of Fiduciary Duty

27. Paragraphs 1-26 are incorporated herein as if repeated verbatim.

28. In the course of conducting the transaction, Plaintiff reposed trust and confidence in MQ, OQ and OAS to properly and lawfully close the transaction including using due care, fair dealing and open and complete honesty.

29. Plaintiff alleges MQ, OQ and OAS breached its fiduciary duty to Plaintiff by acting negligently, willfully, and recklessly causing actual and punitive damages to Plaintiff.

FOR A THIRD CAUSE OF ACTION
Breach of Contract

30. Paragraphs 1-29 are incorporated herein as if repeated verbatim.

31. Plaintiff and MQ, OQ and OAS entered into a contract to purchase an automobile.

32. Plaintiff canceled the contract and MQ, OQ and OAS acted in a manner consistent thereto by returning Plaintiff his earnest money.

33. The parties should be returned to the status they enjoyed prior to entering the contract.

34. MQ, OQ and OAS breached the contract by accepting the purchase money of \$5,000.00 after the transaction had been canceled and refusing to return the money.

35. As a result of Defendants' breach, Plaintiff has not been returned to his prior status and has suffered actual and punitive damages.

FOR A FOURTH CAUSE OF ACTION
Conversion

36. Paragraphs 1-35 are incorporated herein as if repeated verbatim

37. MQ, OQ and OAS are in possession of \$5,000.00 which it received from USAA as payment for an automobile that was never transferred to Plaintiff.

38. MQ, OQ and OAS have refused to return the \$5,000.00 to Plaintiff and is therefore wrongfully excising dominion and control over the money.

39. MQ, OQ and OAS's assumption and exercise of rights of ownership of the money and to the exclusion of Plaintiff is unauthorized.

40. As a result of MQ, OQ and OAS's conversion, Plaintiff has suffered actual and punitive damages.

FOR A FIFTH CAUSE OF ACTION
Breach of Contract Accompanied by Fraudulent Act

41. Paragraphs 1-40 are incorporated herein as if repeated verbatim

42. Plaintiff alleges the parties entered into a contract with the MQ, OQ and OAS and they breached the contract with a fraudulent intention and the breach was accompanied by a fraudulent act.

43. MQ, OQ and OAS's breach was an act of dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design.

44. As a result of Defendants' breach of contract accompanied by fraudulent act, Plaintiff has suffered actual and punitive damages.

FOR A SIXTH CAUSE OF ACTION
Action Against Surety under S.C. Code § 56-15-320(B)

45. Paragraphs 1 through 44 are incorporated herein as if repeated verbatim.

46. South Carolina Code § 56-15-320 (B) requires "each applicant as a dealer or wholesaler shall furnish a surety bond in the amount of thirty thousand dollars." The purpose of the bond is indemnification for loss or damage suffered by an owner of a motor vehicle or his legal representative, by reason of fraud practiced or fraudulent representation made in connection with the sale or transfer of a motor vehicle by a licensed dealer or wholesaler or the dealer's or

wholesaler's agent acting for the dealer or wholesaler. PSC did provide such a bond for MQ, OQ and OAS, a copy of which is attached as Exhibit 9.

47. The Plaintiff as an owner suffered actual losses and damages by reason of fraud practiced or fraudulent representations made in connection with the sale or transfer of a motor vehicle and said losses and damages falls under the Bond required by South Carolina Code § 56-15-320.

48. South Carolina Code § 56-15-320 (B) further provides that the bond is to provide:

indemnification for loss or damage suffered by an owner of a motor vehicle, or his legal representative, **by reason of fraud practiced or fraudulent representation made in connection with the sale or transfer of a motor vehicle by a licensed dealer or wholesaler or the dealer's or wholesaler's agent acting for the dealer or wholesaler or within the scope of employment of the agent or loss or damage suffered by reason of the violation by the dealer or wholesaler or his agent of this chapter. An owner or his legal representative who suffers the loss or damage has a right of action against the dealer or wholesaler and against the dealer's or wholesaler's surety upon the bond** and may recover damages as provided in this chapter. (Emphasis added).

49. All acts alleged above, including fraudulent practice or fraudulent representations, were made by agents of OAS, MQ and/or OQ and all said acts were done within the scope of their employment of OAS and/or as Agents for OAS.

50. Therefore, PSC is a proper party to this action, and should be held liable to indemnify the Plaintiff for all losses and damages caused by MQ, OQ and OAS.

THEREFORE, Plaintiff prays for the following relief:

- a) Treble damages;
- b) Reasonable attorney's fees and costs associated with prosecution of this action;
- c) Actual and punitive damages;
- d) Prejudgment interest as allowed by law; and
- e) For an Order holding that the PSC must indemnify the Plaintiff for all losses and damages suffered in connection with this sale of a motor vehicle, and

- (f) For such other and further relief as the court may deem just and proper.

signature to follow on the next page

Respectfully submitted,

s/Matthew J. Kappel

Matthew J. Kappel
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P.C.114 Whitsett Street
Greenville, South Carolina 29601
(864) 467-9595
(864) 467-1945 (fax)
S.C. Bar Number: 15390

Greenville, South Carolina
August 6, 2021

LAW OFFICES OF
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EMAIL: MATT@KAPPELLAW.COM
Also Licensed to Practice in North Carolina

TELEPHONE: (864) 467-9595

TELECOPIER: (864) 467-1945

October 18, 2019

By Personal Service (SC Process Service and Investigations, Inc.)

Oscar Auto Sales
3501 White Horse Road
Greenville, SC 29611

RE: Jessie Carter
1999 Mustang Cobra

Dear Sir or Madam:

In my 20 years of practicing criminal, civil and family law, I have never seen something quite like this.

My client, Jessie Carter attempted to purchase a 1999 Mustang Cobra from Oscar Auto Sales ("OSA") a couple of months ago and even paid a \$500 cash deposit. Prior to making the deposit, Jessie lined up financing through USAA and was prepared to authorize USAA to wire the funds to OSA upon closing the deal. OSA, however, contacted Jessie within a few days of paying the deposit to inform him there was a problem with the paperwork and the financing from USAA could not be accessed. Jessie eventually became frustrated with OSA and canceled the purchase on August 2d. OSA appeared to accept Jessie's cancellation and REFUNDED his deposit on August 5, 2019. Please see attached hereto check # 2673 from OSA in the amount of \$500.00 as Exhibit #1. OSA, however, submitted the "Dealer Funding Request" on August 1 without informing Jessie no did OSA advise USAA that Jessie canceled the deal. See "Dealer Funding Request" as Exhibit #2.

Several weeks after OSA returned Jessie's deposit money, USAA contacted him about paying the loan. Jessie did not sign any additional documents nor did he authorize the disbursement of the loan proceeds. Somehow the loan proceeds were accessed by OSA even though he did not purchase or take possession of the vehicle. Jessie is now left with the ridiculous situation of having a \$5,000.00 loan with no vehicle attached thereto and OSA "walking away" with a financial windfall. Please see attached Affidavit & Notification of Sale of Motor Vehicle" and Exhibit #3;

Of course, Jessie and his wife tried contacting OSA for a full refund of \$5,000.00 so they can reimburse USAA and close out the loan. Sadly, however, no one at OSA is interesting in speaking with them or fixing the problem. Jessie is left with no option but to hire my firm to resolve the problem.

Oscar Auto Sales
 October 18, 2019
 Page 2

OSA is evidently taking the highly unusual position that its okay to take loan proceeds without selling and transferring the vehicle to the customer. OSA also appears to be engaged in questionable practices in handling loan applications and correspondence with creditors. All of which in my view is improper and in violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"). See § 35-5-10, et seq. of the South Carolina Code of Laws. In particular, violations of the SCUTPA will result in treble damages and attorney's fees. See § 39-5-140(a) that states

If the court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of Section 39-5-20, the court **shall award three times the actual damages sustained** and . . . **shall award reasonable attorney's fees and costs** (emphasis added).

I believe this case is a prototypical violation of the SCUTPA and that my client will be awarded \$15,000.00 plus reasonable attorneys fees. To avoid litigation, however, Jessie has authorized me to make the following offer to OSA:

1 st Loan Payment (9/15/19)	\$102.29
2 nd Loan Payment (10/15/19)	\$102.29
Loan Balance	<u>\$4,879.79</u>
	\$5,084.37
Attorney's Fees	\$750.00
Process Server	\$75.00
TOTAL:	<u>\$5,909.37</u>

Deliver a cashier's check to my law office within 7 days of this letter in the amount of \$5,909.37 payable to the Law Office of Mathew J. Kappel and REMOVE Jessie's name from the title if a title was issued. If payment is not received and Jessies name is not removed from the title within 7 days, we will file an action in the Court of Common Pleas and pray for a judgment against OSA in the amount of \$15,253.11 (\$5,084.37 x 3) and attorney's fees and costs.

I look forward to hearing from you.

Sincerely yours,



Matthew J. Kappel

Enclosures
 cc.: Jessie Carter
 MK/sk

EXHIBIT 2 3d AMENDED COMPLAINT

The service fee for Hospitality Taxes will also be waived until further notice.



Vehicle Tax Detail Information

Details for Vehicle

Basic Information

Name: NORRIS DON FRANKLIN
Levy Year: 2018
Account #: 2019 00 4578195 01 001



Vehicle Information

Year	Make	Model	Body	Wgt	Gross Wgt	VIN #	District
1999	FORD		CN	0	0	1FAFP46V6XF199472	367

Exp Date:
Date Paid: 11/01/2019
Status:

Assessment: 50
Months: 12
Miles: 0

Tax Summary

County Millage: 309.90
City Millage: 0

Total Taxes: \$15.50
Road Fee: 25.00
DMV Decal Fee: 0
NSF Fee:
High Mile Credit: 0

Total Billed: \$40.50
Total Paid: \$40.50



Amended Complaint

OAS ENDING BALANCE

Checking Account 2452

30-Jun-19	\$	26,440.82
31-Jul-19	\$	50,837.68
31-Aug-19	\$	9,636.56
30-Sep-19	\$	85,101.08
31-Oct-19	\$	4,820.71
30-Nov-19	\$	8,373.79
31-Dec-19	\$	17,163.22
31-Jan-20	\$	5,317.81
29-Feb-20	\$	26,736.40
31-Mar-20	\$	12,583.98
30-Apr-20	\$	30,054.71
31-May-20	\$	31,243.54
AVERAGE	\$	25,692.53



000038



EXHIBIT 4

3d AMENDED COMPLAINT

Statement Date	Page No.
Jul 31, 2019	1 of 6

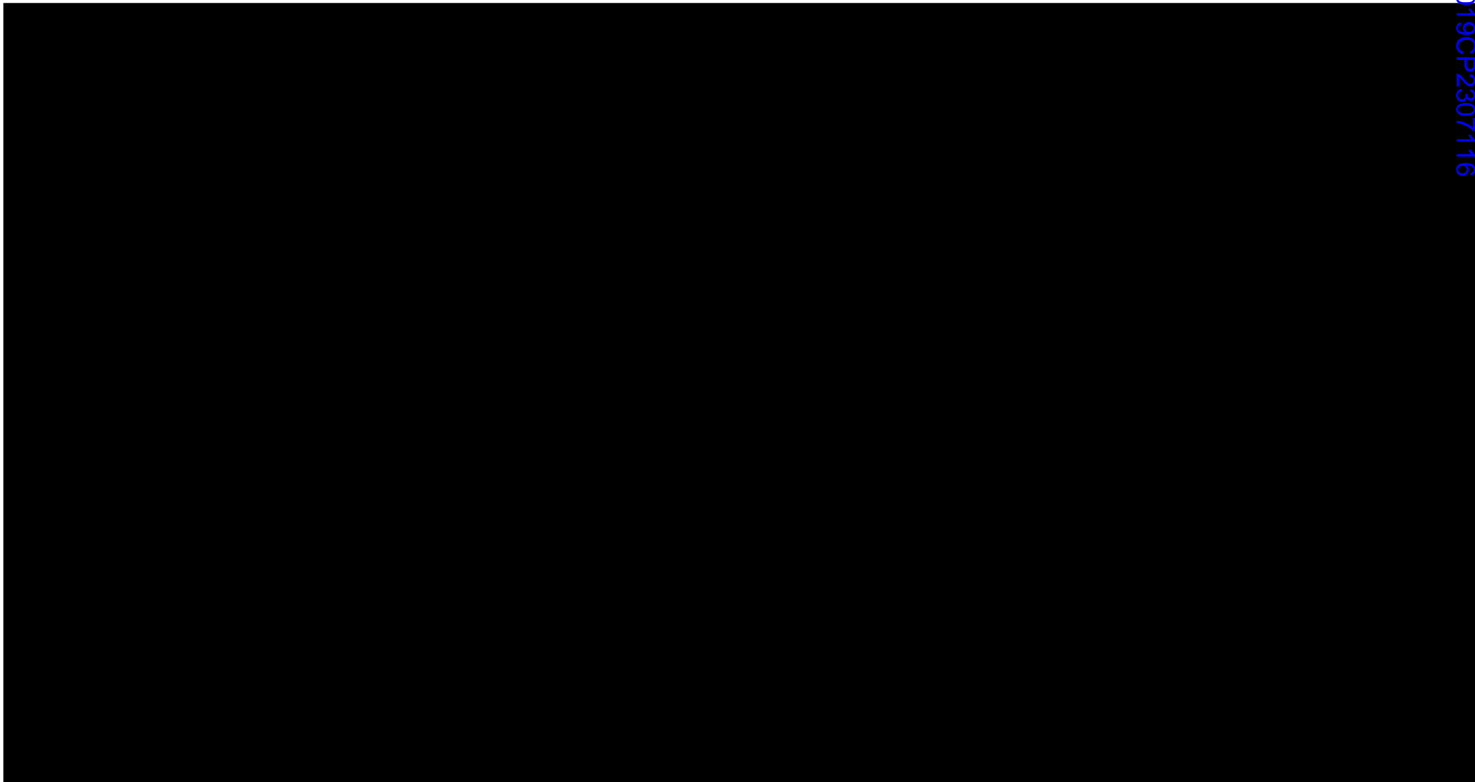
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000038

38 115499 R P0 T0
 MARCO A QUIROGA
 DBA OSCAR'S AUTO SALES
 3501 WHITE HORSE RD
 GREENVILLE SC 29611

BASIC BUSINESS CHECKING - XXXXXX				
Beginning Balance	75 Deposits/Credits	180 Withdrawals/Debits	Days This Period	Ending Balance
\$26,440.82	+ \$276,889.17	- \$252,492.31	31	\$50,837.68





001357



EXHIBIT 7

3d AMENDED COMPLAINT

Statement Date	Page No.
Oct 31, 2019	1 of 5



001357

1357 116430 **AUTO5-DIGIT 29611 R P1 T6
 MARCO A QUIROGA
 DBA OSCAR'S AUTO SALES
 3501 WHITE HORSE RD
 GREENVILLE SC 29611

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BASIC BUSINESS CHECKING - XXXXX				
Beginning Balance	68 Deposits/Credits	162 Withdrawals/Debits	Days This Period	Ending Balance
\$85,101.08	+ \$182,219.87	- \$262,500.24	31	\$4,820.71

Date	DEPOSITS / OTHER CREDITS	Amount
[REDACTED]		

EXHIBIT 8

3d AMENDED COMPLAINT

Oscar Auto Sales Withdrawals Oct-19

10/2/2019	\$	35,800.00	Cashier's Chk
10/9/2019	\$	2,500.00	Cash
10/18/2019	\$	3,000.00	Cash
10/23/2019	\$	4,000.00	Cash
10/24/2019	\$	6,000.00	Cash

\$ 51,300.00

DDA DEBIT TRANSACTIONS Oscar Auto Sales DATE 9/27/19.

EFFECTIVE DATE _____

DRAWN BY Marco A. Quiroga ACCOUNT NUMBER * [REDACTED]

INITIALS [REDACTED]

SELECTOR *115

\$ 35,800.00

0 \$35,800.00 10/2/2019

100 Deposit Forward 150 MMDA Withdrawal
105 Debit Adjustment 144 HSA Distribution
107 Telephone Trf W/D 146 Closing Withdrawal
109 Transfer Withdrawal 147 Auto Closing Withdrawal
115 Withdrawal

Received From **BANK OF TRAVELERS REST** CHECKING WITHDRAWAL
TRAVELERS REST, SC 29690

Date 10/9/19 * [REDACTED]

twenty five hundred Dollars \$ 2,500.00
Marco Quiroga

Print Name [REDACTED]
Signature [Signature]

0 \$2,500.00 10/9/2019

Received From **BANK OF TRAVELERS REST** CHECKING WITHDRAWAL
TRAVELERS REST, SC 29690

Date 10/18/19 * [REDACTED]

Three thousand 00/100 Dollars \$ 3,000.00

Print Name [REDACTED]
Signature [Signature]

0 \$3,000.00 10/18/2019

MARCO A QUIROGA 30092452

Received From **BANK OF TRAVELERS REST** CHECKING WITHDRAWAL
TRAVELERS REST, SC 29690

Date Oct. 23, 19 * [REDACTED]

Dollars \$ 4,000.00

Print Name [REDACTED]
Signature [Signature]

0 \$4,000.00 10/23/2019

Received From **BANK OF TRAVELERS REST** CHECKING WITHDRAWAL
TRAVELERS REST, SC 29690

Date 10/24/2019 * [REDACTED]

six thousand Dollars \$ 6,000.00

Print Name [REDACTED]
Signature [Signature]

0 \$6,000.00 10/24/2019

South Carolina Indemnity Agreement

The undersigned applicant and indemnitors hereby request Palmetto Surety Corporation (the "Company") to become surety for the above bond. The undersigned hereby certify the truth of all statements in the application; authorize the Company to verify the information and to obtain additional information from any source, including obtaining a credit report at the time of application. In any review or renewal, at the time of any potential or actual claim, or for any other legitimate purposes as determined by the Company in its reasonable discretion, and jointly and severally agree:

- 1) To pay the usual premiums, including renewal premiums, to the Company or its agents, when due.
- 2) **To completely INDEMNIFY the Company from and against any liability, loss, cost, attorney's fees and expenses whatsoever which the Company shall at any time sustain and surety or by reason of having been surety on the bond or any other bond issued for applicant, or for the enforcement of this agreement, or in obtaining a release or evidence of termination under such bonds; regardless of whether such liability, loss, costs, damages, attorney's fees and expenses are caused, or alleged to be caused, by the negligence of the company.**
- 3) To furnish the Company with satisfactory and conclusive termination evidence that there is no further liability on this bond or any other bond issued for applicant.
- 4) Upon demand by the Company for any reason whatsoever, to deposit current funds with the Company in an amount sufficient to satisfy any claim against the Company by reason of such suretyship.
- 5) That the Company shall have the right to handle or settle any claim or suit in good faith. An itemized statement of loss and expense incurred by the Company, sworn to by an officer of the company, shall be prima facie evidence of the fact and extent of the liability of the undersigned to the company.
- 6) That the Company may decline to become surety on any bond and may cancel or amend any bond without cause and without any liability which might arise therefrom.
- 7) That the Company shall, without notice, have the right to alter the penalty, terms and conditions of any bond issued for undersigned, and this agreement shall apply to any such altered bond.
- 8) That if a contract or performance bond is issued hereunder, the undersigned hereby assign to the Company any monies now due or hereafter becoming due under the contract, including all deferred payments and retained percentage, supplies, tools, plants, equipment and materials due or used on the contract.
- 9) At the company's discretion, this indemnity agreement shall be governed in all respects by the laws of the State of South Carolina and the undersigned applicant and indemnitor's consent to the jurisdiction of the courts of the State of South Carolina and the United States District Court in all actions or proceedings arising from or relating to this indemnity agreement.
- 10) That this indemnity may be canceled as to subsequent liability by an Indemnitor upon written notice to the Company at 109 River Landing Drive, Suite 200 Charleston South Carolina 29492, effective ten (10) days after the earliest date hereafter upon which the Company could have canceled all bonds in force for applicant.
- 11) In the event of any payment by the company, to pay the Company interest on each amount at the highest legal rate from the date such payments are made.
- 12) No suit, action or proceeding by reason of any default shall be brought on this bond after one (1) year from the final date of completion of the work done by the principle OSCAR'S AUTO SALES.

By clicking agreed you acknowledge acceptance of such conditions and agree to all terms. Any claims filed against this bond will be held liable by you in order to make the surety as a whole to the default of your action. By the display of your name as Indemnitor by electronic display you so agree to all terms and obligations.

Applicant MUST sign this indemnity agreement.

Electronically signed this eleventh day of June, 2019



PALMETTO SURETY
CORPORATION

Where the Agents and Agencies are First and Foremost.

Palmetto Surety Corporation will safeguard the confidentiality and security of the information we obtain from you. This notice describes our privacy policy as it relates to the collection, protection and disclosure of such information resulting from credit card transactions only.

Collection of Information

Palmetto Surety Corporation will collect and use information obtained from credit card transactions only for business purposes. These business purposes include the payment of insurance premium, build up fund payments, and various other fees.

Protecting Your Credit Card Information

The credit card information provided by you to Palmetto Surety Corporation will be stored in a confidential manner. Our employees may access such information only when there is an appropriate business reason to do so, such as when a refund must be issued back to the credit card. We maintain physical, electronic and procedural safeguards to protect your information, and our employees are required to follow these privacy standards.

Disclosure of Your Information

Palmetto Surety Corporation does not disclose any nonpublic information (such as credit card number and their expiration dates) about our agents or former agents to anyone, except as required by law. Information may also be disclosed for audit purposes, to regulatory agencies or for other general administrative services. We do not disclose information about you to other entities who may want to sell their products to you.

**Palmetto Surety Corporation
109 River Landing Drive
Charleston, SC 29492**



South Carolina Department of Motor Vehicles
Motor Vehicle Dealer and Wholesaler Surety Bond

DLA-1B
(Rev. 11/17)

Dealer Number: 18870

NOTE: Please read instructions on second page before executing bond.

Bond Number: PS1-18517 Effective Date: 5/29/2019 12:00:00 AM Time: 12:00 AM PM

KNOW ALL MEN BY THESE PRESENTS: that we OSCAR'S AUTO SALES
 (Name of Dealership)

Conduct business at 3501 White Horse Rd, Greenville, SC 29611-5540

As Principal and Palmetto Surety Corporation as Surety

are duly authorized to do business within the State of South Carolina, are held and firmly bound unto the people of the State of South Carolina to indemnify any owner of a motor vehicle, or his legal representative, who may be aggrieved by any fraud, fraudulent representation or violation by said Principal, salesmen, or representatives acting for such Principal within the scope of employment of such salesmen or representatives, of any of the provisions of Title 56 of the South Carolina Code of Laws relating to Motor Vehicle Dealers and the sale and transfer of motor vehicles, in the aggregate liability amount of:

CHECK ONE:

- Thirty Thousand Dollars (\$30,000) – All dealers, wholesalers, or travel trailers
- Fifteen Thousand Dollars (\$15,000) – Wholesale Auto Auction, Motorcycle Dealers, and Motorcycle Wholesalers

lawful money of the United States of America, for which payment, well and truly to be made, we bind ourselves, jointly and severally, our joint and several heirs, executors, administrators, successors, and assigns, firmly by these presents.

WHEREAS, the above bounden Principal desires that a motor vehicle dealer's or wholesaler's license be issued and thereafter reissued from time to time by South Carolina Department of Motor Vehicles;

WHEREAS, this bond executed by the said Principal and Surety is filed with the South Carolina Department of Motor Vehicles, to enable said Principal to obtain a license from the Department under the provisions of that law.

NOW THEREFORE, the conditions of this obligation are such that if the Principal shall well and truly observe and strictly and faithfully comply with the aforesaid requirements of law and shall save and keep harmless any owner of a motor vehicle or his legal representation made to him by such Principal, such Principal's salesmen or representatives acting for the Principal or within the scope of the employment of such salesmen or representatives, or from any loss or damage suffered by reason of the violation such Principal or any such salesmen or representatives of any of the provisions of Title 56 of the South Carolina Code of Laws relating to Motor Vehicle Dealers and the sale and transfer of motor vehicles, then this obligation shall be null and void; otherwise it shall remain in full force and effect. It is understood that the injured party need not obtain a judgment against the Principal before making claim against the Surety on this bond.

This bond shall not automatically expire with the license for which it is initially issued, but shall continue indefinitely, from license year to license year, upon timely payment of the premium thereon. Before this bond may be cancelled, a thirty (30) day written notice must be given to the Department of Motor Vehicles. Such cancellation does not affect any liability incurred or accrued prior to cancellation.

Marco Quiroga

Printed Name of Owner or Authorized Corporate Officer (Entity Owned)

Scott Willis (Palmetto surety Corp.)

(Surety)

By: *Scott Willis* (AIF)
 (Title)

Signature of Owner or Authorized Corporate Officer

VISIT US AT OUR WEBSITE www.scdmvonline.com

ROA 000058



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South Carolina Department of Motor Vehicles Motor Vehicle Dealer's and Wholesaler's Surety Bond Instructions

DLA-1B (IS)
(Rev. 11/17)

- Every applicant for a motor vehicle dealer's and wholesaler's license must furnish the original Surety Bond for the amount required and Power of Attorney on a form to be prescribed by the Executive Director of the Department of Motor Vehicles. The purpose of the bond is to provide indemnity for loss or damage caused an individual due to fraud or fraudulent representation in relation to a sale or transfer of a motor vehicle by a licensed dealer, wholesaler or their employees.

Surety Bond Amount	Which Dealers and Wholesalers must furnish a Surety Bond for this Amount
Thirty Thousand Dollars (\$30,000)	All dealers, wholesalers, or Travel Trailers
Fifteen Thousand Dollars (\$15,000)	Wholesale Auto Auction, Motorcycle Dealers, or Motorcycle Wholesalers

- The Executive Director of the Department of Motor Vehicles has prescribed a standard form of bond for motor vehicle dealers - Motor Vehicle Dealer and Wholesaler Surety Bond (Form DLA-1B), which is set forth on the reverse side hereof.
- This bond must be executed by the applicant, as principal, and by a corporate surety company authorized to do business in this State, as surety, and given to the Department before the application can be acted upon.
- This bond must be signed by either the owner, partner or corporate officer of the dealership (Principal) and an agent from your surety company.
- The bond must be effective prior to or at the time of the granting of a license.
- If the bonding company has changed, please submit a new original bond and Power of Attorney at the time of renewal.
- If, during the license year, there is any change in a principal's name, address or ownership then an endorsement from the surety agent or a new bond will be required along with a new application for Dealer/Wholesaler License.

DATE AND ATTACHED TO ORIGINAL BOND
PALMETTO SURETY CORPORATION INSURANCE COMPANY
CHARLESTON, SOUTH CAROLINA
POWER OF ATTORNEY

BOND NO. **PS1-18517**

KNOW ALL MEN BY THESE PRESENTS: That PALMETTO SURETY CORPORATION AT CHARLESTON, SOUTH CAROLINA, a South Carolina Corporation, having its principal office at Charleston, County of Berkeley, State of South Carolina, adopted the following Resolution by the directors of the company on February 10, 2003 to wit:

"RESOLVED, that the Chief Executive Officer or appointee of the company shall have the power and authority to appoint Attorneys-in-fact, and to authorize them to execute on behalf of the company, and attach the seal of the company thereto, bonds and undertaking, recognizances, contracts of indemnity, and other writings obligatory in the nature thereof. Signatures of officers and seal of company imprinted on such powers of attorney shall be as binding upon said companies, as fully and amply, to all intents and purposes.

Its true and lawful attorney(s)-in-fact, to execute, seal and deliver for and on its behalf as surety, and all bonds and undertaking, recognizances, contracts of indemnity and other writings obligatory in the nature thereof, and the execution of such instrument(s) shall be as binding upon the Palmetto Surety Corporation Insurance Company at Charleston, South Carolina as fully amply, to all intents and purposes, as if the same had been duly executed and acknowledged by its regularly elected officers at its principal office.

IN WITNESS WHEREOF, the PALMETTO SURETY CORPORATION INSURANCE COMPANY AT CHARLESTON, SOUTH CAROLINA, has caused this to be signed by its authorized officer this 2nd day of January, 2019

Scott B. Willis, Chief Executive Officer



South Carolina
County of Berkeley

On this 2nd day of January, 2019 before me personally came Scott B. Willis, to me know, who being duly sworn, did depose and say that they are Scott B. Willis, Chief Executive Officer of Palmetto Surety Corporation, the corporation described in and which executed the above instrument, that they know the seal of said corporation, that the seal affixed to said instrument is such Corporate Seal, and that they received said instrument on behalf of the corporation by authority of their office pursuant to a Resolution of the Board of Directors of said corporation.

DOLLIE T. PILSON
Notary Public, State of South Carolina
My Commission Expires April 16, 2023

Dollie Pilson, Notary Public

State of South Carolina
County of Berkeley

I, the Chairman of the Board of Palmetto Surety Corporation, do hereby certify that the authority to issue a power of attorney as approved by the Board of Directors resolution shall remain in full force and effect as written and has not been revoked and the resolution as set forth are now in force.

Signed and sealed at Charleston, South Carolina. Dated this 11th day of June, 2019



Not valid if iBond Verified seal and Bond Number not in Color



PALMETTO SURETY
CORPORATION

Where the Agents and Agencies are First and Foremost.

**All Forms Must Be Printed In Color
To Be Valid**

Palmetto Surety Instruction Page:

This page will provide information to explain the bond forms you have just printed out. There are three very important forms you must understand.

The Power of Attorney

This document represents Palmetto Surety Corporation as an approved Insurance Carrier in the state of the bond purchased. This document must be provided to the party requesting the bond along with the surety bond form.

Surety Bond Form

This document represents you, as the principle, will follow all rules and guidelines. This form provides all parties involved to this agreement. This document also must be provided to the party requesting the bond along with the Power of Attorney.

Indemnity Agreement

This form represents your obligation to the surety and actions taken by the surety if a claim is issued for your actions. You have accepted this agreement by purchasing this bond. Once submitted to the obligee this bond is considered an active policy.

Complete the Following:

The Surety Bond Form will require your signature in the principle section. In some cases certain surety bond forms will also require a notary to your signature. Please review this form in its entirety to make sure all information is correct.

If you should have any problems submitting the following forms, or a mistake is made on one of the forms, please contact Palmetto Surety Corporation at 843-971-5441.

We would like to thank you for choosing Palmetto Surety Corporation as your Surety Bond provider. You will receive an electronic notice annually for your bond renewal. We hope our services meet your expectations.

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

JESSIE J. CARTER

Plaintiff

vs.

MARCO A. QUIROGA D/B/A OSCAR
AUTO SALES, OSCAR QUIROGA D/B/A
OSCAR AUTO SALES and PALMETTO
SURETY CORPORATION,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

CASE NO.: 2019-CP-23-07116

**DEFENDANT PALMETTO SURETY
CORPORATION'S MOTION TO
DISMISS, ANSWER TO THIRD
AMENDED COMPLAINT AND
CROSSCLAIM AGAINST ALL OTHER
DEFENDANTS**

The Defendant, Palmetto Surety Corporation (hereinafter "Defendant PSC") appears in this action and asserts the following motion and answer.

FOR A FIRST DEFENSE AND MOTION TO DISMISS
(Failure to Allege Sufficient Facts)

1. The Plaintiff has failed to allege facts to constitute a cause of action against Defendant PSC upon which relief may be granted and the Complaint should be dismissed pursuant to the provisions of SCRCP Rule 12(b)(6). Defendant PSC cross references and incorporates the motion to dismiss filed simultaneously herewith.

FOR A SECOND DEFENSE AND MOTION TO DISMISS
(Failure to State a Valid Claim)

2. The Plaintiff has failed to state a valid cause of action in the Complaint against the Defendant PSC and the Complaint should be dismissed pursuant to the provisions of SCRCP Rule 12(b)(6). Defendant PSC cross references and incorporates the motion to dismiss filed simultaneously herewith.

FOR A THIRD DEFENSE
(Sole Negligence of Others)

3. The allegations contained in the preceding paragraphs are incorporated herein as if fully repeated verbatim.

4. Plaintiff's alleged injuries and damages were proximately caused by the negligence of other persons or entity no under the control or supervision of this Defendant PSC so as to bar recovery against Defendant PSC.

FOR A FOURTH DEFENSE
(Reliance on Other Defenses)

5. The allegations contained in the preceding paragraphs are incorporated herein as if fully repeated verbatim.

6. The Defendant hereby gives notice that they intend to rely upon such other affirmative defenses as may become available or apparent during the course of discovery and thus reserves the right to amend their Answer to assert any such defenses.

FOR A FIFTH DEFENSE
(Incorporation of Affirmative Defenses)

7. The allegations contained in the preceding paragraphs are incorporated herein as if fully repeated verbatim.

8. The undersigned denies each and every allegation of the Complaint, asserts those affirmative defenses set forth in Rule 8 of the South Carolina Rules of Civil Procedures, contests service and personal jurisdiction, and raises those defenses set forth in Rule 12, all to the extent they are applicable.

FOR A SIXTH DEFENSE

9. Defendant PSC reiterates the allegations of paragraphs 1-8 and incorporates them by reference.

10. Subject to Defendant PSC's motion to dismiss, and without waiving any of them, Defendant PSC denies each and every allegation of the Complaint, which is not specifically admitted, qualified or explained and strict proof is demanded thereof.

11. Upon information and belief, paragraphs 1-4 of the Complaint do not attempt to assert any allegation against Defendant PSC and do not require any response from Defendant PSC. To the extent a response to the allegations set forth in paragraphs 1-4 is required, Defendant PSC denies the same.

12. Defendant PSC denies the allegations contained in Paragraph 5 as written.

13. Defendant PSC admits the allegations contained in Paragraph 6.

14. Defendant PSC admits only so much of the allegations of Paragraph 7 as alleges that Defendant PSC issued a bond.

15. Defendant PSC denies Paragraph 8.

16. Upon information and belief, paragraphs 9 – 20 of the Complaint do not attempt to assert any allegation against Defendant PSC and do not require any response from Defendant PSC. To the extent a response to the allegations set forth in paragraphs 9-20 is required, Defendant PSC denies the same.

17. Defendant PSC denies the allegations of Paragraph 21 as written.

18. Defendant repeats and realleges Paragraphs 1-21 as if restated herein.

19. Defendant has insufficient information regarding the first allegation contained in Paragraph 23 and denies the same. Defendant PSC denies all remaining allegations in Paragraph 23.

20. Upon information and belief, paragraphs 24- 45 of the Complaint do not attempt to assert any allegation against Defendant PSC and do not require any response

from Defendant PSC. To the extent a response to the allegations set forth in paragraphs 24-45 is required, Defendant PSC denies the same.

21. Defendant PSC admits Paragraph 46.

22. Defendant PSC has insufficient information regarding the allegations of paragraph 47, and therefore, denies the same.

23. Defendant PSC admits Paragraph 48.

24. Defendant PSC has insufficient information regarding the allegations of paragraph 49, and therefore, denies the same.

25. Defendant PSC denies all allegations contained in Paragraph 50.

FURTHERING ANSWERING BY WAY OF CROSS-CLAIMS AGAINST ALL OTHER DEFENDANTS FOR INDEMNIFICATION

26. Defendant PSC hereby incorporates each of its responses and defenses previously stated as if set forth herein verbatim.

27. Defendant Oscar Quiroga (hereinafter "OQ") d/b/a Oscar Auto Sales (hereinafter "OAS") was located in Greenville County, South Carolina.

28. Defendant Marco A. Quiroga (hereinafter "MQ") was also d/b/a OAS located in Greenville County, South Carolina.

29. Defendant PSC issued a Motor Vehicle Dealer and Wholesaler Surety Bond to OAS with OAS as Principal and PSC as Surety with the effective date of May 29, 2019.

30. Defendant PSC and OAS entered into a South Carolina Indemnity Agreement dated June 11, 2019 which states, in pertinent part, that OAS was, "to completely indemnify the Company (PSC) from and against any liability, loss, cost, attorney's fees and expenses whatsoever which the Company shall at any time sustain and surety or by reason of having been surety on the bond or any other bond issued for

applicant, or for the enforcement of this agreement, or in obtaining a release or evidence of termination under such bonds; regardless of whether such liability, loss, costs, damages, attorney's fees and expenses are caused, or alleged to be caused, by the negligence of the company."

31. Plaintiff has filed suit against OQ, MQ and OAS alleging loss or damage from a breach of contract accompanied by fraudulent act and has filed an action on the bond against the surety pursuant to S.C. Code §56-15-320(B).

32. To the extent Plaintiff proves such allegations and in the event PSC is found liable to Plaintiff for damages as alleged, PSC alleges it is without fault and is entitled to judgement against OQ, MQ and OAS for full and complete indemnity against any such liability, plus costs expenses and attorneys' fees in defending this action.

WHEREFORE, having answered Plaintiff's Third Amended Complaint and asserted Crossclaim, Defendant PSC prays for the following relief:

- a. For dismissal of the Complaint as to Defendant PSC based upon failure to allege sufficient facts upon which relief may be granted;
- b. For dismissal of the Complaint as to Defendant PSC based upon failure to state a valid cause of action against Defendant PSC;
- c. For dismissal of the Complaint as to Defendant PSC for each of the specific reasons set forth and alleged in this answer.
- d. For this Court to grant PSC's Crossclaims against OQ, MQ and OAS;
- e. An award of actual and consequential damages in favor of PSC;
- f. And for any other relief as this Court may find just and proper.

BREWER LAW FIRM, LLC

s/ Amanda D. McKendrick

Barrett R. Brewer, Esq.
Amanda D. McKendrick, Esq.
P.O. Box 1847
510 Mill Street #2B (29464)
Mount Pleasant, SC 29465
o: (843) 779-7454
f: (843) 779-7456
e: barrett@brewerlawfirm.com
e: amanda@brewerlawfirm.com
Attorneys for the Defendant Palmetto
Surety Corporation

September 16, 2021

Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

JESSIE J. CARTER

Plaintiff

vs.

MARCO A. QUIROGA D/B/A OSCAR
AUTO SALES, OSCAR QUIROGA D/B/A
OSCAR AUTO SALES and PALMETTO
SURETY CORPORATION,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

CASE NO.: 2019-CP-23-07116

**DEFENDANT PALMETTO SURETY
CORPORATION'S MOTION TO
DISMISS THIRD AMENDED
COMPLAINT**

NOW COMES the Defendant Palmetto Surety Corporation ("PSC") by and through it's undersigned attorney respectfully moves this Court to dismiss Plaintiff's Third Amended Complaint against PSC pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure as it fails to state facts sufficient to constitute a valid cause of action against PSC since Plaintiff was never an owner of a motor vehicle as required by S.C. Code §56-15-320(B).

The allegations against PSC in the Third Amended Complaint are that PSC issued a Motor Vehicle Dealer and Wholesaler Surety Bond ("the Bond") to Oscar Auto Sales ("OAS") with OAS as Principal and PSC as Surety with the effective date of May 29, 2019. The language of the Bond was very specific and clear that the Principal (OAS) and the Surety....., "are firmly bound unto the people of the State of South Carolina to indemnify any **owner** of a motor vehicle, or his legal representative, who may be aggrieved by any fraud, fraudulent representation or violation by said Principal, salesman, or representatives acting for such Principal within the scope of employment of such

salesmen or representatives,..... relating to Motor Vehicle Dealers **and the sale and transfer of motor vehicles**” (emphasis added).

The South Carolina Department of Motor Vehicles website regarding the purpose of the motor vehicle dealer and wholesaler surety bonds states, “The bond provides security or protection against loss or damage due to fraud or fraudulent representation **in relation to a sale or transfer** of a motor vehicle by a licensed dealer, wholesaler, or their employees.” (Emphasis added) <https://www.scdmvonline.com/Business-Customers/Dealers/Dealer-Licenses/Surety-Bond>.

In Plaintiff’s own words from the Complaint, the Plaintiff cancelled the transaction prior to purchasing the subject automobile from OAS. There was no fraud or fraudulent representation on the part of the Defendants related to a completed sale or transfer. Since the transaction was cancelled by the Plaintiff prior to purchase, there was never a “sale and transfer” of a motor vehicle from OAS to Plaintiff. Plaintiff was never an “owner” of a motor vehicle sold by OAS.

A surety bond is to protect the public, however, the protection of the bond only extends to the violations falling within the coverage of the particular, specific bond provisions. Kennedy v. Henderson, 289 S.C. 393, 394-395. Just as in Kennedy, the surety bond in question in this instance is very specific and clear as to the coverage. The language of the Bond is not triggered and coverage under the Bond is not applicable. Under the set of facts as alleged in the Third Amended Complaint the Plaintiff’s claims do not fall within the protection extended by the Bond and therefore there is no cause of action against Defendant PSC. Moreover, the claims by Plaintiff amount to no more than a dispute with his own financing company, USAA and about USAA forwarding purchase

money for a vehicle the Plaintiff never acquired title to or ownership of.

The Plaintiff has failed to allege facts to constitute a cause of action against Defendant PSC upon which relief may be granted. Further, the Plaintiff has failed to state a valid cause of action in the Complaint against the Defendant PSC.

WHEREFORE, the Complaint should be dismissed pursuant to the provisions of SCRCP Rule 12(b)(6).

BREWER LAW FIRM, LLC

s/ Amanda D. McKendrick

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Surety Corporation

September 16, 2021

Charleston, South Carolina

STATE OF SOUTH CAROLINA)	COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE)	
)	
Jessie J. Carter,	)	Case No.: 2019-CP-23-07116
)	
Plaintiff	)	PLAINTIFFS RETURN DEFENDANT
	)	PALMETTO SURETY CORP MOTION TO
v.	)	DISMISS AND PLAINTIFF’S MOTION FOR
	)	SUMMARY JUDGEMENT
Oscar Quirroga d/b/a)	
Oscar Auto Sales and)	
Marco A. Quiroga d/b/a)	
Oscar Auto Sales, and Palmetto)	
Surety Corporation,)	
)	
Defendants.)	
)	

The Plaintiff filed his 3d Amended Complaint to bring the Defendant Oscar AutoSales’s (hereinafter “OAS”) bond holder into the case. In this matter, Palmetto Surety Corporation (hereinafter “PSC”) is the bond holder as defined by SC Code Sec. 56-15-320(B). PSC answered the Complaint and filed a Motion to Dismiss in which they argue the Plaintiff was not an “Owner” of a vehicle and therefore not entitled to indemnification.

The Plaintiff responds to PSC’s Motion to Dismiss and incorporates a Motion For Summary Judgment. The Plaintiff asserts to the Court that the facts are incontrovertible and thus ripe for the Court’s consideration. Pursuant to Rules 12(b) and 56(c) of the South Carolina Rules of Civil Procedure, the Plaintiff move this Court for Summary Judgment in favor of the Plaintiff.

FACTS

The Plaintiff is a citizen and resident of Greenville County, State of South Carolina.

The Defendant Oscar Quiroga d/b/a/ OAS and Defendant Marco Quiroga d/b/a/ OAS were located in Greenville County at 3501 White Horse Road, Greenville, SC 29611 and were in the business and trade of selling used vehicles. OAS was also in the business of directly financing the purchase of used vehicles or assisting customers with financing a purchase through third-party lending institutions. OAS closed during the course of this litigation on or before August 3, 2020.

Oscar Quiroga and Marco Quiroga were the owners and operators of OAS and upon information and belief are citizens and residents of Greenville County State of South Carolina.

The Defendant Palmetto Surety Corporation (hereinafter “PSC”) is a South Carolina Corporation that provides, *inter alia*, the surety bonds that all automobile dealers are required to obtain under the South Carolina Dealer Bond Statute (S.C. Code § 56-15-320 (B)) “as an indemnification for loss or damage suffered by an owner of a motor vehicle, or his legal representative.” PSC sold such a bond to OAS through bond number PS1-18517 in the amount of \$30,000.00 effective May 29, 2019. Exhibit 1.

Plaintiff entered into a contract with OAS on or about July 31, 2019 to purchase a 1999 Ford Mustang Cobra automobile (hereinafter “Cobra”) for \$5,500.00 (Exhibit 2)¹. Plaintiff paid OAS a deposit of earnest money in the amount of \$500.00 leaving a balance of \$5,000.00. OAS gave the Plaintiff receipt #670008, dated July 31, 2019 and for a 1999 Ford Mustang purchase. (Exhibit 3). The parties agreed the remaining balance would be financed by United Services Automobile Association (“USAA”) as lender to Plaintiff. OAS agreed to produce

¹ Plaintiff’s only copy of the Sales Contract is difficult to read. Plaintiff has requested discovery from the Defendant which would include Defendant’s copy of the original sales contract which presumably would be more legible. Defendant has refused to provide the documents and a motion to compel is forthcoming.

necessary funding documents and that would instruct USAA to pay \$5,000.00 directly to OAS and faxed the funding request on August 2, 2019. (Exhibit 4)

A few days passed and OAS had not contacted the Plaintiff about the sale. Plaintiff appeared at OAS on August 5, 2019 to see about the delay. An OAS employee informed the Plaintiff that there was a problem with his financing from USAA. OAS instructed Plaintiff to wait for another OAS employee to discuss it further. Plaintiff waited for over an hour without speaking with anyone else. Plaintiff became frustrated and determined to cancel the transaction.

OAS purported to accept Plaintiff's termination of the contract and refunded Plaintiff his \$500.00 earnest money deposit on August 5, 2019. (Exhibit 5). OAS, however, did not inform the Plaintiff that OAS had in fact faxed the Funding Request to USAA three days prior on August 2, 2019 and received the purchase money from USAA on August 5, 2019.

Plaintiff, believed the contract to be rescinded and reasonably and rightfully presumed the transaction to be a closed matter. In fact, the transaction was not a closed matter because OAS never returned the \$5,000.00 that USAA wired OAS in furtherance of the transaction.

The wire containing \$5,000.00 is indicated on OAS's August 2019 bank statement (Exhibit 6).

Approximately one month later, USAA notified the Plaintiff that his first loan payment was due. Plaintiff realized the loan proceeds had in fact been delivered to OAS and that he now had a \$5,000.00 loan for an automobile for purchase contract that he believed had been canceled.

For more than 30 days, Plaintiff attempted to resolve this matter with OAS by simply having OAS return the \$5,000.00 to USAA or directly to Plaintiff. OAS was unresponsive.

Sometime after Plaintiff's attempt to rescind the contract OAS sold the vehicle to another customer (Exhibit 7) and as it stands today, OAS sold the automobile twice with only one customer taking possession.

OAS bank records indicate from June 30, 2019 to May 31, 2020, OAS average ending statement balance was \$25,692.53 (Exhibit 8). The ending balance July 31, 2019, August 31, 2019, September 30, 2019 and October 31, 2019 was \$50,837.68, \$9,636.56, \$85,101.08 and \$4,820.71 respectively (Exhibits 9, 6, 10, and 11). Interestingly, OAS' October 31, 2019 balance was offset by \$51,300.00 in withdrawals, \$15,500.00 in cash and \$35,800.00 by way of cashier's check. (See Exhibit 12).

13. The Defendant refused to refund the \$5,000.00 to the Plaintiff or to USAA. After approximately 1 month to trying to resolve the matter, the Plaintiff hired counsel. Counsel drafted a demand letter requesting the Defendant return the \$5,000.00 plus interest and attorney's fees and costs which totaled \$5,909.37 (Exhibit 13). The demand letter was personally delivered to the Defendant on October 18, 2019. The demand was ignored.

14. The Plaintiff has now incurred more than \$14,000.00 in attorney's fees and costs and has paid \$752.10 in interest. The remaining balance on the Plaintiff's loan is \$3,097.49.

CAUSES OF ACTION

The Plaintiff filed this suit in the Court of Common Pleas and alleged the following causes of action: Violation of the South Carolina Unfair Trade Practices Act; Breach of Contract; Breach of Fiduciary Duty; Conversion; Breach of Contract Accompanied by

Fraudulent Act and an Action Against Surety under S.C. Code § 56-15-320(B). The Plaintiff prayed for treble damages, reasonable attorney's fees and costs, actual and punitive damages, prejudgment interest as allowed by law and For an Order holding that the PSC must indemnify the Plaintiff for all losses and damages suffered in connection with this sale of a motor vehicle.

PSC'S MOTION TO DISMISS

PSC filed a Motion to Dismiss on September 16, 2021. In its Motion, PSC argues that its "bond provides security or protection against the loss or damage due to fraud or fraudulent representation in relation to a sale or transfer of a motor vehicle by a licensed dealer . . ." PSC relies upon the notion that the Plaintiff believed that he "cancelled the transaction prior to purchasing the subject automobile from OAS" and that "there was no fraud or fraudulent representation on the part of the Defendants related to a completed sale or transfer."

Remarkably, PSC suggests "the claims by Plaintiff amount to no more than a dispute with his own financing company USAA and about USAA forwarding purchase money for a vehicle the Plaintiff never acquired title to or ownership of."

PLAINTIFF'S RETURN TO PSC'S MOTION TO DIMISS

The Plaintiff and OAS signed a bill of sale for the purchase of a specific automobile, 1999 Ford Mustang Cobra, VIN #IFAFP46V6XF199472 for \$5,500.00. The Plaintiff paid a \$500 deposit and agreed to finance the balance through USAA. At this point in the transaction, the Plaintiff becomes an "Owner" in the sense that he acquired an ownership interest in this specific vehicle to the exclusion of anyone else. Plaintiff's ownership interest in this specific vehicle does not terminate until the contract is fully and completely rescinded. Rescission or cancellation of the contract requires returning the Plaintiff to the position he was in prior to entering the contract. In this case, the contract could only be cancelled after OAS

returned all of the money to the Plaintiff. **OAS cannot cancel the contract and keep the money.**

There is very little case law regarding SC Code Sec. § 56-15-320(B) as to who qualifies as an “Owner” and protection from fraud or fraudulent representations by way of the surety. The South Carolina Court of Appeals in Wachesaw Plantation East Community Services Association, Inc. v. Todd C. Alexander, 802 S.E.2d 635 (Ct App. 2017) involved the judicial sale of real property where the Plaintiff in that case attempted vacate the sale. In denying the Plaintiff relief, the Wachesaw court stated “when Bidder ‘became the successful bidder’ and paid the required deposit, **‘he became the equitable owner’ of the property.**” Wachesaw Plantation East Community Services Assoc., Inc. v. Todd C. Alexander, 420 S.C. at 262 (citing Parrott v. Dickson, 148 SE 704, 707 (SC 1929) (emphasis added).

The Plaintiff believes the Wachesaw and Parrott cases support the notion that the Plaintiff obtained ownership rights to the 1999 Ford Mustang Automobile to the exclusion of anyone else when he signed the bill of sale and paid the agreed upon deposit. Moreover, Plaintiff’s ownership in the vehicle can only be extinguished upon returning the Plaintiff to the position he was in prior to the contract which would require the return of all of the purchase money OAS received. PSC is arguing that there can be a partial rescission or cancellation, which the Plaintiff respectfully suggests is impossible. PSC is basically arguing that a party can cancel a sales contract without returning the purchase money and thus eliminate any subsequent action for breach of contract.

Finally, PSC’s comment that “the claims by Plaintiff amount to no more than a dispute with his own financing company USAA and about USAA forwarding purchase money for a vehicle the Plaintiff never acquired title to or ownership of” is not supported by law or by fact.

OAS faxed the funding request directly to USAA so that it could receive \$5,000.00 as final payment for the 1999 Ford Mustang Cobra, VIN # IFAFP46V6XF199472. USAA acted upon OAS's instructions and was merely a conduit for providing the purchase price to complete the sale. Moreover, any action against USAA to the exclusion of the OAS would excuse the fraudulent acts perpetrated by OAS. Additionally, PSC's statement that USAA somehow acted improperly when it forwarded "purchase money for a vehicle the Plaintiff never acquired title to" is simply nonsensical. Generally speaking, automobile titles are typically not provided to a purchaser until after all of the purchase money has been paid. USAA was providing the purchase money on behalf of the Plaintiff and acting on OAS's instructions.

SUMMARY JUDGMENT/LAW

The judgment sought pursuant to Rule 56(c) shall be rendered when the pleadings, affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether any triable issues of material fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. Fleming v. Rose, 350 S.C. 488, 493–94; 567 S.E.2d 857, 860 (S.C. 2002).

Upon review of the exhibits as well as the Plaintiff's affidavit in the light most favorable to the Defendants, eight issues are incontrovertible:

(1) OAS and the Plaintiff entered into a contract for the sale/purchase of a 1999 Ford Mustang Cobra, VIN # IFAFP46V6XF199472 and the Plaintiff paid a \$500 deposit to secure his ownership interest in this specific vehicle which is referenced on the bill of sale and receipt #670008.

(2) OAS faxed a funding request to USAA for the remaining balance of \$5,000.00. USAA complied with OAS's request and wired OAS \$5,000.00 on August 5, 2019.

(3) OAS purported to cancel the contract when it returned the Plaintiff his \$500 deposit for the vehicle. OAS, however, never refunded the \$5,000.00 it received from USAA;

(4) OAS sold the vehicle to another buyer on or before 11-1-2019 as is indicated by the Greenville County Tax Receipt in the name of Norris Don Franklin who is not related to or otherwise known to the Plaintiff;

(5) The Defendant's bank account had more than sufficient funds to reimburse the Plaintiff or USAA.

(6) OAS was engaged in a trade and commerce and breached the contract and committed an unfair, deceptive act and practice by refusing to return the Plaintiff's purchase money. OAS also committed an unfair and deceptive act and practice when it sold the same vehicle to another purchaser. All of these unfair, deceptive acts and practices constitute an unlawful trade practice which had an adverse impact on the public interest.

(7) The Plaintiff incurred attorney's fees and costs and has suffered otherwise a monetary loss that resulted from the use and employment of an unfair and deceptive act by the Defendant.

(8) The Plaintiff is an "owner" of the 1999 Ford Mustang Cobra VIN # IFAFP46V6XF199472 for purposes of satisfying § 56-15-320(B) in that the vehicle was specifically referenced on the bill of sale and the receipt of payment. When the Plaintiff signed the contract and paid the deposit he obtained rights of ownership of the vehicle to the exclusion

of anyone else. Plaintiff's ownership interest in the vehicle continued because OAS did not cancel contract when it refused to return the purchase money to the Plaintiff.

PSC argues the Plaintiff's ownership interest ceased to exist once the Plaintiff attempted to cancel the sale. Following PSC's argument to its logical conclusion, the Court must necessarily agree that OAS can cancel the purchase contract, eliminate Plaintiff's ownership rights to the vehicle and keep the purchase money. Alternatively, the Plaintiff believes that OAS cannot cancel the contract and keep the money. As the money has never been returned, Plaintiff's ownership interests in the vehicle remain.

An essential element required to cancel a purchase contract is to return the Plaintiff to the position he was in prior to the contract. Here, the Plaintiff is far from his original position as he is still paying on a \$5,000.00 loan to USAA for vehicle he does not possess.

THEREFORE, the Plaintiff moves for an Order of this Court for Summary Judgement as to all causes of action and award the following:

- a) Treble damages;
- b) Reasonable attorney's fees and costs associated with prosecution of this action;
- c) Actual and punitive damages;
- d) Prejudgment interest as allowed by law; and
- e) For an Order holding that the PSC must indemnify the Plaintiff for all losses and damages suffered in connection with this sale of a motor vehicle, and
- (f) For such other and further relief as the court may deem just and proper. including treble damages, attorney's fees, costs and prejudgment interest allowable by law.

Respectfully submitted,

October 22, 2020

s/ Matthew J. Kappel
Matthew J. Kappel
114 Whitsett Street
Greenville, SC, 29601
864-467-9595 (voice)

864-467-1945 (fax)
SCBar # 15390

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Jessie J. Carter,)
)
 Plaintiff)
)
 v.)
)
 Oscar Quirroga d/b/a)
 Oscar Auto Sales and)
 Marco A. Quiroga d/b/a)
 Oscar Auto Sales, and Palmetto)
 Surety Corporation,)
)
 Defendants.)
)

COURT OF COMMON PLEAS
 THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-23-07116

PLAINTIFF’S AFFIDAVIT
 RE: DEFENDANT’S PSC MOTION TO DISMISS
 PLAINTIFF’S MOTION FOR SUMMARY
 JUDGMENT

1. I am the named Plaintiff in the above entitled action.
2. I went to Oscar Auto Sales because OAS is a used car dealer and I noticed a used car that was on their lot that I was interested in buying. I ultimately agreed to buy the car and entered into a contact with OAS on July 31, 2019 to purchase a 1999 Ford Mustang VIN # 1FAFP46V6XF199472 for \$5,500.00 and paid them a \$500 deposit.
3. I agreed to finance the \$5,000.00 balance through my account with USAA which was preapproved. OAS agreed to furnish USAA all the necessary paperwork including a “funding request” so that USAA could send the \$5,000.00 balance directly to OAS.
4. After a few days without hearing anything from OAS, I drove to the car lot to see about the delay. An OAS employee told me there was a problem with the funding from USAA and that I had to wait to speak with someone about it. After waiting more than 1 hour and listening to comments made by the OAS employee about the funding issue, I became frustrated and decided to cancel the purchase. I spoke with Oscar directly and he agreed to cancel the transaction.

5. OAS refunded my \$500 deposit on August 5, 2019. At this point, I thought everything was over. Since OAS told me there was a problem with the funds, I didn't think USAA was going to send the money to OAS. Unfortunately, I was wrong. USAA sent OAS \$5,000 on August 5, 2019 – the same day OAS refunded my deposit.

6. OAS never informed me the loan proceeds from USAA had been delivered to them. I only found out about it when USAA contacted me two weeks later about servicing the loan. I am now obligated to pay \$102 per month in principal and interest for a car I did not get.

7. After learning from USAA that the money was actually paid to OAS, I drove directly to the OAS lot with my wife to sort out the problem and spoke with Oscar. Oscar wanted proof that USAA made the payment. My wife and I left and contacted USAA for paperwork proving payment had been made to OAS. I returned to OAS a week or so later with the paperwork and Oscar was not there. I left the paperwork with an employee who promised to give it all to Oscar and that he would call me, but he never did. My wife and I called OAS for approximately a week to ten days – all without a response from OAS. Basically, I got nowhere with OAS for more than 30 days.

8. I finally realized, that OAS wanted to keep the money – even though they never delivered the car to me. My wife and I decided to hire a lawyer to send a letter to OAS and thought the prospect of a lawsuit might inspire them to do the right thing. OAS ignored my lawyer's letter too.

9. I am not pleased that I had to file this lawsuit. I had to pay my lawyer a \$5,000.00 retainer to file the case for something OAS should have resolved on August 5th when the \$5,000 wire from

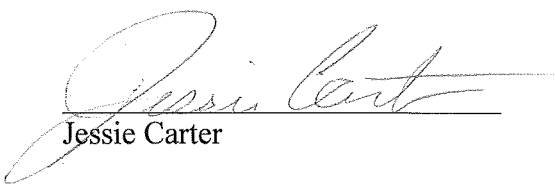
USAA was deposited into their account. In addition, I am still paying principal and interest on the loan. A loan for a car that I thought I had not purchased nor have I ever had possession.

10. I will say that since I paid \$5,000.00 for the 1999 Mustang and I am paying a loan that I obtained for the sole purpose of buying the Mustang, I really feel that I own a car that I have never possessed or driven. To date, I have paid \$752.10 in interest and the principal balance is \$3,097.49.

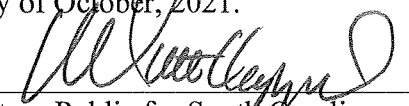
11. I have also learned that OAS sold the 1999 Mustang to another person sometime before November 1, 2019. So basically, OAS sold the same car twice.

12. I have also reviewed through my lawyer OAS bank statements that show OAS has had plenty of money in their account to refund money that is not rightfully theirs. I am particularly frustrated when I see OAS withdrawing \$51,300.00 in cash in October 2019. Obviously, OAS does not care at all about resolving this matter. I am also very frustrated that OAS is now closed.

13. Finally, I believe OAS is acting in bad faith, using deceit and unfair dealing to keep the \$5000 payment from USAA that is not rightfully theirs.


Jessie Carter

SWORN TO BEFORE ME this 22d
Day of October, 2021.


Notary Public for South Carolina
My Commission Expires: 9/26/2029

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

JESSIE J. CARTER

Plaintiff

vs.

MARCO A. QUIROGA D/B/A OSCAR
AUTO SALES, OSCAR QUIROGA D/B/A
OSCAR AUTO SALES and PALMETTO
SURETY CORPORATION,

Defendants.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

CASE NO.: 2019-CP-23-07116

**DEFENDANT PALMETTO SURETY
CORPORATION'S MEMORANDUM IIN
OPPOSITION TO PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT**

Defendant Palmetto Surety Corporation ("PSC") submit this Memorandum in Opposition to Plaintiff's Motion for Summary Judgment.

Defendant PSC is not in a position to argue the specific issues of fact between the Plaintiff and the Defendants, Marco Quiroga, Oscar Quiroga and Oscar Auto Sales ("OAS Defendants"). PSC will let the opposing affidavits filed by the Plaintiff and OAS Defendants speak for themselves. It is the position of Defendant PSC that Plaintiff neither has standing, nor has set forth a proper claim for relief against this third party since: (1) there was no fraud or fraudulent representation made, (2) in connection with the sale or transfer of a motor vehicle by a licensed dealer or dealer's agent/ employee, and (3) the Plaintiff was never the "owner" of the subject OAS vehicle.

BACKGROUND and ARGUMENT¹

¹ Defendant PSC incorporates by reference their argument in their Memorandum of Support of their Motion to Dismiss, which was filed with the Court on September 16, 2021, and is hereby attached, marked as Exhibit A.

Defendant PSC was recently brought into this suit by being served with Plaintiff's Third Amended Summons and Complaint. PSC filed a motion to dismiss on September 16, 2021. Plaintiff filed a Return to PSC's motion to dismiss while contemporaneously filing his motion for summary judgment on October 22, 2021. The Plaintiff's first motion for summary judgment was filed on September 30, 2020. It appears to PSC that the motion for summary judgment, filed over a year before PSC was brought into this suit, is the same if not identical to Plaintiff's most recent motion for summary judgment and does not involve or include allegations of fact pertaining to Defendant PSC. For the reasons below and discussed in PSC's motion to dismiss, Plaintiff's motion for summary judgment should be denied and the complaint against PSC should be dismissed.

The main crux of this lawsuit and the facts that remain undisputed, but critically important, are that the Plaintiff arranged for his own financing of the vehicle with his own finance company, USAA and that the Plaintiff did not follow up with his own finance company and cancel financing **after he canceled the purchase transaction at OAS.**

In Plaintiff's own words, the Plaintiff canceled the transaction prior to purchasing the subject automobile from OAS and OAS returned the deposit money. There was no fraud or fraudulent representation on the part of the Defendants. Since the transaction was cancelled by the Plaintiff prior to purchase, there was never a "sale and transfer" of a motor vehicle from OAS to Plaintiff. It is only logical that the Plaintiff was never an "owner" as he did not take title to the motor vehicle. Therefore, the motor vehicle license bond does not apply under these facts and circumstances between the Plaintiff and the OAS Defendants.

CONCLUSION

For the foregoing reasons, the Plaintiff's motion for summary judgment should be denied and the Defendant PSC's motion to dismiss should be granted pursuant to SCRCP Rule 12(b)(6).

BREWER LAW FIRM, LLC

/s/ Amanda D. McKendrick

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Surety Corporation

November 5, 2021

Charleston, South Carolina

State of South Carolina
County of Greenville

Court of Common Pleas

Jessie Carter)
)
 Plaintiff,)
 v.)
 Marco A. Quiroga,)
)
 Defendant.)

Transcript of Record
2019-CP-23-07116

November 8, 2021
Greenville, South Carolina

B E F O R E:

The Honorable Letitia H. Verdin, Judge.

A P P E A R A N C E S:

Matthew J. Kappel, Esquire
Attorney for the Plaintiff

Barrett Ray Brewer, Esquire
Attorney for the Defendant

James P. O'Connell, Esquire
Attorney for the Defendant

Lisa Scott
Circuit Court Reporter

I N D E X

WITNESS

PAGE

No Witnesses.

E X H I B I T S

NO.

DESCRIPTION

ID.

EVD.

No Exhibits.

P R O C E E D I N G S

* * * * *

1
2
3 THE COURT: All right. *Jessie Carter v. Marco*
4 *Quiroga*.

5 (Parties approached.)

6 THE COURT: All right. So this is Defendant
7 Palmetto Surety's motion to dismiss; and this is
8 Jessie Carter, plaintiff, Jessie Carter's motion for
9 summary judgment.

10 MR. O'CONNELL: Your Honor?

11 THE COURT: Yes, sir.

12 MR. O'CONNELL: May it please the Court? We
13 had a motion to dismiss my -- one of my clients,
14 Oscar Quiroga. We had -- that was when we met here
15 the last time, they -- Matt and I agreed to continue
16 both of those motions until this young fellow who
17 represents the insurance company or something ---

18 THE COURT: Okay.

19 MR. O'CONNELL: --- he had something.

20 THE COURT: Sounds good. All right. So if
21 everybody -- would everybody be prepared to also go
22 forward on Defendant Quiroga's motion for summary
23 judgment?

24 MR. KAPPEL: Yes, ma'am.

25 THE COURT: Okay. All right. If everybody's

1 ready for that, then why don't we start with
2 Palmetto Surety's motion to dismiss?

3 MR. BREWER: Thank you, Judge. And I also
4 think that's the cleanest place to start.

5 THE COURT: Sure.

6 MR. BREWER: Does the Court mind if ---

7 THE COURT: Oh, please, go right ahead. If
8 you -- if you feel comfortable having your mask
9 off ---

10 MR. BREWER: It would help me speak and
11 probably help you understand.

12 THE COURT: It would be great. Thank you.

13 MR. BREWER: Judge, thank you for having us.
14 Nice to meet you. I've never been in front of you
15 before. I'm Barrett Brewer. I represent Palmetto
16 Surety.

17 THE COURT: Okay.

18 MR. BREWER: Palmetto Surety is a surety
19 corporation. And, you know, this is -- most times
20 I'm arguing these, it's kind of something new
21 because these don't come up a lot. In fact, I think
22 Mr. Kappel will tell you, there's not a lot of case
23 law because these things don't come up.

24 So my client, Palmetto, provides surety bonds
25 like the old surety bonds, but as well provides

1 surety bonds for, like, dealers. And for -- these
2 are like LLR related bonds, right? We also do
3 construction surety bonds.

4 Now, one of the cases that we cited for you, it
5 talks about the fact that with these particular
6 dealer bonds, these LLR related bonds, right, we
7 have to make a clear distinction that these are not
8 insuring a contract, right? That's a performance
9 bond. These are statutory beasts, right? So it's
10 intent that we grapple about statutes. Now, let me
11 tell you what the case is about knowing what my
12 involvement is.

13 THE COURT: Okay.

14 MR. BREWER: This is an auto dealer bond.
15 Mr. Kappel represents the gentleman who attempted to
16 buy a vehicle and didn't. In fact, this gentleman,
17 Mr. Carter, started a transaction and then decided
18 mid-transaction he didn't want the vehicle anymore.

19 THE COURT: Okay.

20 MR. BREWER: As best I understand it, because
21 I -- my client was not involved in this at all, so
22 I'm repeating what I think Mr. Kappel's going to
23 tell you, alright, and what the affidavits from
24 these two gentlemen's clients say. Is that,
25 Mr. Carter goes in. Puts down a \$500 down payment.

1 Apparently, according to Mr. O'Connell's client, it
2 was initially going to be a cash deal. He's going
3 to bring in cash. That's somewhat important here.

4 Apparently, mid-transaction Mr. Kappel's
5 client, Mr. Carter, changes the terms and says,
6 "Hey, I want to do financing and I want to use my
7 own finance company," as opposed to using who the
8 auto dealer probably utilizes for financing, right?
9 So he wants to use USAA. So Mr. Carter inserts his
10 own lender into this deal and asks the Oscar's Auto
11 Company to contact USAA about the transaction. So
12 they initiate some type of documentation, allegedly,
13 by the complaint.

14 Midway through the transaction, Mr. Carter
15 says, "I don't want the car anymore." This is the
16 most important part of this case. He goes to
17 Oscar's and says, "Cancel the deal. I want out and
18 give me my money back." Oscar's gave him the only
19 money they had at the time, \$500.

20 Now, apparently, Mr. Carter did not contact his
21 own lender, USAA, to tell them he had canceled the
22 transaction, right? And so USAA, like a large
23 company does that's not associated with Oscar's, the
24 check's in the mail already. And not only is it a
25 check, I think it's a wire transfer.

1 THE COURT: Okay.

2 MR. BREWER: And Oscar, I don't know the full
3 story, may or may not be fully in business or slowly
4 going out of business, but long story short,
5 according to the affidavit submitted by
6 Mr. O'Connell for his client, it took them a couple
7 of months to realize he got the money.

8 THE COURT: Okay.

9 MR. BREWER: According to Mr. O'Connell's
10 client, he offered to give the money back, but by
11 that time, Mr. Kappel's client had already had to
12 make a payment, had some interest, and wanted them
13 to pay interest and attorney's fee and now we're in
14 this lawsuit. Okay?

15 Now, there's a slight different set of facts
16 regarding Mr. Kappel's affidavit from his client.

17 THE COURT: Okay.

18 MR. BREWER: But I wanted to -- I want to, one,
19 argue that to say, clearly summary judgment on
20 Mr. Kappel's side is uncalled for here. I'm just
21 going to go ahead and address that because there's
22 competing affidavits in that issue.

23 My motion to dismiss -- and you can call it a
24 motion for summary judgment today if you want. I
25 don't care -- is on the law. The case is whether or

1 not as pled this is even something that triggers a
2 licensing surety claim. So let's talk about what
3 these LLR surety bonds are.

4 They come from and are authorized by Title 56,
5 which is basically the lemon law statute, right?
6 It's the code of law that says, "Used car salesman,
7 thou shalt not sell -- sell crappy cars to little
8 old ladies," right?

9 THE COURT: Right.

10 MR. BREWER: It uses the terms "fraud,
11 misrepresentation," but it goes back to all things
12 about cracking the odometer, rolling the odometer
13 back. That sort of thing.

14 Now, we cite in our brief to you a case that
15 again goes back and says, "Now, let's be real clear,
16 you can't as a lawyer, as good as lawyers are,
17 creatively plead your pleadings to try to create
18 coverage." It's not really a coverage issue, but
19 create -- trigger the bond, right, because you don't
20 like the result of your contract, right? This is
21 not a performance bond or a contract. This is a
22 statutory beast based on what would normally be, "I
23 sold you a crappy car."

24 Now, where that is most evident, and there's
25 not a lot of cases. There's a couple. Can I

1 approach the Court and hand up a case?

2 THE COURT: Oh, yes. Please.

3 MR. BREWER: Now, I want to be clearly
4 transparent, okay? There -- there's two cases here,
5 *Connecticut v. Burdette Chrysler*. And then if
6 you -- halfway -- I think it was there. Halfway
7 back, there's another case called Midstate Auto.

8 THE COURT: Okay.

9 MR. BREWER: Midstate Auto, there's a -- this
10 Connecticut case needs to be shepardized against
11 Midstate because Midstate overturned one narrow
12 holding, but they actually discuss the law for this
13 state, right?

14 THE COURT: Okay.

15 MR. BREWER: So the Connecticut case, both of
16 these two cases together talk about what the
17 importance of being an owner is, right? And that's
18 what's so important here. It relates back to the
19 issue about whether this is a contractual issue or
20 whether an issue covered by Title 56, right?

21 THE COURT: Okay.

22 MR. BREWER: You have to own the vehicle. If
23 you don't -- if you didn't buy a vehicle and you're
24 not the owner of it, you're not the victim of fraud,
25 right.

1 So let's start with this -- if you turn to the
2 last page. I show the numbers being -- sorry.

3 THE COURT: It's okay.

4 MR. BREWER: But if you go to the Connecticut
5 case, one, two, three, four, five, six. It's the
6 last page. Okay. What this case discusses, it says
7 that you cannot as the claimant cause your own
8 problem and benefit from it. Okay.

9 THE COURT: Okay.

10 MR. BREWER: This problem started because
11 Mr. Carter canceled his transaction, i.e., did not
12 become an owner. Never took title to the vehicle,
13 right? Had Mr. Carter not canceled this
14 transaction, everything would've happened the way
15 it's supposed to, right? But Mr. Carter canceled it
16 and then didn't let his own auto insurer know under
17 his own allegations. Well, not the auto -- USAA.
18 Didn't let his own lender know not to pay the money.

19 Now, the way I look at this is, this is a
20 financial transaction issue, right? At best, it's a
21 breach of contract issue between those two guys.
22 When did I get the money back or should I have
23 gotten the money back. It's not fraud because he
24 never actually took title and never wanted to take
25 title of the vehicle.

1 THE COURT: Okay.

2 MR. BREWER: Even according to Mr. O'Connell's
3 affidavit, they tried to offer the money back. And
4 the only discrepancy between the two is that
5 Mr. Kappel's client says, "I'm not going to take the
6 5,000 because I've already incurred interest, I've
7 already incurred attorney's fees, and you need to
8 pay me for those," and so now we end up in court.

9 This is not a fraudulent misrepresentation.
10 That's a normal breach of contract dispute between
11 those two gentlemen that doesn't trigger anything
12 under Title 56. In fact, nothing in Mr. Kappel's
13 complaint points to anything under Title 56 where my
14 client breached one of the conditions or the
15 requirements to title. The only thing he cites in
16 his statute -- in his complaint is the statute that
17 allows you to -- the issue of the right of action
18 against the surety bond. That's another thing,
19 right, but that's not the same thing as saying, "I
20 breached one of the provisions that requires me to
21 sell you a car without a rolled back odometer." Do
22 you follow my gist?

23 THE COURT: Yes.

24 MR. BREWER: So he's only cited the
25 jurisdictional standing section. Nowhere else has

1 he alleged a fraudulent or negligent act.

2 Now, why this relates back to the other case,
3 Midstate. Midstate overturned Connecticut on one
4 small issue. Connecticut was a little too loose in
5 its language and basically said -- used this
6 language that said something like, anyone can bring
7 a cause of action under this statute.

8 Midstate overruled that and said no, no, no.
9 This is a beast of statutory construction;
10 therefore, we have to strictly look at what the
11 legislature says, just like in these arbitration
12 clauses, Your Honor, right? Has to comply with the
13 letter of the law -- bold, underlined, with strict
14 instruction.

15 Title 56, and that particular statute says,
16 only an owner has a cause of action. If
17 Mr. Kappel's client never took title, never took
18 possession, and doesn't own the vehicle, how is he
19 an owner? Now, Mr. Kappel makes up a really
20 creative argument. I'm sure he'll stand up here,
21 hey, we started the transaction, therefore, it's
22 pertaining to the transaction. Even if that
23 argument works, how does it work when his client's
24 the one that canceled the transaction, right?

25 This isn't the beast of any misrepresentation

1 or fraudulent conduct on Oscar's part. It's a beast
2 of the fact that he canceled the transaction, didn't
3 let USAA know, and then complained when the money
4 went to Oscar's, and Oscar's didn't voluntarily give
5 it back to him in 30 days, right?

6 So if an owner has to be strictly construed
7 though -- this is the other kind of argument I don't
8 want to get lost in court. Mr. Kappel says, well,
9 your argument doesn't make sense, Brewer, because
10 the title would've gone to the lender and not
11 Mr. Kappel's client, Carter, so, therefore, your
12 analysis doesn't make sense.

13 Judge, there was no transfer of ownership or
14 title at all. He canceled the transaction. He
15 didn't want the car. And that's a very different
16 beast than making kind of hyper-technical arguments
17 about who's named on the title. Although, as I
18 understand how these things work, the title does
19 issue in the new owner's name and it physically goes
20 to the lender and they're physically holding the
21 title. So I think their argument is just kind of a
22 red herring if that makes sense.

23 So that's kind of my position here is that, I'm
24 not saying these two gentlemen don't have some kind
25 of dispute here. To the extent that affects my

1 interest, I don't think this is ripe for summary
2 judgment, and there is some question as to how that
3 affects my rights on how you grant today.

4 On their motion for summary judgment, I don't
5 think it affects my interest -- or excuse me. It --
6 it measurably affects my interest, and I think there
7 is a genuine issue of fact as presented by their
8 affidavits. But my motion to dismiss should take me
9 out of this and let them keep fighting, right, which
10 I filed first.

11 And my motion to dismiss is simply that there
12 is no cause of action against the surety here
13 because Mr. Kappel's client isn't an owner and
14 because he, under these cases -- this is something
15 the Court can rule on -- he caused the problem
16 himself. Therefore, under no remote interpretation
17 of the statute does it relate back to a mis --
18 misrepresentation.

19 In fact, these cases actually discuss similar
20 fact patterns where it's like one of these is that
21 the checks didn't make it for the cars. And they go
22 through and say, the bank accounts having
23 insufficient funds isn't an issue of fraud, right?
24 That's just a simple breach of contract issue.
25 You're supposed to have taken the money. You

1 haven't paid me yet, right?

2 Well, the same thing. Just because USAA, which
3 is the one that sent the check sent it to Oscar's,
4 and out of the wire, Oscar's doesn't know about it,
5 right? They let him know a month later. They're
6 calling it fraud because Oscar's didn't comb their
7 bank account to find \$5,000 that happened to wind up
8 in their account when they thought the transaction
9 had been canceled, right?

10 THE COURT: Right.

11 MR. BREWER: So that's really the biggest issue
12 I have had with this here, and I go back to the
13 Carter case that we cite to the Court, has to make
14 this -- has to make this strict discernment between
15 the types of bond. I think that this -- Mr. --
16 Mr. Kappel's complaint, the financial one is a
17 transactional one. It's a contract one. It's what
18 happened to the money. He had nothing to do with
19 selling him a dud car.

20 THE COURT: Gotcha.

21 MR. BREWER: And that's nowhere alleged
22 anywhere in the complaint.

23 THE COURT: All right.

24 MR. BREWER: We rely on that, as well. Thank
25 you, Your Honor.

1 THE COURT: Thank you. Mr. Kappel.

2 MR. KAPPEL: May it please the Court?

3 THE COURT: Yes.

4 MR. KAPPEL: This is my case. Yes, we brought
5 in Palmetto Surety Corporation by virtue of the
6 surety bond. I respectfully disagree with virtually
7 every characterization Mr. Brewer has to say about
8 this transaction.

9 The -- the facts are very straightforward and
10 very simple. My client purchased a vehicle from
11 Oscar Auto Sales and gave them a \$500 deposit.

12 THE COURT: Okay.

13 MR. KAPPEL: Oscar Auto Sales agreed to fax a
14 funding request to USAA for the balance, the \$5,000
15 balance. My client attempted to cancel the contract
16 and thought he had canceled the contract. When he
17 went back to the dealership a few days later, having
18 not heard anything from them about finishing and
19 taking possession of the vehicle. When he arrived,
20 they told him there were problems with the funding.
21 There were problems with getting the funds from
22 USAA. He became frustrated. He said, "Well, I'm
23 done. Give me my money back." All that's true and
24 I think we all agree with this.

25 The issue is, whether or not my client's

1 actually canceling the contract and, you know, it
2 kind of takes two to tango. You know, you can
3 unilaterally cancel it sometimes, or you can have a
4 contractual cancelation where you put the parties
5 back to where they were prior to the transaction
6 even starting, the residual.

7 Well, that doesn't happen when Oscar Auto Sales
8 received the \$5,000 that same day that he was there.
9 And when you're talking about combing your bank
10 accounts and doing those kinds of things, you know,
11 it's Oscar Auto Sales' responsibility taking on this
12 job to -- to -- to get direct funding from USAA, to
13 keep up with it, and to know if he has it. And to
14 basically cancel it or to make my client believe
15 it's canceled while keeping the money is fraud.

16 The statute does not distinguish about lemons
17 or rolling back odometers. It just says, "Loss or
18 damage suffered by an owner of a motor vehicle by
19 reason of fraud."

20 THE COURT: Well, what about the cases that
21 have interpreted that, though?

22 MR. KAPPEL: The cases -- the cases that he's
23 citing aren't really analogous to this situation
24 simply because what they're describing are people
25 that were -- were coordinating sales through an auto

1 auction. The weren't direct consumers dealing
2 directly with the -- with the car dealer.

3 There's never been a case analogous to this
4 fact pattern in this state that says, "We think an
5 owner is this." What they've simply said in one
6 case, they said that -- in another case, Centennial
7 Casualty, they said that the auto auction was an
8 owner because they had a contract where the rights
9 of the buyer and seller were assigned to the auto
10 auction. And I'll give the cite. I've got a copy
11 of that case if you would like.

12 THE COURT: Okay. The citing's fine.

13 MR. KAPPEL: It's 4 -- excuse me -- 772 S.E.2d
14 274. So it's -- it's kind of -- it's similar to
15 Midstate because it involves the -- the -- like an
16 auto auction, but the difference in Centennial
17 Casualty and this one is a 2015 case. I believe
18 it's Supreme Court. Yeah, Supreme Court, 2015-case.
19 Where this Midstate that Mr. Brewer relies upon is
20 from 1996. And then -- and then Centennial, you'll
21 see the Court allowed that action to go through
22 stating because there had been assigned the rights
23 of both the buyer and the seller in that
24 transaction.

25 It didn't go through because -- well, I would

1 say it was frustrated by canceled checks. So it's
2 very similar to the Midstate case, but they found --
3 excuse me -- in favor of -- of the -- it was an
4 insurance company seeking indemnification from
5 insured.

6 So I think if you were to take a look at both
7 those cases together, you wouldn't find it
8 completely analogous to this situation because what
9 we're dealing with here is the direct consumer
10 dealing directly with the sell -- seller that's
11 trying to buy a vehicle.

12 THE COURT: Okay.

13 MR. KAPPEL: And when he bought -- when he puts
14 the \$500 deposit and instructs Oscar Auto Sales to
15 send a funding request for the remaining balance,
16 and the -- and the funding request and all the
17 documentation have the VIN number, the make, and the
18 year of the vehicle, our argument is that my client
19 becomes an owner to that vehicle at that point.

20 In other words, once he has commenced this
21 transaction with Oscar Auto Sales to buy this
22 specific vehicle with this specific VIN number and
23 this specific year, then Oscar can't turn around and
24 sell it to somebody else. It has my guy's name on
25 it so to speak.

1 We -- you know, I combed the cases. The Court
2 may know sometimes I'm challenged with legal
3 research, but we -- we -- we cited one case in
4 particular that discusses real estate and the
5 significance of paying a deposit and becoming
6 basically kind of an equitable ownership interest
7 where you become the owner of it once you pay the
8 deposit.

9 THE COURT: Okay.

10 MR. KAPEL: Now, the statute says fraud. And
11 just to kind of repeat some of the other comments
12 that have been made, you know, that Oscar Auto Sales
13 also canceled the contract. They didn't cancel the
14 contract because they never gave them the money
15 back.

16 Oscar Auto Sales can't say, "Okay. This
17 cancel -- this contract is canceled. It's done,"
18 and keep the money. So in a sense, there's still --
19 there's a breach, but there's still something there.
20 It's not -- it's not fully canceled or rescinded
21 because my client has not been placed back in the
22 position he was in prior to the transaction.

23 The significance or insignificance of USAA
24 being a third-party lender to me is -- is highly
25 insignificant here when Oscar Auto Sales was sending

1 the funding request to USAA to be paid directly.

2 The point is, where did the fraud begin? When
3 did it happen? Did it happen in the parking lot
4 when he was test driving the vehicle? Was there a
5 problem with the odometer? Was there -- was it a
6 lemon? Was it in the -- in the signing of the bill
7 of sale? I forgot to mention, Judge. They have a
8 bill of sale where my client signed the bill of sale
9 with the VIN number, the make, the model of the
10 vehicle.

11 So when does the fraud begin? The fraud
12 actually begins when Oscar Auto Sales refuses to
13 fully effectuate a cancelation of the contract.
14 Now, does a fraud have to be an odometer? Does a
15 fraud have to be the vehicle's bad? He said, thou
16 shall not sell lemons. Well, I broke down, thou
17 shall not steal. And that's what -- that's really
18 what's happened here is Oscar Auto Sales, through
19 this transaction, stole and has continued to steal
20 by not refunding the money.

21 We pled the Unfair Trade Practices Act. I'll
22 point out, Judge, that the Unfair Trade Practices
23 was drafted, I think, in 1961, enacted in 1961. And
24 if you look at the statute that we're all
25 referencing, it was enacted in 1983.

1 And I tried to do some digging into the
2 legislative history unsuccessfully so I can only
3 surmise, but it's almost as if when you read the
4 Unfair Trade Practices Act, in my view, this is
5 almost like the poster child example of an unfair
6 trade practice, to basically swindle and snake
7 someone through a transaction for a specific vehicle
8 giving them ownership interest into a specific
9 vehicle and then refusing to fully cancel it by not
10 refunding the money.

11 Now, Oscar Auto Sales has gone out of business.
12 And so it's my view that this is not atypical -- an
13 atypical practice in the used car industry and maybe
14 they felt that the Unfair Trade Practices Act wasn't
15 sufficient to protect the consumers. And so they
16 went back and said, you know what? We're going to
17 make the used car people get a surety up to \$30,000
18 so that the consumers can be protected from
19 shenanigans and outrageous behavior that Oscar Auto
20 Sales is doing.

21 My client went back to Oscar Auto Sales, as
22 said in his affidavit, and they told him that he had
23 to prove to them that they had the money. They
24 actually refused to check their own bank account to
25 see if they actually had the money.

1 And you -- I've got exhibits attached to this
2 motion. You can look at the bill of sale. You can
3 look at the receipt that references a 1999 Ford
4 Mustang purchase. You can look at the funding
5 request. You can look at the bank statement from
6 August 31st and see that it's on October 5, 2019,
7 when the \$5,000 was wired into their account. And
8 you look at the check that was drafted as a
9 quote/unquote refund of his deposit, it's the same
10 day, August 5, 2019.

11 To me, this is fraud. This is fraud in the
12 connection and sell of a vehicle. And when you look
13 at the statute, it says fraud or practice -- fraud
14 practiced or fraudulent representation made in
15 connection with the sell or transfer of motor --
16 motor vehicle. It doesn't say fraud, practice, or
17 fraudulent representation made in the completion of
18 a sell or transfer. It says made in connection.
19 That ---

20 THE COURT: All right.

21 MR. KAPPEL: --- anyway. That's significant to
22 me.

23 THE COURT: Okay.

24 MR. KAPPEL: I don't know if you want me to
25 address the motion to dismiss by Oscar or Marco

1 Quiroga.

2 THE COURT: Well, I haven't -- well, I'll be
3 back to you on that in just a minute.

4 MR. KAPPEL: Yeah, that'll be fine.

5 THE COURT: Is there anything you want to say
6 about your motion while you're up?

7 MR. KAPPEL: Well, my motion is essentially the
8 same.

9 THE COURT: Yes.

10 MR. KAPPEL: The facts are quite clear based on
11 the documents. There's -- there was -- there was a
12 purchase with a deposit. There was a funding
13 request. There was a refund. And there was a
14 deposit, but not a refund or a return of the \$5,000
15 that was paid. The documents that I've presented in
16 exhibits illustrate that.

17 My view is -- is -- is -- is clear on its face
18 based on my client's affidavits, the conduct of
19 Oscar Auto Sales, that the only issue is in my view
20 are damages, attorney's fees, because I think -- I
21 think the documents speak for themselves. And I
22 don't want to take up anymore time, but I think it's
23 quite clearly illustrated.

24 THE COURT: Yeah, and I'm going to need to take
25 this matter under advisement because I've got some

1 cases here that I've not read and I -- you know, I
2 need to, so I'm going to take the matter under
3 advisement anyway. All right.

4 MR. KAPPEL: Judge, may I?

5 THE COURT: Sure.

6 MR. KAPPEL: The Kennedy case also that he
7 cites in one of his motions, I don't believe is
8 analogous either. It involves a construction matter
9 of someone that didn't show up on a job site at all
10 and didn't perform any work.

11 THE COURT: Okay. All right. Mr. O'Connell,
12 do you have anything to say about this motion or
13 Mr. Kappel's motion?

14 MR. O'CONNELL: Mr. Kappel's?

15 THE COURT: Yes.

16 MR. O'CONNELL: As to what's being said here,
17 it's a factual question as I believe Mr. Barrett is
18 saying and then Matt is saying. These are factual
19 issues.

20 We dispute highly that there was any fraud
21 involved. Based on what I understand happened, a
22 guy comes in. Wants to buy a car. Gives him some
23 money. Says he's coming back the next day, he's
24 going to purchase it. The next day he comes back
25 and says, "No, I don't want to finance. My people

1 sent a finance request." And then the ball goes
2 downhill a couple of days later or whatever. You
3 can read it in these documents.

4 A couple of days later, they come in and say,
5 "No, I don't want to go through it." Well, my guy's
6 already filed the papers, so it's going to take a
7 while to re -- what do you call it -- erase all that
8 and see if the people got the money.

9 THE COURT: Okay.

10 MR. O'CONNELL: And they were going to take it.

11 My guy actually and I don't think anybody --
12 didn't know he had the money in his accounts because
13 Matt got his -- what do you call them -- bank
14 statements and you're moving about \$250,000 a month.
15 You know, I think that's what they show. Yeah, it's
16 easily overlooked, you know. And I think we just
17 filed an affidavit from his niece or somebody that
18 was working there and said my client, Mr. -- all of
19 them are my clients because none of them got
20 dismissed -- says that, "Hey, somebody comes in my
21 office and says all this stuff," and he didn't know
22 what was going on.

23 So the bottom line here is, we have a bond.
24 And I think the bondsman was covered. And I think
25 it was a little bit odd, but I always thought when

1 you bought a car and you're paying for it, the title
2 went to the lender and the lender puts a lien on the
3 title. Has anybody got the title of the car? Has
4 anybody seen the title of the car?

5 THE COURT: Okay.

6 MR. O'CONNELL: Thank you.

7 THE COURT: Thank you. I appreciate it. Yes,
8 sir.

9 MR. BREWER: May I be heard, Your Honor?

10 THE COURT: Of course.

11 MR. BREWER: The -- of -- of the -- the issues
12 Mr. Kappel raised I would just simply say a couple
13 of things. There -- there are so few cases on this
14 issue that I think you could probably always say,
15 "Well, this doesn't fit those facts," because
16 there's literally four. It's not many, right? We
17 have to take the law we have and the strict
18 construction of the statute that we have.

19 I would point the Court's attention to the
20 Connecticut indemnity case and at page 409 of that.
21 It literally reads, "There is no evidence to support
22 the trial Court's finding that Burdette as an owner
23 of motor vehicles established fraud as contemplated
24 by the statute, irrespective of whether the
25 worthless checks Eagle gave to Burdette were

1 considered fraudulent or not."

2 In other words, what the Courts say -- and even
3 if you consider a worthless check to be a fraudulent
4 act, that's still not a fraudulent act that's
5 contemplated under the statute because it pertains
6 to the -- to the contractual statute. It's not
7 Title 56, right? It is a performance bond issue,
8 which is what Kennedy speaks to. That's a different
9 kind of bond. You can't make that claim here.

10 And I think that goes back to his financial
11 transactions contractual issue is not a cover issue
12 under this bond. I think that's clear by what
13 Mr. Kappel said earlier when he said my client
14 cannot -- has not been placed back in the position
15 that he was before. That's literally a breach -- a
16 breach of contract, right? Not a fraud here.

17 The other thing I wanted to point out is that
18 Mr. Kappel's client because he initiated this
19 cancelation of the contract, he now understands that
20 that's causing him a problem and so he wants to --
21 the old saying goes trying to be half pregnant, but
22 you can't do that, right? He canceled the contract
23 and you cannot say I canceled the contract. I never
24 took title, which is how a title is passed in South
25 Carolina. It was never put in his name. And

1 somehow, because that harms me in my claim against
2 the surety, I need to step around that for a second
3 and still claim some kind of interest in it.

4 Under this strange theory that it's Oscar's
5 responsibility to unilaterally make sure the
6 contract's canceled. I mean, that's just not the
7 facts and they're not the facts presented in the
8 complaint in the four corners of that complaint.

9 So we would ask the Court to recall that this
10 is a plan. This series of events was started by
11 Mr. Carter canceling the contract, rejecting, and
12 waiving his right to any of the title. He's never
13 tried to take possession of the vehicle, and I -- I
14 don't think under anything submitted to the Court
15 has ever tried to take possession or title of the
16 vehicle. They're simply make -- stating
17 phraseologies like that to try to maintain some
18 legal jurisdiction and standing for the surety bond,
19 but I think that everything is clear, they never
20 tried to take it.

21 I think that's it, Judge. I appreciate the
22 Court's time today.

23 THE COURT: Okay. Fantastic.

24 MR. O'CONNELL: Thank you, Your Honor.

25 THE COURT: All right. And I tell you what, I

1 will go to Mr. O'Connell and see what he's got to
2 say, and then I'll go to you on what you want to say
3 on his motion, and then I'll go ahead and probably
4 respond. Yes, sir.

5 MR. O'CONNELL: I appreciate these two young
6 fellows coming in because I tell all the young
7 attorneys, come watch motion hearings, because you
8 learn more in a motion hearing than you do sitting
9 in trial.

10 THE COURT: I can see that.

11 MR. O'CONNELL: That's all I have to say.

12 THE COURT: Yes, sir. Is there anything you
13 want to say on your motion?

14 MR. KAPPEL: I appreciate the spirit and the
15 advocacy from Mr. Brewer. I mean, if it quacks like
16 a duck, walks like a duck, it's a duck. If they
17 took the money and didn't give it back to him, they
18 stole it. It's stolen. And the fact of the matter
19 is, is that this company that was in the business of
20 selling vehicles agreed to cancel a contract and
21 they keep the money. And if that's not fraud, then
22 maybe I need find something else to do, but, you
23 know, if someone keeps the money and they don't want
24 to give it back, it's like being on the playground.
25 That's not yours. Give it back. Give it back. Why

1 aren't you giving it back?

2 You know, and so the issue is, when did the
3 fraud begin? And the fraud began when they decided
4 to keep the money. And so this whole idea that they
5 tried to give the money back, I think you'll see
6 when you look at the affidavits that there were
7 months that went by where they didn't give the money
8 back. And if you go to the bank statement, which
9 is -- which is in my attachments, the bank statement
10 has it. It's the second item, USAA auto loan
11 payment, you know, which was on the same day.

12 You know, I don't know how much money is going
13 through their account, but I would hope with that
14 much money going through the account they would have
15 an accountant that would go through it to make sure
16 everything was straight, but, anyway, I digress.

17 The motion to dismiss with Oscar, I have also
18 submitted a response to that. I'm trying to put my
19 hands on it. The gist of the motion is that Oscar
20 was just kind of working for his father -- or excuse
21 me -- Marco.

22 MR. BREWER: Correct. His dad was Marco, yes.

23 MR. KAPPEL: Okay. So Oscar was working for
24 Marco.

25 I don't want to go too long. I think if you're

1 going to take it under advisement, you'll look at
2 this anyhow.

3 The point is, is that Marco, in my view, as
4 owner -- excuse me -- that Oscar was basically the
5 owner in fact. It was called Oscar Auto Sales.
6 He's Oscar. And I think that the -- my argument is,
7 Oscar signed the check. Oscar's kind of running the
8 business based on my client's statement.

9 If you look at Oscar's criminal history, he has
10 a prior record for messing around with a title or a
11 statute -- or excuse me -- with a motor vehicle.
12 And if you look at the statute on who gets an auto
13 license or auto sales license, you can't have a
14 prior record with those kind of things.

15 My point is, based on his criminal history and
16 this kind of dubious power of attorney that was
17 granted to him in 2014, my feeling is they set the
18 business up in Marco's name because he could get the
19 license, and basically left it to Oscar to run it as
20 his own. And I think all the facts kind of bear
21 that out as well.

22 THE COURT: All right. Mr. O'Connell, do you
23 have anything you want to say?

24 MR. O'CONNELL: Yes, Your Honor. Again, I'm
25 going to say, that's a factual issue, isn't it?

1 They set it up. (Inaudible.) If my client can't
2 hold a license, they put it in the other person's
3 name, my guy's not the owner then, Oscar is.

4 THE COURT: Okay.

5 MR. O'CONNELL: Thank you.

6 THE COURT: All right. Well -- yes, sir.

7 MR. BREWER: Just as to the motions -- just as
8 to what's hanging out there with Mr. O'Connell's
9 claim. I'm going to say this and I hope it helps
10 everybody. So like I said earlier, surety is not
11 insurance, right? So we have a right of
12 indemnification back against Oscar's and Marco,
13 right? So our right of indemnification only exists
14 against your client to the extent we're in this
15 case.

16 THE COURT: Okay.

17 MR. BREWER: Right? So, obviously, this isn't
18 like free money, right? If we stay in the case, we
19 want a claim against you guys to pay us back for it.
20 That's my position on that. And, obviously, if
21 we're dismissed in the case, then we have no claim
22 against you and we would happily dismiss -- if our
23 motion to dismiss is granted ---

24 THE COURT: Okay.

25 MR. BREWER: --- we would happily dismiss our

1 cross claims against you and throw that baby out
2 with the bath water ---

3 THE COURT: Okay.

4 MR. BREWER: --- because then we're not subject
5 to having to pay the claim.

6 THE COURT: Okay.

7 MR. BREWER: I think there was some confusion
8 about that as to how those motions were filed.

9 THE COURT: Understood. All right.

10 MR. O'CONNELL: Thank you again, Your Honor.

11 THE COURT: Thank you. Well, like I said, I'm
12 going to need to take this matter under advisement.
13 As far as I know, I don't have any other matters
14 under advisement. I mean, I would anticipate
15 issuing a decision if not by maybe this Friday,
16 definitely by, you know, early next week.

17 (The proceedings concluded at 3:01 p.m.)

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C E R T I F I C A T E O F R E P O R T E R

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

I, the undersigned, Lisa Scott, Circuit Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned cause, relative to appeal in the Circuit Court for Greenville County, South Carolina, on the 8th day of November, 2022.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

March 8, 2022

/s/Lisa Scott

Lisa Scott
Circuit Court Reporter

STATE OF SOUTH CAROLINA)) COUNTY OF GREENVILLE)) Jessie J. Carter,)) Plaintiff)) v.)) Oscar Quirroga d/b/a) Oscar Auto Sales and) Marco A. Quiroga d/b/a) Oscar Auto Sales, and Palmetto) Surety Corporation,)) Defendants.)) <hr style="width: 30%; margin-left: 0;"/>	COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT Case No.: 2019-CP-23-07116 PLAINTIFF’S MOTION TO ALTER OR AMEND Rule 59(e)
---	--

COMES NOW, the Plaintiff by and through counsel and moves this court to Alter or Amend its Order issued on November 17, 2021 wherein the Court granted Palmetto Surety Corporation’s (“PSC) Motion to Dismiss.

Brief Review of the Facts

OAS was a used automobile dealer in Greenville County and contracted with PSC to serve as its surety in the amount of \$30,000.00 pursuant to S.C. Code Sec. 56-15-320 (b). The surety agreement was in effect at all times relevant to this action. The Plaintiff agreed to purchase from Oscar Auto Sales (“OAS”) a 1999 For Mustang Cobra, VIN # 1FAFP46V6XF199472, for \$5,500.00 and as a result a contract for sale was entered. The Plaintiff paid a \$500 deposit on July 31, 2019 with the remaining \$5,000.00 financed through USAA. As part of the contract for sale, OAS agreed to facilitate the financing by communicating directly with USAA. OAS delivered to USAA a “Dealer Funding Request” on August 2, 2019 wherein OAS requested the \$5,000.00 balance be wired directly to OAS. The Plaintiff, having heard nothing from OAS about the transaction, visited OAS on August 5, 2019

to see about the delay in delivery of the vehicle. The Plaintiff became frustrated with OAS staff and attempted to cancel the contract for the car. OAS fraudulently misrepresented that it would cancel the contract and returned the \$500 deposit to the Plaintiff and did not notify USAA. Subsequently, OAS received the \$5000 loan proceeds for the purchase of the vehicle at issue. OAS did not notify the Plaintiff of the receipt of the purchase money from USAA and did not deliver or offer to deliver the vehicle.

The Plaintiff learned of the \$5000 wire to OAS two weeks later when USAA notified the Plaintiff he had a loan payment due. USAA now seeks the loan balance of \$5,000.00 pursuant to the contract for sale and agreement it had with the Plaintiff. For approximately two months, the Plaintiff tried to get OAS to refund the \$5,000.00 which it refused to do. As a last resort, the Plaintiff hired counsel and OAS was personally served with a demand letter on October 18, 2019 demanding the return of the \$5,000.00 plus attorneys fees and interest. OAS repeatedly refused to return the \$5,000.00 and return the Plaintiff to the status quo ante. USAA is pursuing payments of the debt from the Plaintiff. On or before November 1, 2019, OAS sold the vehicle to another purchaser and therefore reaped the benefit of selling one car to two different people.

OAS has ceased all operations and permanently closed and the Plaintiff has made a demand upon the Surety PSC based upon the contract of sale and subsequent fraud.¹ For the purpose of § 56-15-320 (b), the Plaintiff is an “owner” as OAS had accepted the purchase price of the vehicle and the Plaintiff is entitled to possession of the vehicle under the contract for sale.

Statute 56-15-320(b)

The statute requires auto dealers to have a surety bond of \$30,000 as indemnification for loss or damage suffered by an owner of a motor vehicle, or his legal

¹ The Plaintiff did not include a cause of action demanding the vehicle be delivered to him as OAS sold the vehicle to a subsequent purchaser prior to filing of the Summons and Complaint in this case.

representative, by reason of fraud practiced or fraudulent representation made in connection with the sale or transfer of a motor vehicle by a licensed dealer.

Court Order

PSC argued that Plaintiff's claim cannot stand because Plaintiff was never the owner of this motor vehicle. The Court agreed. "It is clear the legislature intended to provide only the owner of a motor vehicle . . . with a cause of action against the surety on a bond issued pursuant to that statute." Mid-State Auto Auction of Lexington v. Altman 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996).

This Court found that "Whether the Plaintiff was or wasn't an owner at the time he paid the deposit, he was not an owner after he rescinded the contract." The Court further held the "Plaintiff cannot now argue that he retains an ownership interest today even after the sale contract has been rescinded by both parties." The Court's ruling is in error as there has been no valid rescission of the contract of sale.

Rescission

The fundamental prerequisite for rescission is that the parties be returned to the status quo prior to the contract. Hamilton Ridge Lumber Corp. v. Boston Ins. Co., 133 S.C. 472, 483, 131 S.E. 22 (and cases cited); 17A C.J.S., Contracts Section 438; 17 Am.Jur.2d, Contracts Section 512. This includes the requirement that the party seeking rescission must restore to the opposite party the benefits received. Hamilton Ridge, supra; 17A C.J.S., Contracts Section 427. Rice & Santos, Inc. v. Jones, 305 S.E.2d 74, 279 S.C. 201 (S.C. 1983).

The Court's ruling overlooks the fact that OAS did not return the purchase price of the vehicle and the Plaintiff was not returned to the status quo ante. OAS kept both the vehicle and the purchase price of the vehicle. As a result, OAS and in turn the surety cannot

claim rescission as a safe harbor for the fraudulent actions of OAS. Without the return of the purchase price, the Plaintiff remains an “owner” of the vehicle under the statute. Plaintiff’s attempt to rescind the contract was clearly not accepted or mutually agreed upon as OAS kept both the vehicle and purchase price for the vehicle. The law on Rescission is that the intent and subsequent actions must be mutual. Therefore, under the contract of sale, the Plaintiff was an “owner” in precisely the situation the statute intended to protect against.

OAS never rescinded the contract because it never returned the \$5,000.00 benefit it received as a result of entering into the contract. As a result, under Hamilton Ridge OAS cannot claim the contract has been rescinded while keeping both the vehicle and the purchase price it received from USAA. What is clear from the record is that OAS refused to return the purchase money from USAA even after counsel served a demand letter to them on October 18, 2019 – a full 75 days after OAS received the money. The record shows the Plaintiff notified OAS on or about August 19, 2019 and multiple occasions thereafter and OAS simply refused to return the purchase money.

The Plaintiff respectfully argues that the Court’s ruling excluding the Plaintiff from the statute simply because he attempted to cancel the contract is too restrictive. Especially where it is clear that as a matter of law that rescission could not occur without returning the Plaintiff to the status quo ante which is not contested. As a consequence of its Order, the Court nullifies the purpose of § 56-15-320 (b) which is to protect consumers from “fraud practiced . . . in connection with the sale or transfer of a motor vehicle by a licensed dealer . . .” Otherwise, Dealers could unilaterally “cancel” purchase contracts and keep deposits or wired funds and close the business leaving the consumer without recourse against the surety which is the precise purpose of the statute.

The failure of OAS to rescind the contract or return the purchase money from USAA left the Plaintiff without the car he had purchased and to which he is entitled as the buyer and owner under the contract of sale.

Therefore, the Plaintiff is an “Owner” for the purpose of § 56-15 320 (b) . an enforceable contract for the purchase of automobile and therefore an “Owner” for purposes of § 56-15 320 (b).

Respectfully submitted,

s/Matthew J. Kappel
Matthew J. Kappel
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S.C. Bar Number: 15390

November 29, 2021
Greenville, South Carolina

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
)	
JESSIE J. CARTER,	)	Civil Action 2019-CP-23-07116
Plaintiff,)	
VS	)	RETURN TO MOTION
)	
Oscar Quiroga, etal,)	
Defendants.)	

The DEFENDANTS, Oscar Quiroga (OQ), dba Oscar Auto Sales (OAS), Marco A.Quiroga (MQ) dba OAS Returning to the Motion of the Plaintiff to Alter and or Amend South Carolina Rules of Civil Procedure Rule 59(s) to Alter and or Amend would respectfully show and allege to the Court:

A. As to the Brief Review of the Facts:

1. Defendants here returning, inform the Court that Plaintiff is stating allegations as facts and all stated allegations and or alleged facts are in dispute.

B. As to Statue 56-15-320(b):

2. Defendant states that upon a review of the case law of South Carolina that there is as to South Carolina Code of Law Section 56-15-320(b), OAS did have a surety bond, from Palmetto Surety Corporation (PSC). Which on it's face requires "ownership" of a motor vehicle and that the "owner" of the vehicle.

3. As previously stated the question of "ownership" and "owner" of a motor vehicle is or are questions of fact.

C. As to Court Order:

4. The requirement as to "ownership" and "owner" of a motor vehicle, is a question of fact.

Because the question is when does "ownership" attach? The Court states, the question of owner or ownership is not a question in this case as the Plaintiff "rescinded the contract."

A review of the pleadings does not appear to address the question of "ownership".

D. As to Rescission:

5. The Plaintiff, did not appear to rescind the contract; as the issue of the civil action and does concern, "When and if there was an actual rescission?" Even though the deposit was returned promptly, the facts would show that Defendants (OAS) were not aware of the return of the funded remaining purchase price, to the Defendants, and that amount plus interest is in the main of the action.
6. Defendants again state there was no fraud, but as a jury questions, the surety should be involved in this action, at least until a jury has rendered a verdict.
7. Defendants request the Court to reverse It's ruling, South Carolina Rules of Civil Procedure Rule 8(F), which indicate that any matters and or issues should be heard by the Court to do "substantial justice" to the parties. See Dixon v. Ford, McFarlane v. Manley 264SC392 /264SE2d 838.

Which would not be the case here, as the Court's ruling would have the Plaintiff to bring another action, if and only if a jury finds there was fraud.

THEREFORE, Defendants returning to the Motion to Alter or Amend, which is considered to be a Motion to Reconsider.

S/James P. O'Connell
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& Oscars Auto Sales.
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December 5, 2021