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.

FINAL REPLY BRIEF OF APPELLANT

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September 30, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

ARGUMENT

I. APPELLANT'S COMPLAINT SUFFICIENTLY ALLEGED FRAUD AND FRAUDULENT REPRESENTATION IN CONNECTION WITH THE SALE OR TRANSFER OF A MOTOR VEHICLE.

Respondent's arguments under section III of its brief were not raised nor ruled on by the circuit court. "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). It is "axiomatic that an issue cannot be raised for the first time on appeal." *Id*. Imposing such a requirement on the appellant "is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011)

Despite the general rule, "Under the present rules, a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.' I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). "The basis for [a] respondent's additional sustaining ground[] must appear in the record on appeal . . . ." *Id*. at 420, 526 S.E.2d at 723. "The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR." Equivest Fin., LLC v. Ravenel, 422 S.C. 499, 507-08, 812 S.E.2d 438, 442 (Ct. App. 2018). To

the extent that the Court determines that Respondent's argument on the sufficiency of the pleadings can be raised, the record fails to support the argument.

Respondent's argument attempts to limit its liability based on a claim that fraud is essential to its liability under the Dealer's Act. While the Act provides that the bond cover acts of fraud it also covers violations of the Act that result in loss to a party or the public. S.C. Code Ann. § 56-15-320 (B) requires that the bond in this case 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*." S.C. Code Ann. § 56-15-320.

By statute, as well as the express provisions of the Respondent's bond, coverage therefore exists not only in cases of fraud but in any case where the dealer causes damage by reason of any violation of the chapter applying to dealers. In its argument the Respondent overlooks the full scope of liability under the Act. The Respondent also overlooks the expansive definition the Act gives to the term fraud.

Appellant alleged that the dealership sold him a car which is evidenced by a bill of sale. Appellant alleged that he canceled the sale. He also alleged that the dealership agreed to a cancellation of the sale. Appellant further alleged that despite the dealership's representations the dealership accepted and refused to return $5,000 in loan proceeds for the Appellant's purchase of the car. Then, despite having refused to return the purchase money, the dealership refused to transfer possession of the vehicle to the Appellant, and instead, sold it to a third party. Thus the dealership was paid twice for the same vehicle. As alleged, these acts constitute not only fraud but

a violation of the laws applicable to dealerships.

Pursuant to 56-15-10 (m): "Fraud," shall include, in addition to its normal legal connotation, the following: a misrepresentation in any manner, whether intentionally false or due to gross negligence, of a material fact; a promise or representation not made honestly and in good faith; and an intentional failure to disclose a material fact. S.C. Code Ann. § 56-15-10.

Appellant's Third Amended Complaint alleges *inter alia*, Breach of Contract Accompanied by Fraudulent Act. Specifically the Complaint alleges that the Defendants breached the contract with a fraudulent intention and the breach was accompanied by a fraudulent act. (R. pp. 44-45). Here the dealership represented that it would sell the vehicle to the Appellant. Implicitly, the Dealership represented that once it received the loan proceeds it would transfer possession of the vehicle to the Appellant. Despite receiving the purchase funds the Dealership failed to transfer possession of the vehicle to the Appellant. The Dealership's representations inherent in the sale were therefore false. The Dealership further represented that it would cancel the sale. Because the return of the purchase money was necessary to effectuate a cancellation of the sale, the Dealership's representations there were also false. The Dealership's failure to deliver possession or return the purchase money constitutes fraud, especially under the expanded definition given in S.C. Code Section 56-15-10 (m).

In the present case, the surety bond at issue provides coverage as required under S.C. Code Section 56-15-320 (B) which is set out above.

Appellant's Third Amended Complaint alleges, *inter alia*, a cause for Unfair Trade Practices. S.C. Code Section 56-15-30 provides: "(a) Unfair methods of competition and unfair or deceptive acts or practices as defined in § 56-15-40 are hereby declared to be unlawful." S.C. Code Section 56-15-40 (B) provides: "It shall be deemed a violation of Section 56-15-30(a) for

any manufacturer, factory branch, factory representative, distributor, or wholesaler, distributor branch, distributor representative or *motor vehicle dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public*." S.C. Code Section 56-15-30 *emphasis added*. Here, the dealership's actions in refusing to either transfer possession of the vehicle or return the purchase money constitute acts which are arbitrary, in bad faith, or unconscionable and which caused damage to the Appellant who remains responsible for the repayment of the loan proceeds.

"Arbitrary" for purposes of the Dealers Act includes "acts which are unreasonable, capricious or nonrational; not done according to reason or judgment; depending on will alone." Taylor v. Nix, 307 S.C. 551, 555, 416 S.E.2d 619, 621 (1992). Bad faith includes acts involving actual or constructive fraud, or a design to deceive or mislead another, or a neglect or refusal to [fulfill] some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. State v. Griffin, 100 S.C. 331, 333, 84 S.E. 876, 877 (1915) (*quoting* Black's Law Dictionary).

"The Dealers Act defines 'fraud' to include its 'normal legal connotation' as well as 'misrepresentation in any manner, whether intentionally false or due to gross negligence, of a material fact; a promise or representation not made honestly and in good faith; and an intentional failure to disclose a material fact.'" deBondt v. Carlton Motorcars, Inc., 342 S.C. 254, 263-64, 536 S.E.2d 399, 404 (Ct. App. 2000) (*quoting* S.C. Code Ann. § 56-15-10(m) (1991)).

To be liable under the Dealers Act, the dealer must participate in the wrongful conduct. Jackson v. Speed, 326 S.C. 289, 302, 486 S.E.2d 750, 756 (1997). "An agent for an entity who makes misrepresentations while attempting to sell a motor vehicle qualifies as a dealer who may

be held liable under this act." *Id. at* 302, 486 S.E.2d at 756.

In the present case the record contains evidence of misrepresentations, fraud, and violations of the Act committed by the dealership or its authorized agents. By accepting the down payment and terms of financing the dealership represented that it would transfer possession of the vehicle to the Appellant when it received the loan proceeds. The dealership subsequently represented that it would cancel the contract when in fact they did not do when they refused to return Appellant's loan proceeds. Thus, the dealership failed to return the Appellant to *status quo* which was required to effectuate a cancellation of the sale. The dealership's failure to either transfer possession of the vehicle or return the Appellant's purchase money constitute a refusal to fulfill its duties owed to the Appellant. As such they constitute a sufficient basis to establish a violation of the Dealers Act. *See* Estate of Carr v. Circle S Enters., 379 S.C. 31, 42-44, 664 S.E.2d 83, 88-89 (Ct. App. 2008). Appellant's complaint therefore sufficiently states a claim against the Respondent's bond under the Dealers Act.

CONCLUSION

Based on the foregoing the decision of the circuit court granting Respondent Palmetto's motion to dismissed should be reversed.

Respectfully submitted,

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PROOF OF SERVICE

I certify that on September 30, 2022, I served the Appellant's Final Reply Brief on the Respondent, and others if so indicated, by AIS email only addressed to counsel of record, and any others, and by other means, as indicated below:

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