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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals Jr., Circuit Court Judge

Case No. 2023-000540

Target Motors, LLC d/b/a Port City Motors, Appellant,

v.

Grand Strand Nissan, Inc., and Grainger Companies, Inc. d/b/a Grainger Honda, Defendants,

Of which Grand Strand Nissan, Inc., is the Respondent.

INITIAL BRIEF OF APPELLANT

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QUESTION PRESENTED

When a car dealer deceptively sells a previously-wrecked vehicle, intending that it be resold, is the dealer automatically immune from liability to all purchasers after the first purchaser?

OVERVIEW

Respondent Grand Strand, Inc., an automobile dealer, deceptively placed a frame-damaged, rebuilt Nissan Titan into the stream of commerce. It did so via a dealers-only auction, where all vehicles are intended to be re-sold by the purchaser. Grand Strand did not disclose that the vehicle had been wrecked, or that the entire frame had been replaced, although the auction rules require all structural repairs and replacements to be disclosed. Its purchaser discovered the prior wreck and then did as Grand Strand had done: it resold the vehicle via the same auction, without disclosing the prior wreck or the frame replacement. Appellant Target Motors, LLC ("Target") purchased the Titan. Target learned of the wreck when the consumer to whom Target sold the Titan learned of it and informed Target. Target promptly agreed to refund part of the purchase price. Target then sued Grand Strand. (Target also sued the intermediate purchaser-reseller, Grainger Companies, and the auction, Manheim Darlington, which had learned of the wreck in the interim between the two sales. Neither is a party to this appeal).

Target brought causes of action against Grand Strand for negligence, including carelessness, recklessness, willfulness, and wantonness, negligent misrepresentation, violation of the Unfair Trade Practices Act and Dealers Act, and fraud. Grand Strand does not dispute argue that, had it deceptively sold the wrecked Titan from its own lot to a customer, who later learned of the wreck, the customer could sue Grand Strand under each of these theories. But it claims that as an indirect seller that had no interaction with Target, it is immune from suit by

Target, as Grand Strand asserts a victim of a deceptive motor vehicle sale may sue only the party who sold it to him. The lower court agreed, and granted Grand Strand summary judgment, as a matter of law, before discovery was completed. Thus this appeal.

Grand Strand's position is unjust, for if any owner in the chain goes bankrupt, the deceptive dealer gets off scot-free. It is inefficient, for if each purchaser must sue only the seller it bought the vehicle from, courts will be required to adjudicate each link in the chain, as liability painstakingly moves up from each owner to the owner before it. The Order's reasoning is contrary to well-established jurisprudence and common sense. It rejected Target's claims on grounds that Grand Strand owed Target no duty. But it makes no sense to reject claims for reckless and intentional torts on grounds of a lack of duty. Courts do not ask, "But to whom did the defendant owe a duty not to be reckless?" They ask only whether the injury was proximately caused by the wrongful act, and hold the reckless or intentional wrongdoer liable for whatever harm he caused. Its sub-holdings that "all of Plaintiff's claims require either that Grand Strand have some form of communication, relationship, or interaction with Plaintiff" and therefore "Grand Strand did not owe a duty to Plaintiff under any theory recognized by South Carolina law" further err because they contradict the Supreme Court's holding that it would be "absurd" to "prohibit UTPA actions by all remote buyers," Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc. ("Colleton Prep."), 379 S.C. 181, 196, 666 S.E.2d 247, 255 (2008), overruled on other grounds by Sapp v. Ford Motor Co., 386 S.C. 143, 687 S.E.2d 47 (2009), as well as this Court's holding in Rayfield v. S.C. Dep't of Corr., 297 S.C. 95, 103, 374 S.E.2d 910, 914 (Ct. App. 1988). Rayfield held that a plaintiff establishes a duty by showing that a statute protects a class of which he is a member from the kind of harm which he experienced. It is plain that the UTPA and Dealers Act protect the class of automobile

buyers from deceptive sales by automobile dealers. It is simply not necessary that a defendant have prior "communication, relationship, or interaction" with the plaintiff. E.g., Gossett v. Burnett, 251 S.C. 548, 164 S.E.2d 578 (1968) (finding a case should go to the jury where initial tortfeasor set off burglar alarm, and officer sped to the scene, failing to give proper notice he would run a red light, colliding with a second vehicle, which then collided with a third, which then collided with plaintiff's vehicle (the fourth vehicle)). Courts routinely hold defendants liable for acts that hurt persons with whom they had no prior "communication, relationship, or interaction"—for example, where Driver A negligently causes Driver B to crash into a vehicle driven by Driver C.

Its holdings on proximate cause employ the wrong standard of decision. The Order holds that "Plaintiff failed to prove that Grand Strand was the proximate cause of Plaintiff's damages," but a party resisting summary judgment need not prove his claims.

Its holdings also misunderstand the doctrine of proximate cause. The doctrine of proximate cause has two parts, but-for causation (or "causation-in-fact"), and foreseeability. The Order misunderstands each. It holds, "The test for cause in fact is not: 'but for' Grand Strand's sale to Grainger, Plaintiff suffered damages." But that is exactly what the test is, as many cases have held. The Order even quotes a decision from the Supreme Court stating exactly that: "Causation-in-fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence[.]" Under the Order's own case, the decision should be for Target.

As for foreseeability, "[t]he touchstone of proximate cause in South Carolina," Koester v. Carolina Rental Ctr., Inc., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994), it is eminently foreseeable that where a dealer sells a previously-wrecked pickup as never having been

wrecked, someone is going to end up with a previously-wrecked pickup after paying for a never-wrecked one. That is all our law requires. "It is sufficient that in view of all the attendant circumstances, he should have foreseen that his negligence would probably result in injury of some kind to some one." Tobias v. Carolina Power & Light Co., 190 S.C. 181, 186, 2 S.E.2d 686, 688 (1939). The injury was foreseeable. The Order's holding that the injury was not foreseeable is wrong.

Its sub-holdings include several independently reversible errors. In support of its sub-holding that "There are simply too many intervening negligent events" for proximate cause to exist, it cites only one case—which says nothing about too many events defeating proximate cause. The Supreme Court has repeatedly stated that the test is not the number of events. "The test is to be found in the probable consequences reasonably to be anticipated, and not in the number or exact character of events subsequently arising." Matthews v. Porter, 239 S.C. 620, 626, 124 S.E.2d 321, 324 (1962). Pfaehler v. Ten Cent Taxi Co., 198 S.C. 476, 486, 18 S.E.2d 331, 335 (1942) (similar).

And the case the Order relies on for its holding re foreseeability, Oliver v. South Carolina Dep't of Highways & Pub. Transp., 309 S.C. 313, 422 S.E.2d 128 (1992), actually states,

> [I]f the character of the intervening act claimed to break the connection between the original wrongful act and the subsequent injury was such that its probable or natural consequences could reasonably have been anticipated, apprehended, or foreseen by the original wrongdoer, the causal connection is not broken and the original wrongdoer is responsible for all the consequences resulting from the intervening act.

Oliver, 309 S.C. at 317, 422 S.E.2d at 131 (emphasis added). Here, the consequence—someone ending up with a previously wrecked vehicle after paying for a never-wrecked one—could

reasonably have been anticipated by Grand Strand. Again, under the Order's own case, the decision should be for Target.[1]

To the extent that the Order may rely on its observation that "an intervening party, Grainger, had knowledge of the prior wreck damage and failed to disclose it to the Plaintiff," it again errs, as "[I]t matters not that the supervening and concurrent cause was an act of negligence of a third person or even a wilful or criminal act." Wineglass v. McMinn, 235 S.C. 537, 541–42, 112 S.E.2d 652, 654 (1960).[2]

To the extent the Order may intend that the identity of the victim was unforeseeable, it errs. There is no requirement that the identity of the specific victim be foreseeable. Tobias, 190 S.C. at 186, 2 S.E.2d at 688; see also Horne v. Atl. Coast Line R. Co., 177 S.C. 461, 471, 181 S.E. 642, 646 (1935) (holding it is "not necessary" for proximate cause "that the person committing it could or might have foreseen the particular consequence or precise form of the injury, … or that it would occur to the particular person, if by the exercise of reasonable care it might have been foreseen or anticipated that some injury might result").

The Order states (alteration in original), "when the evidence is susceptible of only one inference, [] proximate cause becomes a matter of law for the court." Here, if the evidence is susceptible of only one inference, it is that the harm was foreseeable, and Target, not Grand Strand, is entitled to judgment as a matter of law.

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[1] And under many others. For example, Tobias and Matthews, cited above for related propositions, each contain language identical to the block quote from Oliver above. Tobias v. Carolina Power & Light Co., 190 S.C. 181, 186, 2 S.E.2d 686, 687-8 (1939); Matthews v. Porter, 239 S.C. 620, 627, 124 S.E.2d 321, 325 (1962).

[2] Again, our appellate courts have repeatedly so held. E.g., Culbertson v. Johnson Motor Lines, 226 S.C. 13, 24, 83 S.E.2d 338, 343 (1954) (similar); Ayers v. Atl. Greyhound Corp., 208 S.C. 267, 37 S.E.2d 737, 741 (1946)) (similar).

Additionally, courts in other jurisdictions considering similar defenses by businesses that deceptively place a vehicle into the stream of commerce reject those defenses. They find the initial wrongdoer liable to the indirect purchaser with whom the defendant had no interaction. E.g., Grabinski v. Blue Springs Ford Sales, Inc., 136 F.3d 565, 569 (8th Cir. 1998). As one court noted, "It is difficult to conceive of a commodity that is any more likely to involve knowledge by a seller that there is an especial likelihood that a misrepresentation will reach third persons and will influence their conduct, than in the case of a motor vehicle." Clark v. McDaniel, 546 N.W.2d 590, 593-94 (Iowa 1996) (cleaned). As another noted, the defendant "collected a non-salvage premium for the car when it sold it" while wrongfully "shift[ing] the salvage discount downstream to someone else to bear." Santander Consumer USA Inc., No. 16-14012-CIV, 2016 WL 11570406, at *4 (S.D. Fla. Aug. 2, 2016), report and recommendation adopted, No. 2:16-CV-14012, 2016 WL 11570405 (S.D. Fla. Aug. 19, 2016). These cases and many others hold that upstream businesses that deceptively sell a vehicle are liable to the party that bears the foreseeable injury, under the same principles that South Carolina law upholds. This Court should so hold, too.

STATEMENT OF THE CASE

Appellant Target Motors, LLC d/b/a Port City Motors ("Target") filed suit in the Horry County Court of Common Pleas on February 8, 2022. The original complaint alleged claims against Respondent Grand Strand Nissan, Inc. ("Grand Strand"), the intermediate purchaser-reseller, Grainger Companies, Inc. d/b/a Grainger Honda ("Grainger Companies"), and the auction, Manheim Remarketing, Inc. d/b/a Manheim Darlington ("Manheim Darlington") stemming from Target's purchase on January 2, 2020 of a used 2018 Nissan Titan SV pickup truck through Manheim Darlington's online auction. (Compl.) Manheim Remarketing Inc.

removed the case to federal court on grounds of a federal question, as the original complaint had a claim under the federal Odometer Act. (Notice of Removal). Target amended the complaint to remove Manheim Remarketing as a defendant and to remove the federal claim. (Am. Compl.) The case was remanded to the Horry County Court on April 18, 2022. (Order of Remand).

The Amended Complaint (R. pages _-_) alleged that Grand Strand had performed wreck-related repairs to the wrecked Titan, then bought the truck, and sold it on November 14, 2019 as a "green light" vehicle via the Manheim online auto auction without disclosing the pickup had suffered extreme wreck related frame damage. (Am. Compl. pp. 2-4). Manheim is a dealers-only auction, the rules of which require disclosure of this damage.

The Amended Complaint further alleged:

- repairing the wreck damage cost more than $18,000 (Am. Compl. p. 2);
- repairs included removing and replacing the frame (id.);
- upon discovering the wreck damage, Defendant Grainger Companies, which had bought the vehicle from Respondent Grand Strand, sold the vehicle without disclosure to Appellant Target via the same auction (id. pp. 2-4);
- Target then sold the vehicle to a customer (id. p. 4);
- Target learned of the wreck damage on or about February 17, 2020, when its customer discovered the damage and informed Target (id. p. 4); and
- Target and the customer thereupon agreed on a payment from Target to the customer (id.).

The Amended Complaint brought claims against Grand Strand for negligence, including carelessness, recklessness, willfulness, and wantonness, negligent misrepresentation,

violation of the South Carolina Unfair Trade Practices Act ("UTPA"), S.C. Code Ann. Sections 39-5-10 to -730, and the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act ("Dealers Act"), S.C. Code Ann. Sections 56-15-10 to -600, and fraud. (Am. Compl. pp. 5-9). It also brought similar claims and a breach of contract claim against the intermediary purchaser-reseller, Grainger Companies. (Id. p. 4-9). (Grainger Companies is not a party to this appeal).

Grand Strand's Answer, filed April 26, 2022, denied all liability and raised six affirmative defenses. (Answer to Am. Compl). Grand Strand did not argue that, had it deceptively sold the wrecked Titan from its own lot to a customer, who later learned of the wreck, the customer could not sue Grand Strand under each of these theories. But it asserted that Target's injuries were due solely to "the intervening and superseding acts of third parties" (id. p. 7) (Third Defense), that any damage to Target was due to Target's own negligence (id.) (Fourth Defense), and that "the negligence of Grand Strand is not the direct or proximate cause of any injury alleged by the Plaintiff" (id.) (Fifth Defense).

On October 5, 2022, Grand Strand moved for summary judgment under Rule 56, SCRCP, on all of Target's claims against it (R. p.), and filed its memorandum in support on December 22, 2022 (R. pp.). Target filed its memorandum in opposition on January 2, 2023. (R. pp.). A hearing was held on January 3 before the Honorable William H. Seals, Jr. A Form 4 order issued on January 5, 2023. It dealt with two motions.[3] As to Grand Strand's motion, it stated, "Defendant's Motion/Summary Judgment is Granted. A Formal Order to Follow by [Grand Strand's] Attorney Mary Caskey." (Form 4 order).

[3] The second motion concerned a discovery issue between Target and Grainger Companies.

The more formal order by Ms. Caskey ("the Order") was electronically signed by the judge without change and filed on January 19, 2023. (R. pp.). The formal Order holds for Grand Strand as a matter of law. (Order p. 4) (holding that "Grand Strand's alleged fault is too remote to be linked to Plaintiff's damages as a matter of law" as to all claims). It further holds that "all of Plaintiff's claims require either that Grand Strand have some form of communication, relationship, or interaction with Plaintiff regarding the history and condition of the Truck" (id.); that "Grand Strand did not owe a duty to Plaintiff under any theory recognized by South Carolina law" (id. p. 5); that "[t]he test for cause in fact is not: 'but for' Grand Strand's sale to Grainger, Plaintiff suffered damages" (id. p. 8); that "[t]here are simply too many intervening negligent events to link Grand Strand to Plaintiff's damages," (id.); that the UTPA does not allow actions by remote buyers (id. p. 9), and that "Grand Strand did not violate the Dealers Act" (id. p. 10).

Target's motion to reconsider was denied by Form 4 order filed March 3, 2023. (R. p.). Discovery had not been completed when these orders issued. (Tr. Hr'g 13:21-22; 17:20-21:2; 24:19-24). Nor is discovery concluded as of this writing.

Notice of Appeal was served on March 31, 2023.

STATEMENT OF FACTS

Most of the relevant facts are provided above in the Statement of the Case. One procedural fact should be pointed out: while the Order may leave the unfortunate impression that Target sued Grand Strand for breach of contract, Target did not do so. (Am. Compl. p. 4) (amended complaint seeking breach of contract damages only against Grainger Companies); (Target's Mem. Opp. p. 10) (Target's Opposition to Grand Strand's motion, stating that Target "has not made a contract claim against Grand Strand").

It should also be pointed out, substantively:

- The auction rules require sellers to "disclose permanent structural damage, any structural alterations, structural repairs or replacements." (Arbitration Policy – In-Lane and Online, p. 11).[4]
- Grand Strand did not disclose. (Order, p. 3).
- It was eminently foreseeable to a seller like Grand Strand at a dealers-only auction like the Manheim auction that the vehicle would be sold to a dealer and eventually to a consumer. In fact, the auction is limited to vehicles intended to be re-sold. The Auction's Terms and Conditions state, "[A]ny Vehicle is purchased for resale in the form of tangible personal property in the regular course of business and is the sort usually purchased [for] resale." (Manheim Terms and Conditions, p. 5 paragraph (m)).
- There were three obvious possibilities at the time Grand Strand put the vehicle up for sale: The dealer to whom Grand Strand sells the vehicle will quickly discover the problem and rescind the contract, demand compensation, or otherwise frustrate Grand Strand's intent; the dealer to whom Grand Strand sells the vehicle will discover the problem and pass it on without disclosure, as happened here; or the dealer to whom Grand Strand sells the vehicle will not discover the problem, and will pass it on to another buyer.

[4] Sales under green lights, like the sales here, are guaranteed by the seller and any defects or issues requiring disclosure per the auction's policies must be announced. (Bill of Sale, p. 1)); (Arbitration Policy – In-Lane and Online, p. 3 Sec. II(1)).

ARGUMENT

BACKGROUND LAW

I. STANDARD OF REVIEW

The standard of review is de novo as to all claims. The Order holds for Grand Strand as a matter of law (Order p. 4), and matters of law are reviewed de novo. Wright v. PRG Real Est. Mgmt., Inc., 426 S.C. 202, 211–12, 826 S.E.2d 285, 290 (2019) ("When a circuit court grants summary judgment on a question of law, this Court will review the ruling de novo."). The Order's rejections of the statutory claims are reviewed de novo for the additional reason that these decisions were based on interpretations of statutes: the interpretation of a statute is a question of law, which is reviewed de novo. Layman v. State, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008).[5]

II. STANDARDS FOR SUMMARY JUDGMENT

Summary judgment under Rule 56, SCRCP, is a "drastic remedy" that should be invoked only "cautiously" "to ensure that a litigant is not improperly deprived of a trial on disputed factual issues." BPS, Inc. v. Worthy, 362 S.C. 319, 326, 608 S.E.2d 155, 159 (Ct. App. 2005). Its purpose is simply "to expedite disposition of cases which do not require the services of a fact finder." Id. Summary judgment "is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Hoard ex rel. Hoard v. Roper Hosp., Inc., 387 S.C. 539, 546, 694 S.E.2d 1, 4 (2010).

[5] To the extent, if any, that the Court might consider any topic here to be a novel issue, the Court may decide it in light of what bests comports with the law and public policies of this state and the Court's sense of law, justice and right. "When addressing a novel question of law, the appellate court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of this state and the court's sense of law, justice, and right." State v. Sweat, 379 S.C. 367, 373-74, 665 S.E.2d 645, 649 (Ct. App. 2008) (citing Croft v. Old Republic Ins. Co., 365 S.C. 402, 408, 618 S.E.2d 909, 912 (2005)), aff'd as modified, 386 S.C. 339, 688 S.E.2d 569 (2010).

The burden is on the movant. Owens v. Magill, 308 S.C. 556, 562, 419 S.E.2d 786, 790 (1992). The movant must "clearly establish" the absence of a triable issue. "The party seeking summary judgment has the burden of clearly establishing by the record properly before the Court the absence of a triable issue of fact." (Id., citing Standard Fire Ins. Co. v. Marine Contracting and Towing Co., 301 S.C. 418, 392 S.E.2d 460 (1990)). "A party who fails to show the absence of a genuine issue of material fact is not entitled to summary judgment even though his adversary does not come forward with opposing materials." Standard Fire Co. v. Marine Contracting & Towing Co., 301 S.C. 418, 422, 392 S.E.2d 460, 462 (1990) (citing Title Insurance Co. of Minnesota v. Christian, 267 S.C. 71, 226 S.E.2d 240 (1976)).

"All ambiguities, conclusions and inferences arising in and from the evidence must be construed most strongly against the movant for summary judgment." Williams v. Chesterfield Lumber Co., 267 S.C. 607, 610, 230 S.E.2d 447, 448 (1976); BPS, Inc., 362 S.C. at 325, 608 S.E.2d at 159 (similar). The party resisting summary judgment need not prove its contentions; it is enough that they can be supported by a "reasonable inference," Kitchen Planners, LLC v. Friedman, Op. No. 2020-001669 (S.C. Sup. Ct. filed Aug. 23, 2023) (Howard Adv. Sh. No. 33 at 11, 14) (2023 WL 5420401, at *2). "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Nelson v. Charleston Cnty. Parks & Recreation Comm'n, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct. App. 2004) (citing Hall v. Fedor, 349 S.C. 169, 173–74, 561 S.E.2d 654, 656 (Ct.App.2002)).

This Court has repeatedly held that questions of proximate cause are jury questions except under "rare or exceptional" circumstances. Hurd v. Williamsburg Cnty., 353 S.C. 596, 614, 579 S.E.2d 136, 145 (Ct. App. 2003), aff'd, 363 S.C. 421, 611 S.E.2d 488 (2005); Ballou

v. Sigma Nu Gen. Fraternity, 291 S.C. 140, 147, 352 S.E.2d 488, 493 (Ct. App. 1986) (same) (citing 65A C.J.S. Negligence § 264 at 917 (1966)). See also Player v. Thompson, 259 S.C. 600, 606, 193 S.E.2d 531, 533 (1972) (similar).[6]

It is error to grant summary judgment when discovery is not complete and additional facts might shed light on the application of a question of law. "[E]ven if some points involve established matters of law, the grant of summary judgment in his case prematurely ended the parties' discovery process. We believe questions about the application of the law to the relevant facts . . . preclude the grant of summary judgment." Callawassie Island Members Club, Inc. v. Martin, 437 S.C. 148, 160, 877 S.E.2d 341, 347 (2022).

III. STATUTES

Two statutes apply here. These are the South Carolina Unfair Trade Practices Act and the South Carolina Dealers Act.

Statutory Texts

The Unfair Trade Practices Act ("UTPA"), S.C. Code Ann. sections 39-5-10 to -730, provides that "unfair or deceptive acts or practices in the conduct of any trade or commerce are . . . unlawful," section 39-5-20(a). "Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by Section 39-5-20 may bring an action." Section 39-5-140(a) (emphasis added).

[6] Even the Oliver case the Order relied on (Order p. 8) agrees, "[L]egal cause is ordinarily a question of fact for the jury," Oliver v. S.C. Dep't of Highways & Pub. Transp., 309 S.C. 313, 317, 422 S.E.2d 128, 131 (1992), as this Court has pointed out, Hurd, 353 S.C. at 614, 579 S.E.2d at 145 (citing Oliver, 309 S.C. at 317, 422 S.E.2d at 131).

The UTPA applies to deceptive sales of motor vehicles. "South Carolina precedent establishes that failure to accurately represent the history of a car constitutes a deceptive trade practice under section 39-5-20." Wright v. Craft, 372 S.C. 1, 26–27, 640 S.E.2d 486, 500 (Ct. App. 2006) (citing several authorities).

The Dealers Act, S.C. Code Ann. sections 56-15-10 to -600, similarly provides that "Unfair methods of competition and unfair or deceptive acts or practices [are] unlawful," section 56-15-30. "It shall be deemed a violation of Section 56-15-30(a) for any . . . 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." Section 56-15-40(B). "[A]ny person who shall be injured in his business or property by reason of anything forbidden in this chapter may sue therefor . . . ." Section 56-15-110(1) (emphasis added). "The Dealers Act also specifically provides that 'any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy.'" Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 30 n.7, 644 S.E.2d 663, 671 n.7 (2007) (quoting § 56–15–130 (2006)).

Additionally, under the Dealers Act, "'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." Section 56-15-10(m) (emphasis added).

Statutory Analysis

Plain language. "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal

meaning." Edwards v. State Law Enf't Div., 395 S.C. 571, 575, 720 S.E.2d 462, 464 (2011). Garrison v. Target Corp., 435 S.C. 566, 581, 869 S.E.2d 797, 805 (2022) (quoting Media Gen. Commc'ns, Inc. v. S.C. Dep't of Revenue, 388 S.C. 138, 148, 694 S.E.2d 525, 530 (2010)) (similar). See also Centennial Cas. Co. v. W. Sur. Co., 412 S.C. 331, 334, 772 S.E.2d 274, 276 (2015) (reading South Carolina's Dealers Act in terms of its plain language). The Supreme Court has held the UTPA allows for suits by indirect purchasers. Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc. ("Colleton Prep."), 379 S.C. 181, 666 S.E.2d 247 (2008), overruled on other grounds by Sapp v. Ford Motor Co., 386 S.C. 143, 687 S.E.2d 47 (2009).[7] Favorably citing "The dissent in Reynolds [which] pointed out that: the plain meaning of the UTPA statute did not limit remedies to the initial purchaser," id. at 195, 666 S.E.2d at 254, the Supreme Court explained that to hold otherwise "would lead to an absurd result. Such a finding would prohibit UTPA actions by all remote buyers and competitors," id. at 196, 666 S.E.2d at 255 (emphasis added).

Remedial Nature. Alternatively, principles of statutory construction require that any ambiguity in remedial statutes like these be construed liberally to effect their purposes. The statutes are obviously designed to remedy the problem that too many businesses were not playing fair (UTPA), and specifically that too many in the automotive field were not playing fair (Dealers Act). Ducworth v. Neely, 319 S.C. 158, 163 n.3, 459 S.E.2d 896, 899 n.3 (Ct.

[7] In Colleton Prep., the Court considered two certified questions. Its decision on the first certified question, which concerned the economic loss doctrine, was later overruled by Sapp. The second certified question was, "(2) Can a plaintiff who used but did not purchase a product directly from the defendant and nonetheless suffered a loss as a result of the defendant's unfair or deceptive acts obtain relief under the South Carolina Unfair Trade Practices Act?," 379 S.C. at 186, 666 S.E.2d at 250. "[W]e answer the second certified question, 'yes.'" Id. at 196, 666 S.E.2d at 255. See also id. at 194, 666 S.E.2d at 254 (similar).

App. 1995) ("Because the provision affords the innocent owner a remedy not recognized previously, it should be classified as remedial"); Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 477, 351 S.E.2d 347, 349 (Ct. App. 1986) (internal quotation marks omitted) ("The legislature intended in enacting the UTPA to control and eliminate the large scale use of unfair and deceptive trade practices within the state of South Carolina."); State ex rel. McLeod v. C & L Corp., 280 S.C. 519, 527, 313 S.E.2d 334, 339 (Ct. App. 1984), abrogated on other grounds by Murphy v. Owens-Corning Fiberglas Corp., 346 S.C. 37, 550 S.E.2d 589 (Ct. App. 2001) (The UTPA's "purpose is to give additional protection to the victims of unfair trade practices, not to make a case harder to prove than it would be under common law principles"); cf. Am. Lease Plans, Inc. v. R. C. Jacobs Plumbing, Heating & Air Conditioning, Inc., 274 S.C. 28, 33, 260 S.E.2d 712, 714 (1979) ("It was never contemplated that this statute (s 56-19-360) which was obviously intended to prevent fraudulent transfer of cars should be applied so as to protect one whose conduct has enabled another to commit a fraud"). "[T]he strong public policy notions behind the enactment of the SCUPTA and the Dealers Act," Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 30 n.7, 644 S.E.2d 663, 671 n.7 (2007), include "punishing acts that adversely affect the public interest," id. at 14; 644 S.E.2d at 671. A related purpose of the UTPA is to allow fair businesses like Target to compete with unfair businesses like Grand Strand. Taylor v. Medenica, 331 S.C. 575, 579, 503 S.E.2d 458, 460 (1998).

Remedial statutes are to be construed liberally to achieve their purposes. "This is a remedial statute, and as such should receive a liberal construction; that is, a construction giving the words the largest, the fullest, the most extensive meaning of which they are susceptible." Allen v. Union Oil & Mfg. Co., 59 S.C. 571, 577, 38 S.E. 274, 276 (1901) (internal quotation

marks omitted); South Carolina Dep't of Mental Health v. Hanna, 270 S.C. 210, 213, 241 S.E.2d 563, 564 (1978) (similar); Inabinet v. Royal Exch. Assurance of London, 165 S.C. 33, 36, 162 S.E. 599, 600 (1932) (similar). If there were an ambiguity in the texts of the statutes, it should be construed in favor of making the statute more effective.

APPLICATION

IV. THE ORDER ERRS IN GRANTING SUMMARY JUDGMENT

Grand Strand deceptively sold the Titan, intending that it be resold. Grand Strand does not argue that, had it deceptively sold the frame-damaged Titan to Target, Target could not sue Grand Strand upon discovering the fraud. Its claim that it distanced/immunized itself, as a matter of law, from liability to the victim by routing the vehicle through an intermediary should be rejected.

South Carolina courts have repeatedly held tortfeasors liable to indirect victims for similar acts, and other courts have specifically found indirect sellers of motor vehicles liable to the ultimate victims of their deceptive sales. The Court should so hold. More specifically, it should hold that it is, at the least, a jury question.

A. Duty and Proximate Cause

1. Duty

The Order errs in holding, "Grand Strand did not owe a duty to Plaintiff under any theory recognized by South Carolina law." (Order p. 5). The Supreme Court disagrees. Colleton Prep. (holding that indirect buyers may sue under the UTPA). More generally, as this Court has held,

> In order to show that the defendant owes him a duty of care arising from a statute, the plaintiff must show two things: (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect.

Rayfield v. S.C. Dep't of Corr., 297 S.C. 95, 103, 374 S.E.2d 910, 914 (Ct. App. 1988). It is obvious that an essential purpose of the UTPA is to protect against deceptive or unfair sales by businesses generally and an essential purpose of the Dealers Act is to protect against deceptive or unfair sales specifically by motor vehicle dealers like Grand Strand, and that motor vehicle purchasers like Target are members of the classes the statutes intend to protect. Grand Strand owed Target a duty.

More generally, South Carolina recognizes a duty to the public, S.C. Elec. & Gas Co. v. Utilities Const. Co., 244 S.C. 79, 88, 135 S.E.2d 613, 617 (1964) (emphasis added) ("[L]egal duty is that which the law requires to be done or forborne with respect to a particular individual or the public at large"), at least where motor vehicles are involved, see, e.g., Myers v. Atl. Coast Line R. Co., 172 S.C. 236, 242, 173 S.E. 812, 814 (1934) (motor vehicle collision) ("[B]oth companies owed the duty to the public of whatever would be reasonably adequate to protect" it); Lentz v. Carolina Scenic Coach Lines, 208 S.C. 278, 290, 38 S.E.2d 11, 17 (1946) (emphasis added) ("Common sense and reason make it plain that a bus operator owes a duty to the public lawfully using the highways, as well as a duty to its passengers."). Here, there is a duty to the public not to deceptively place wrecked and rebuilt motor vehicles into the stream of commerce with the intent that the purchaser resell the vehicle to the public without disclosure.[8]

[8] To the extent the Order relies on Wright v. Craft, 372 S.C. 1, 25, 640 S.E.2d 486, 499 (Ct. App. 2006) as limiting the circumstances in which the law will find an implicit duty to disclose, the Order errs, as (a) here, there was an explicit duty to disclose (Arbitration Policy – In-Lane and Online, pp. 9, 11, 13; Manheim Terms and Conditions p. 1 Item 3, p. 4 Item I(ii)); and (b) there was both an explicit and statutorily-mandated duty of good faith and fair dealing, S.C. Code Ann. Sections 36-1-201 (defining "good faith"), 36-1-304 (imposing "an obligation of good faith in its performance and enforcement"), which, here, required disclosure.

South Carolina courts have no problem finding liability against actors that indirectly injured the victims in the motor vehicle context. Ayers v. Atl. Greyhound Corp., 208 S.C. 267, 275, 37 S.E.2d 737, 740 (1946) (holding that one who improperly stops a vehicle on the highway is liable for damage caused to third parties when a driver of another vehicle negligently fails to see the stopped vehicle) (further stating that "quite a number" of cases so hold) (citing 131 A.L.R. 603 at p. 605); id. at 277, 37 S.E.2d at 741 (further stating the rule is the same when the supposed intervening act is willful or criminal). See also Durant v. Stuckey, 221 S.C. 342, 345, 348, 70 S.E.2d 473, 474, 475 (1952) ("there are reciprocal duties resting upon those who use the highways."); Tobias v. Carolina Power & Light Co., 190 S.C. 181, 184-88, 2 S.E.2d 686, 687–88 (1939) (electric company not entitled to demurrer where it left exposed wires, even though contact to pedestrian was only caused by negligent driver); Gossett v. Burnett, 251 S.C. 548, 164 S.E.2d 578 (1968) (where initial tortfeasor set off burglar alarm, and officer sped to the scene, failing to give proper notice he would run a red light, colliding with a second vehicle, which then collided with a third, which then collided with plaintiff's vehicle (the fourth vehicle), it was error to hold the harm was too far removed as a matter of law from the initial wrong).

Nor is it a defense to say that in Gossett more than simple negligence was involved, see id. at 550, 164 S.E.2d at 578 (the complaint there alleged that both the initial wrongdoer and the intermediate wrongdoer acted negligently, willfully and wantonly), because the Amended Complaint here alleges the same (Am. Compl. pp. 5-9).[9]

[9] Authorities uniformly hold that liability expands as one moves from simple negligence to wanton and reckless, and again as one moves to intentional torts, all of which are alleged here. A good collection of authorities is in Kimberlin v. DeLong, 637 N.E.2d 121 (Ind. 1994). Id. at 126 (quoting W. Page Keeton et al., Prosser and Keeton on The Law of Torts § 8, at 37 (5th ed. Cont'd

More generally, it makes little sense to speak of "duty" where reckless and intentional conduct is alleged, as here. Where one's reckless conduct injures another, we do not ask "But to whom did he owe the duty to not be reckless"? We hold him liable for the foreseeable consequences. When a wrongdoer throws a lighted squib into a market, and it is then thrown by a series of persons, each of whom is trying to avoid the squib exploding near their goods, the initial wrongdoer is liable to whomever the squib ends up exploding next to. It is no defense to say the culprit did not have a duty to the ultimate victim. It matters not how many intervening actors threw the squib from their stand to another. So too here. Likewise, a wholesaler of medical devices that knowingly sells defective devices to a hospital, which learns they are defective but uses them anyway, is liable to any patient who thereby suffers harm.[10] A family whose minor child dies from illegal drugs can sue everyone in the chain—even if bought and sold by several street-level dealers before it ended up with the dealer who sold it to their son. Art dealer 1 sells a painting to Dealer 2, telling Dealer 2 the painting is by Artist Smith. In reality, it is by Artist Jones, and so is less valuable. Dealer 2 discovers the deception, and asks Dealer 1 to rescind the contract. When Dealer 1 refuses, Dealer 2 decides that rather than sue Dealer 1, it will just pass the deception along. It sells the painting to Dealer 3, giving the same assurance that the painting is by Smith. A string of Dealers each do the same, discovering the

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1984) ("The defendant's interests have been accorded substantially less weight in opposition to the plaintiff's claim to protection when moral iniquity is thrown into the balance."). Id. (quoting § 9, at 4 of the same treatise) ("Liability for intentional torts extends beyond foreseeability because 'it is better for unexpected losses to fall upon the intentional wrongdoer than upon the innocent victim.'"). Cf. F. Patrick Hubbard & Robert L. Felix, THE SOUTH CAROLINA LAW OF TORTS (5th ed. 2023) 176 ("Where the initial act is an intentional tort, it is more likely that the defendant's acts will be regarded as a proximate cause despite the intervening act.") (citing, e.g., RESTATEMENT § 435A; PROSSER § 9, at 40; Mellen v. Lane, 377 S.C. 261, 659 S.E.2d 236 (Ct. App. 2008)).

[10] Implicit in the Supreme Court's holding in Colleton Prep. that remote buyers have a cause of action is that the duty extends to remote buyers.

deception and passing it on, until the painting arrives at Dealer 6—an honest dealer who discovers and refuses to pass along the deception. Dealer 6 should be entitled to sue Dealer 2, who neither started nor ended the chain of deception. A fortiori, he should be able to sue Dealer 1, who started the chain of deception. One has a duty to foreseeable subsequent purchasers not to offer a deceptive product to a middleman for resale.

The Order thus errs in holding, "Grand Strand did not owe a duty to Plaintiff under any theory recognized by South Carolina law." Grand Strand owed Target a duty under all causes of action.

2. Proximate Cause

Proximate cause is a jury issue except in an exceptional case. The keystone is foreseeability. "Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law." Hurd v. Williamsburg Cnty., 353 S.C. 596, 613–14, 579 S.E.2d 136, 145 (Ct. App. 2003), aff'd, 363 S.C. 421, 611 S.E.2d 488 (2005) (citing Trivelas v. South Carolina Dept. of Transp., 348 S.C. 125, 137, 558 S.E.2d 271,277 (Ct. App. 2001); Ballou v. Sigma Nu Gen. Fraternity, 291 S.C. 140, 147, 352 S.E.2d 488, 493 (Ct. App. 1986)). "The touchstone of proximate cause in South Carolina is foreseeability." Koester v. Carolina Rental Ctr., Inc., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994) (citing Young v. Tide Craft, 270 S.C. 453, 462, 242 S.E.2d 671, 675 (1978)). This is simply not the "exceptional" case where the harm so obviously could not reasonably have been foreseen that Grand Strand was entitled to judgment as a matter of law.

The Order thus errs in granting the motion.

Along the way, the Order makes a series of individually reversible errors, as explained below.

As an initial matter, the Order employs the wrong standard. It holds, e.g., that "[Target's] claims for negligence still fail as a matter of law because Plaintiff failed to prove that Grand Strand was the proximate cause of Plaintiff's damages" (Order p. 7); "As with Plaintiff's other claims, it has failed to prove that Grand Strand was the proximate cause of its damages, and therefore cannot recover under the UTPA" (id. p. 9). The Order cites no cases for its holdings that to avoid summary judgment a non-movant has to prove its contention, which are obviously incorrect, as summary judgment should be denied if a "reasonable inference" from the evidence supports the non-movant, Kitchen Planners, LLC v. Friedman, Op. No. 2020-001669 (S.C. Sup. Ct. filed Aug. 23, 2023) (Howard Adv. Sh. No. 33 at 11, 14) (2023 WL 5420401, at *2).

Proximate cause is established if the defendant's acts were a but-for cause of the harm, and the injury was foreseeable. The Order recognizes this. (Order p. 7) (quoting J.T. Baggerly v. CSX Transp., Inc., 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006)).[11] Target's claims meet this test. The Order errs in holding to the contrary.

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[11] The Order does cite several cases for the general proposition that proximate cause must be shown in a negligence claim, but it cites only one case for what must be shown to establish proximate cause. That case is J.T. Baggerly v. CSX Transp., Inc., 370 S.C. 362, 635 S.E.2d 97 (2006). The Order states,

> "Proximate cause requires proof of: (1) causation-in-fact, and (2) legal cause." J.T. Baggerly v. CSX Transp., Inc., 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006). "Causation-in-fact is proved by establishing the injury would not have occurred "but for" the defendant's negligence, and legal cause is proved by establishing foreseeability." Id.

(Order p. 7).

a. "But-For" Causation

It is a reasonable inference that but-for Grand Strand's acts, Target would not have incurred its injury. One might speculate that perhaps someone else might have sold this Titan deceptively if Grand Strand had not, and Grand Strand can argue that to the jury, but a reasonable jury could conclude that but-for Grand Strand's acts of placing the wrecked and rebuilt vehicle in the stream of commerce as a never-wrecked vehicle, Target would not have purchased the vehicle as an unwrecked vehicle.

The Order errs in holding that no reasonable jury could so conclude.

The Court need not delve into the how and why the Order errs about proximate cause, but to the extent the Court may be interested, there are at least two lesser-included errors in the Order's reasoning. First, the Order erroneously states, "The test for cause in fact is not: 'but for' Grand Strand's sale to Grainger, Plaintiff suffered damages." (Order p. 8). But that is exactly the test for cause in fact. "Causation in fact is proved by establishing the plaintiff's injury would not have occurred 'but for' the defendant's negligence." Wickersham v. Ford Motor Co., 432 S.C. 384, 391, 853 S.E.2d 329, 332 (2020) (quoting Hurd v. Williamsburg Cty., 363 S.C. 421, 428, 611 S.E.2d 488, 492 (2005)). The Oliver case the Order relies on for a related point states the same. "Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence." Oliver v. S.C. Dep't of Highways & Pub. Transp., 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992) (quoting Whitlaw v. Kroger Co., 306 S.C. 51, 410 S.E.2d 251, 253 (1991) (quoting Bramlette v. Charter – Med.–Columbia, 302 S.C. 68, 74, 393 S.E.2d 914, 916 (1990)). The previous page of the Order even quotes Baggerly stating that is exactly the test for cause in fact. "'Causation-in-fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence.'" (Order p. 7) (quoting Baggerly).

The Order then again contradicts Baggerly by holding that "[i]nstead" of the test being whether the injury would have occurred "but for" Defendant's acts, the test is whether someone else's acts were a but-for cause of the injury. The Order holds, "Instead, the test here is 'but for' Grainger's failure to disclose known wreck damage and 'but for' Grainger knowingly selling the Truck back through the auction without disclosing the damage, Plaintiff suffered damages." (Order p. 8). In other words, the Order holds there can be only one but-for cause of an injury. That is illogical. It is contrary to law. E.g., Gossett (implicitly holding that both the initial tortfeasor's act and the intervening negligence of the police officer were but-for causes of plaintiff's injury); Matthews v. Porter, 239 S.C. 620, 627–28, 124 S.E.2d 321, 324–25 (1962) (explicitly rejecting the contention that there can be only one but-for cause). As the Supreme Court has recognized, the Order's holding is contradicted even by the Baggerly case the Order relies on to define proximate cause. See Ruh v. Metal Recycling Servs., LLC, 439 S.C. 649, 654, 889 S.E.2d 577, 580 (2023) (citing Baggerly as "recognizing there may be more than one proximate cause of any injury"). The Order errs in holding that no reasonable juror could consider Grand Strand's acts as a but-for cause of Target's injury.

b. Foreseeability

It is highly foreseeable that if one places a rebuilt wrecked vehicle into the stream of commerce as a never-wrecked vehicle, someone will suffer the harm[12] of buying a wrecked

[12] As one court put it, the defendant "collected a non-salvage premium for the car when it sold it" while wrongfully "shift[ing] the salvage discount downstream to someone else to bear." Santander Consumer USA Inc., No. 16-14012-CIV, 2016 WL 11570406 at *4 (S.D. Fla. Aug. 2, 2016), report and recommendation adopted, No. 2:16-CV-14012, 2016 WL 11570405 (S.D. Fla. Aug. 19, 2016). South Carolina law similarly recognizes the principle "that a 'sound price warrants a sound commodity,'" Lane v. Trenholm Bldg. Co., 267 S.C. 497, 502, 229 S.E.2d 728, 730 (1976), and applies it even to cases of simple negligence. "[Defendant] has profited by receiving a fair price and, as between it and an innocent purchaser, the innocent purchaser should be protected from latent defects." Id. at 503, 229 S.E.2d at 731.

vehicle as if it were never wrecked. "It is sufficient that in view of all the attendant circumstances, he should have foreseen that his negligence would probably result in injury of some kind to some one." Tobias v. Carolina Power & Light Co., 190 S.C. 181, 186, 2 S.E.2d 686, 688 (1939) (citing Horne v. Southern R. Co., 186 S.C. 525, 197 S.E. 31 (1938), 116 A.L.R. 745; Sandel v. State, 115 S.C. 168, 181, 104 S.E. 567, 571 (1925), 13 A.L.R. 1268), overruled on other grounds by Sirrine v. State, 132 S.C. 241, 128 S.E. 172 (1925). It need not be foreseeable that the injury would occur to a specific person. Where a negligent act is concerned, it is "not necessary to render it the proximate cause that the person committing it could or might have foreseen . . . that it would occur to the particular person, if by the exercise of reasonable care it might have been foreseen or anticipated that some injury might result." Horne v. Atl. Coast Line R. Co., 177 S.C. 461, 471, 181 S.E. 642, 646 (1935).

Because it was easily foreseeable that selling this rebuilt frame-damaged truck as unwrecked would result in someone purchasing it as unwrecked, the foreseeability element is met. The Order errs in holding that no reasonable juror could conclude it was reasonably foreseeable.[13]

Again, the Court need not delve into how the Order's analysis errs, but to the extent the Court may be interested, Target offers the following:

If the drafter reasoned that the precise manner in which the harm occurred was unforeseeable, the Order errs. The Supreme Court has repeatedly stated that unforeseeability

[13] To the extent there may be a dispute as to whether the injury was reasonably foreseeable, the Order errs in dismissing the claim before discovery is concluded. During discovery, Grand Strand would properly be entitled to question Grand Strand about what it expects when it sells a vehicle at a dealers-only auction while failing to make the required disclosures.

of the manner in which the harm occurs is irrelevant to a proximate cause determination. In language very similar to its Tobias holding above, the Supreme Court has explained,

> (I)t is unessential that the precise manner in which the injuries might have occurred, or where sustained, be foreseeable, or foreseen. It is sufficient that there is a reasonable generalized gamut of greater than ordinary dangers of injury and that the sustaining of the injury was within this range.

Hughes v. Children's Clinic, P. A., 269 S.C. 389, 397, 237 S.E.2d 753, 756–57 (1977) (emphasis added) (alteration in original). Graham v. Whitaker, 282 S.C. 393, 398, 321 S.E.2d 40, 43 (1984) (quoting the same portion of Hughes); Lowrimore v. Fast Fare Stores, Inc., 299 S.C. 418, 422-3, 385 S.E.2d 218, 220 (Ct. App. 1989) (same).

The test for intervening causes is the same: whether the harm was foreseeable. If the intervening cause led to a type of harm that was unforeseeable, then there was no proximate cause; if the harm was foreseeable, it was foreseeable, regardless of whether intervening acts or their precise manner were foreseeable. "The test is to be found in the probable consequences reasonably to be anticipated, and not in the number or exact character of events subsequently arising." Matthews v. Porter, 239 S.C. 620, 626, 124 S.E.2d 321, 324 (1962). Tobias v. Carolina Power & Light Co., 190 S.C. 181, 186, 187, 2 S.E.2d 686, 688 (1939) (similar); Pfaehler v. Ten Cent Taxi Co., 198 S.C. 476, 486, 18 S.E.2d 331, 335 (1942) (similar).

Although the Order mentioned the intervening act on pages 4 and 8 (R. pp.), the Order cites only one case in support of its holding that intervening acts eliminated liability. That case directly contradicts the Order's holding. The Order states, "There are simply too many intervening negligent events to link Grand Strand to Plaintiff's damages. See Oliver v. South Carolina Dep't of Highways & Public Transp., 309 S.C. 313, 422 S.E.2d 128 (1992) (stating that an intervening cause can render initial negligence too remote)." (Order p. 8).

The Order's reliance on Oliver suffers from at least two problems. First, as an initial matter, (a) Oliver said nothing about too many intervening acts making a cause non-proximate; (b) Matthews explained, "The test is . . . not in the number . . . of events subsequently arising" but is rather the foreseeability of the harm; and (c) if a given number of intermediary events defeated proximate cause as a matter of law, it would be absurd to hold the events here are too many, see, e.g., Gossett, 251 S.C. 548, 164 S.E.2d 578 (probable cause is a jury issue where initial tortfeasor set off burglar alarm, resulting indirectly in damage to plaintiff's automobile, when officer speeding to the scene drove recklessly, and collided with a second vehicle, which collided with a third, which then collided with Plaintiff's vehicle (the fourth vehicle)).

Second, and more importantly, Oliver explained,

> [W]hile the general rule is that, if, subsequently to an original wrongful or negligent act, a new cause has intervened, of itself sufficient to stand as the cause of the injury, the former must be considered as too remote, still, if the character of the intervening act claimed to break the connection between the original wrongful act and the subsequent injury was such that its probable or natural consequences could reasonably have been anticipated, apprehended, or foreseen by the original wrongdoer, the causal connection is not broken and the original wrongdoer is responsible for all the consequences resulting from the intervening act.

Oliver, 309 S.C. at 317, 422 S.E.2d at 131 (emphasis added). Under the Order's own case, Grand Strand is liable to Target.[14] It was easily foreseeable that Grand Strand's sale of this truck as unwrecked would result in someone buying this truck as unwrecked ("would probably result in injury of some kind to some one," Tobias, 190 S.C. at 186, 2 S.E.2d at 688). Because the sale was at an auction of vehicles intended to be resold, it simply makes no sense to hold

[14] And under other cases. Oliver was quoting Tobias v. Carolina Power & Light Co., 190 S.C. 181, 187, 2 S.E.2d 686, 687-88 (1939). Matthews v. Porter, 239 S.C. at 627, 124 S.E.2d at 324-25, also quotes the same language from Tobias.

that the purchase of this truck as unwrecked by a subsequent buyer is a consequence that could not reasonably have been foreseen.

Nor does it matter that, as the Order put it (Order p. 4) "an intervening party, Grainger, had knowledge of the prior wreck damage and failed to disclose it to the Plaintiff." Our Supreme Court has stated many times that the test is whether the harm was foreseeable, and not the nature of any intervening act. "We repeat that it matters not that the supervening and concurrent cause was an act of negligence of a third person or even a wilful or criminal act." Wineglass v. McMinn, 235 S.C. 537, 541–42, 112 S.E.2d 652, 654 (1960) (quoting Ayers v. Atl. Greyhound Corp., 208 S.C. 267, 37 S.E.2d 737, 741 (1946)) (internal citations omitted).[15]

The harm here was easily foreseeable. It was as foreseeable as the harm from a drug cartel's chief selling drugs through layers of intermediaries. That someone else sold it to the

[15] More fully, Wineglass held,

> That case [Pfaehler v. Ten Cent Taxi Co., 198 S.C. 476, 18 S.E.2d 331, 335] and Hunter v. Boyd, 203 S.C. 518, 28 S.E.2d 412, 413, were cited in Ayers v. Atlantic Greyhound Corp., 208 S.C. 267, 37 S.E.2d 737, 741, for the following: 'The intervening negligence of another will not excuse the first tort-feasor, if the intermediate wrong or a similar one (Tobias v. Carolina P. & L. Co., 190 S.C. 181, 2 S.E.2d 686) should have been foreseen in the exercise of due care; the original negligence remains active and constitutes a concurring proximate cause of the ultimate injury.' The court continued as follows: 'We repeat that it matters not that the supervening and concurrent cause was an act of negligence of a third person (38 Am. Jur. 716, 717; 38 Am. Jur. 716, 717; Tate v. Claussen-Lawrence Const. Co., 168 S.C. 481, 167 S.E. 826, and cases cited) or even a wilful or criminal act. Green v. Atlantic & C. A. L. Ry. Co., 131 S.C. 124, 126 S.E. 441, 38 A.L.R. 1448.' See also Brown v. National Oil Co., 233 S.C. 345, 105 S.E.2d 81, and authorities there cited.

Wineglass v. McMinn, 235 S.C. 537, 541–42, 112 S.E.2d 652, 654 (1960) (emphasis added). See also Culbertson v. Johnson Motor Lines, 226 S.C. 13, 24, 83 S.E.2d 338, 343 (1954) (alteration in original) (quoting Ayers) ("We repeat that it matters not that the supervening and concurrent cause was an act of negligence of a third person * * * or even a wilful or criminal act").

victim does not make the harm unforeseeable. The Order errs in holding it was unforeseeable as a matter of law.

The Order relied on Baggerly for its holding that there was no but-for causation and Oliver for its holding that the harm was not foreseeable. Each case is opposite to the point for which the Order cites it. The Supreme Court has stated many times what the law is on these questions. Target is entitled to bring its claims to a jury.

Summation as to Duty and Proximate Cause

Because South Carolina law recognizes a duty to indirect victims and proximate cause is a jury issue, the Order errs in holding that Grand Strand owed no duty to Target and that there were "too many" intervening events. The Order should be reversed as to all causes of action.

B. Other Jurisdictions Applying These Principles To Deceptive Sales Of Vehicles By Remote Sellers Find Liability.

The law of other states is similar. Their courts find businesses that deceptively place motor vehicles into the stream of commerce liable to indirect purchasers for negligence, negligence per se, negligent misrepresentation, violation of consumer protection acts and fraud.

- California

  Where a car dealer misrepresented the salvage status of an automobile in making a sale, he is liable to a subsequent purchaser with whom he had no interaction. Varwig v. Anderson-Behel Porsche/Audi, Inc., 74 Cal. App. 3d 578, 141 Cal. Rptr. 539 (1977) held it was error to have granted summary judgment to the indirect seller.

  The appellate court held, id. at 580–81, 141 Cal. Rptr. at 540 (alteration in original) (citation omitted),

> If a representation is made with "intent to defraud . . . a particular class of persons," the one making such a representation is deemed to have intended "to defraud every individual in that class who is actually misled by the deceit."
>
> As the Restatement puts it: "The maker of a fraudulent misrepresentation is subject to liability . . . to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct . . . ." (Rest. 2d Torts, § 533.) It is not necessary that the maker of the representation "have any particular person in mind. It is enough that he intends or has reason to expect to have it repeated to a particular class of persons and that the person relying upon it is one of that class." (Id., com. g.)

- Iowa

  Where a car dealer misrepresented the repaired and reconstructed status of a used passenger vehicle, he is liable to the people his purchaser sold it to, in negligent misrepresentation, fraudulent misrepresentation and fraud. Clark v. McDaniel, 546 N.W.2d 590 (Iowa 1996).

  The court noted, "It is difficult to conceive of a commodity that is any more likely to involve knowledge by a seller that there is an especial likelihood that [a misrepresentation] will reach [third] persons and will influence their conduct, than in the case of a motor vehicle." Id. at 593-94 (alteration in original) (citation omitted) (internal quotation marks omitted).

- Michigan

  Where an automobile dealer forged a title for a stolen car, and sold it to an auto parts dealer that was unaware of the fraud, knowing the auto parts dealer intended to resell the vehicle, the former was liable to the latter's customer for fraud. Oppenhuizen v. Wennersten, 139 N.W.2d 765 (Mich. App. 1966).

> It has been repeatedly held that where a party makes false representations to another with the intent or knowledge that they be exhibited or repeated to a third party for the purpose of deceiving him, the third party, if so deceived to his injury, can maintain an action in tort against the party making the false statements for the damages resulting from the fraud.

Id. at 768 (emphasis in original) (quoting 23 Am. Jur., Fraud and Deceit, § 118, pp. 903, 904).

The court added,

> [D]efendant Veneklasen [automobile dealer] knew that the forged title would be used by Wennersten [its purchaser] in making a resale of the 'stolen monza' and that his sale was based mainly upon such an event happening. With such knowledge, could it have been possible that Veneklasen did not intend for Wennersten to represent to a prospective purchaser, in fact to the plaintiff herein, that the title was valid? We think not.
>
> Such a conclusion validates the connection or relationship between the parties necessary to hold defendant responsible to plaintiff for his damages suffered by reason of the fraud.

Id. at 769. So too here. Grand Strand intended its purchaser to represent the vehicle to the next purchaser as Grand Strand represented it to its direct purchaser. Otherwise, Grand Strand would have no sale.

- Missouri

Where a dealer rolled back an odometer, the dealer was held liable to a customer downstream of the initial buyer. Freeman v. Myers, 774 S.W.2d 892, 893-94 (Mo. Ct. App. 1989) (emphasis added) (citation omitted),

> Myers, tacitly conceding the rolled back odometer and the odometer statement was a misrepresentation, sets up as a defense to Freeman's fraud claim the fact that Myers' misrepresentation was not made directly to the Freemans. The jury was entitled to infer, however, that the representation implicit in Myers' odometer rollback was intended or at least expected by him to extend to and be relied upon by a retail purchaser of the car from the automobile dealership to whom Myers sold the car. The fact Myers' fraudulent statement was not made directly to the

Freemans is not a defense to the Freemans' damage claim against him. The rule is thus stated in Restatement (Second) of Torts § 533 (1977):

> The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction or type of transaction involved.

Wilson v. Murch, 354 S.W.2d 332, 337 (Mo. App. 1962); Handy v. Beck, 282 Or. 653, 581 P.2d 68 (1978); 37 Am. Jur. 2d Fraud and Deceit § 298 (1968).[16]

- Oklahoma

Where an upstream car broker placed a vehicle into the stream of commerce knowing and not disclosing that the car was a salvage vehicle and that the insurance company had failed to obtain a salvage title, a downstream purchaser who had no interactions with either could bring claims against both, for negligence, fraud/deceit, and violation of the consumer protection act. Conatzer v. Am. Mercury Ins. Co., 15 P.3d 1252, 1257 (Okla. Civ. App. 2000) (paragraph numbering omitted),

[16] See also O'Brien v. B.L.C. Ins. Co., 768 S.W.2d 64, 68–69 (Mo. 1989) (affirming awards for negligence, fraud, and punitive damages for ultimate purchaser against insurance company that failed to mark title as salvage before selling a car to the service manager of dealer that worked on the flood damage; the service manager took the car with him to a new employer, which later sold it to plaintiff.)

The Missouri Supreme Court held the intervening criminal acts of other parties were not a defense. In language similar to the teaching of our Supreme Court in Ayers, 208 S.C. 267, 37 S.E.2d at 741, and Wineglass, 235 S.C. at 541–42, 112 S.E.2d at 654, that it "matters not" that the intervening acts of a third party were "wilful or criminal act," it applied this rule to a deceptive sale of a previously-wrecked and rebuilt vehicle. "The doctrine of intervening cause is not so strong as it seems to have been at one time. The essential question is foreseeability. Even criminal conduct will not always insulate a tortfeasor, if the criminal conduct is reasonably foreseeable." O'Brien, 768 S.W.2d at 68.

> We cannot say, as a matter of law, that the acts or omissions of other parties were sufficient to constitute a supervening cause that would negate any liability of AMI and/or Prestige.
>
> We therefore conclude that Plaintiffs have stated claims for fraud/deceit, violation of the Consumer Protection Act, and negligence. Thus, dismissal of the action for failure to state a claim was error.

- Federal Eighth Circuit

  Where a car dealer placed a wrecked vehicle in the stream of commerce as an unwrecked vehicle, the Eighth Circuit held the dealer liable for fraud and violation of a statute to a subsequent purchaser it had no dealings with. Grabinski v. Blue Springs Ford Sales, Inc., 136 F.3d 565 (8th Cir. 1998). The Court rejected the dealer's argument that it should escape liability because its agent's statements were not made directly to the downstream customer. Id. at 569. "Contrary to BSF's argument, moreover, the fact that Mr. Lotspeich's statements were not made 'directly to' Ms. Grabinski is not a defense to her damage claim." Id.

- Federal District Court – Florida

  Citing Conatzer and O'Brien v. B.L.C. Ins., both discussed above, and Thornton, discussed below, the federal district court held the same principles found in Oklahoma, Missouri, and Ohio law apply in Florida law as well. Jones v. Santander Consumer USA Inc., No. 16-14012-CIV, 2016 WL 11570406 (S.D. Fla. Aug. 2, 2016), report and recommendation adopted, No. 2:16-CV-14012, 2016 WL 11570405 (S.D. Fla. Aug. 19, 2016). There, the defendant lender had re-taken physical possession of the car after a wreck, and caused a title to be issued that failed to recognize the vehicle's wrecked status. "[T]he Defendant began making arrangements to turn around and sell the car. That is, to place the car back into the stream of commerce." Id. at *1.

A dealership then bought the car at auction. Id. The car ultimately was sold to the plaintiff. Id. The court held the plaintiff's claims against the initial wrong-doer for common law fraud and violation of Florida's consumer-protection statute should go to the jury. It rejected defendant's arguments that there was no duty, nor proximate cause, and that intervening parties broke the chain and that the defendant had never interacted with the plaintiff. Id. (passim). "[T]he Defendant's argument effectively shifts the salvage discount downstream to someone else to bear—while it, itself, collected a non-salvage premium for the car when it sold it." Id. at *4.[17]

- Federal District Court – Ohio

  The federal court for Ohio's Northern District similarly found these principles inherent in Ohio law, where an insurance company placed a used vehicle in the chain of commerce, while failing to disclose its wrecked status. Thornton v. State Farm Mut. Auto Ins. Co., No. 1:06-CV-00018, 2006 WL 3359448 (N.D. Ohio Nov. 17, 2006). A subsequent downstream customer, who had no interaction with the insurer, sued. The court rejected the defendant's argument that the plaintiff's claims should be dismissed because the defendant had made no misrepresentation to the plaintiff. The Court held it was for the jury to decide on plaintiff's claims for common-law fraud, for negligence per se, id. at *17-18, and for violation of the Ohio consumer protection statute, id. at *9.

[17] In so holding, it echoed the South Carolina Supreme Court. Recognizing the principle "that a 'sound price warrants a sound commodity,'" Lane v. Trenholm Bldg. Co., 267 S.C. 497, 502, 229 S.E.2d 728, 730 (1976), the South Carolina Court held that "[Defendant] has profited by receiving a fair price and, as between it and an innocent purchaser, the innocent purchaser should be protected from latent defects." Id. at 503, 229 S.E.2d at 731. If there is a difference, it would be that Florida law may limit the principle to reckless and intentional torts, while South Carolina applies it more broadly. Id. (stating that its holding is not based on fault).

So too here. Grand Strand sold the vehicle for resale. It "collected a non-[wreck] premium for the car when it sold it." It should have reasonably expected the Titan to be resold and represented as Grand Strand had misrepresented it. Its misrepresentations were repeated, to Target, which relied on the misrepresentations. As the other jurisdictions have held, a jury should decide these claims. The relationship of upstream deceptive motor vehicle seller to downstream customer is not too remote.[18] It is no more remote than the relationship between one who negligently runs a red light, causing a second vehicle to swerve, and thus collide with a third.

V. THE ORDER ERRS IN HOLDING GRAND STRAND DID NOT VIOLATE THE DEALERS ACT.

The Order's statement that "Grand Strand did not violate the Dealers Act" (Order p. 10) is simply wrong. The Dealers Act explicitly forbids deceptive sales by motor vehicle dealers. Section 56-15-30 declares, "Unfair methods of competition and unfair or deceptive acts or practices declared unlawful." Section 56-15-40(B) states, "It shall be deemed a violation . . . for any . . . 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." By allegedly breaking the auction's rules that one must disclose frame damage, falsely representing the vehicle did not have frame damage, and placing the vehicle in the stream of commerce, Grand Strand acted arbitrarily, in bad faith, and unconscionably and caused damage to one of the parties and to the public. It thus violated the Dealers Act.

[18] The Court need not determine here how many purchasers in a chain would have a claim against the initial wrongdoer. The test is not the number of steps but whether the injury is foreseeable. Even if the Court were inclined to specify an arbitrary number of subsequent sales that is "too many" as a matter of law, it should do so in the future, where a case pushes against a limit. Here, the first subsequent sale is not "too many."

The Dealers Act additionally defines it to be "fraud" for an automobile dealer to misrepresent a material fact "in any manner, whether intentionally false or due to gross negligence," or to intentionally "fail[] to disclose a material fact." Grand Strand allegedly did more than simply violate the Dealers Act, it also allegedly committed the statutory tort of Dealers' Act fraud.

Target has sufficiently pled a Dealers Act violation and the facts amply support such an inference.

To the extent the Order may have intended to state that Grand Strand did violate the Act, but is immune to suit by Target, the Order errs. The Order states (Order p. 10) that "a party can only recover under the Act against the dealer who proximately caused the party's damage," but Grand Strand did proximately cause the damage, as discussed in depth in Section IV above (noting, inter alia, that the cases the Order relies on for proximate cause hold opposite to the Order's readings, as do many other cases). Nor does the Order cite a single case for the proposition that the Dealers Act is limited to direct purchasers. Rather, the Supreme Court's rationale in Colleton Prep. applies equally well to the Dealers Act. The Dealers Act's text, "any person who is injured in his business or property by reason of anything forbidden in the Act may bring an action," is not ambiguous and should be given its plain meaning, e.g., Edwards v. State Law Enf't Div., 395 S.C. 571, 575, 720 S.E.2d 462, 464 (2011) ("When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning."). See also Brockman v. Am. Suzuki Motor Corp., No. CA 6:11-3381-TMC, 2012 WL 3264995, at *5 (D.S.C. Aug. 10, 2012) (emphasis in original) (following Edwards) (citing S.C. Code Ann. Section 56-15-110(1) (holding that the Dealers Act's text, "any person who is injured in his business or property by

reason of anything forbidden in the Act may bring an action" is unambiguous and means exactly that).[19] Finally, were there any doubt, the remedial nature of the Act means it should be interpreted broadly to fulfill its aims of punishing deceptive acts by automobile dealers, as delineated in Section III.[20]

VI. FINAL CONSIDERATIONS

A. The Order Misstates the Issue in Holding There Is No Liability "Solely" for Placing an Item in the Stream of Commerce.

The Order's holding that "South Carolina law does not recognize a theory of liability for a vehicle owner to pursue claims against a dealer with whom the owner had no direct contact with solely because the dealer placed the vehicle in the stream of commerce" (Order p. 9) (emphasis added) misses the point. It mischaracterizes the facts. It mischaracterizes Target's argument. Of course, one who merely places an item in the stream of commerce is not liable to anyone. South Carolina law allows a vehicle owner to pursue claims against a dealer with whom the owner had no direct contact with because the dealer deceptively placed the vehicle in the stream of commerce, and expected and intended the deception to carry on to the subsequent purchaser.

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[19] The court held,

> The [Dealers] Act specifically provides that any person who is injured in his business or property by reason of anything forbidden in the Act may bring an action. The court finds the language of § 56–15–110 to be unambiguous [and to] include any person who has been injured in his business or property. Had the legislature wanted to limit standing . . . , it could have done so. Accordingly, the court concludes that any person . . . has standing to bring a claim under the Act.

Brockman v. Am. Suzuki Motor Corp., No. CA 6:11-3381-TMC, 2012 WL 3264995, at *5 (D.S.C. Aug. 10, 2012).

[20] The referenced discussion is the last one-and-a-half pages of Section III, under the subheading, "Remedial Nature."

B. Argument Concerning A Novel Issue

For reasons discussed above, Target believes the law is clear that all its claims against Grand Strand are proper for jury determination. To the extent, if any, that the Court might consider any topic here to be a novel issue, this Court has set out the guidelines: "When addressing a novel question of law, the appellate court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of this state and the court's sense of law, justice, and right." State v. Sweat, 379 S.C. 367, 373-74, 665 S.E.2d 645, 649 (Ct. App. 2008) (citing Croft v. Old Republic Ins., 365 S.C. 402, 408, 618 S.E.2d 909, 912 (2005)), aff'd as modified, 386 S.C. 339, 688 S.E.2d 569 (2010).

The law is clear that willful, wanton, and intentional tortfeasors are not free of liability to indirect victims. The public policy of this state is to stamp out deceptive trade practices, and to prevent automobile dealers from putting previously-wrecked and repaired cars into the stream of commerce without disclosure. It would be unjust and not right to allow such dealers to escape liability if one link in the chain dissolves its business, goes bankrupt, or simply does not care because it does not have any assets. It would be unjust and not right to absolve them if any party in the chain misses a statute of limitations or a statute of repose. It would conflict with the "strong public policy" of this state. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 30 n.7, 644 S.E.2d 663, 671 n.7 (2007); see also S.C. Code Ann. § 56–15–130 (Dealers Act) ("any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy"). It would unnecessarily expend judicial resources if each step in the chain had to be litigated when there was but one bad actor and one

ultimate victim. All these factors militate in favor of a decision for Appellant. [21] "Finally, the recognition of a duty in this context advances a major policy goal of tort law: deterrence." Shaw v. Psychemedics Corp., 426 S.C. 194, 200, 826 S.E.2d 281, 284 (2019).

If the Court cannot decide the issue on the above grounds, the claims should be remanded for full development of the facts. Before a novel question is decided, "the case should be fully developed and tried on its merits." Jackson v. Atl. Soft Drink Co., 286 S.C. 577, 579, 336 S.E.2d 13, 14 (1985); State ex rel. McLeod v. Fritz Waidner Sports Cars, Inc., 263 S.E.2d 384, 274 S.C. 332 (1980) (similar); Vaughan v. Kalyvas, 288 S.C. 358, 364, 342 S.E.2d 617, 620 (Ct. App. 1986) (similar).

Summation as to Novel Issue

To the extent the Court considers this case to represent a novel issue, it should decide the issue in compliance with the strong public policy of stamping out dealers' deceptive sales of motor vehicles and with consideration for the potential unfairness and waste of judicial resources in requiring every buyer in a chain to sue the previous buyer. In the alternative, it should consider the well-established judicial policy of requiring full development of facts in the lower court level where novel issues are concerned. Either way, it should reverse the Order below.

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[21] As stated in F. Patrick Hubbard & Robert L. Felix, THE SOUTH CAROLINA LAW OF TORTS (5th ed. 2023) 422-23 (footnotes omitted) (internal quotation marks omitted) (emphasis in original),

> Initially, the concern to prevent undue liability was given prominence by the courts, and liability was limited to persons A intended to rely on the misrepresentation or to persons whose relationship was like privity. More recently, many cases have given greater weight to the wrongfulness of fraud and have extended the defendant's liability for fraud to the persons or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the fraudulent misrepresentation.

CONCLUSION

Because grants of summary judgment are appropriate only after a full opportunity to develop the facts, which has not been afforded here, the Order should be reversed.

Because it would be unconscionable to allow one to intentionally place a rebuilt wrecked vehicle in the stream of commerce while deceptively hiding its flaws, and then say, "No one but the initial purchaser may sue me," because the Supreme Court has held deceptive sellers upstream may be sued by subsequent downstream purchasers, and for such other reasons as may be apparent to the Court, the Court should reverse the grant of summary judgment as to all causes of action.

Respectfully submitted,

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