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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

Trial Court Case No.: 2022-CP-26-00861
Appellate 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 RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

STATEMENT OF THE ISSUES ON APPEAL

1. Did the circuit court properly grant summary judgment to Grand Strand Nissan, Inc. ("Grand Strand") as to the claims for negligence, negligent misrepresentation, fraud, the South Carolina Unfair Trade Practices Act ("UTPA"), and the South Carolina Motor Vehicle Dealer's Act ("Dealer's Act") brought by Target Motors, LLC d/b/a Port City Motors ("Target Motors") where there was no relationship or communication between Grand Strand and Target Motors and there was no reliance by Target Motors on any representation made by Grand Strand?

STATEMENT OF THE CASE

Target Motors filed this action on February 8, 2022 against Grand Strand, Grainger Companies, Inc. d/b/a Grainger Honda ("Grainger"), and Manheim Remarketing, Inc. d/b/a Manheim, Darlington ("Manheim") asserting various causes of actions against each defendant. (Complaint, R. at ____).[1] The claims against Grand Strand stem from the sale of a used truck sold first by Grand Strand to Grainger through Manheim's auction and then by Grainger to Target Motors in a second auction.[2]

In its amended complaint, Target Motors asserted the following causes of action against Grand Strand: (1) negligence, (2) negligent misrepresentation, (3) fraud, (4) UTPA, and (5) the Dealer's Act. (Amended Complaint, R. at ____). Grand Strand answered, asserting the following defenses: (1) failure to state a claim; (2) intervening and superseding acts; (3) comparative negligence; (4) absence of proximate cause; and (5) several equitable defenses. (Answer, R. at ____).

After some initial discovery, Grand Strand moved for summary judgment on all of the claims asserted against it by Target Motors on October 5, 2022, which was supported by an affidavit of its owner, Robbie Haynes, concerning the purchase of the vehicle. (Motion, R. at ____). Target Motors filed its memorandum in opposition to Grand Strand's motion for summary judgment on January 2, 2023; however, it did not file any affidavits relating to the issue of whether additional discovery was needed. (Memorandum with Attachments, R. at ____). Following a

[1] Manheim filed a notice of removal on March 23, 2022, based on Target Motors' claim under the Federal Odometer Act. (Notice of Removal, R. at ____). Target Motors subsequently filed an amended complaint on April 18, 2022, dropping Manheim as a defendant in the action and dropping its claim under the Federal Odometer Act. (Amended Complaint, R. at ____). The district court remanded the case to the circuit court that same day. (Remand, R. at ____).

[2] Grainger filed a cross-claim against Grand Strand relating to the first sale of the Truck at Manheim. (Amended Answer and Cross-Claims of Grainger, R. at ____).

hearing, the circuit court entered an order granting Grand Strand's motion for summary judgment on January 19, 2023 on the following grounds: (1) Grand Strand did not owe any duty to Target Motors; (2) Grand Strand did not cause any damage to Target Motors; (3) Grand Strand did not make any representations to Target Motors; (4) Grand Strand did not act unfairly or deceptively with respect to Target Motors so as to trigger the UTPA; and (5) Target Motors did not have a claim against Grand Strand under the Dealer's Act. (Order, R. at ____).

Target Motors filed a motion to reconsider seeking more specific rulings as to each claim (Motion, R. at ____), which the circuit court denied on March 3, 2023 (Order, R. at ____). This appeal followed.

FACTS

The material facts of this case are undisputed. Grand Strand is a car dealership that services, repairs, sells, and buys new and used cars. On or about August 30, 2019, Grand Strand completed wreck-related repairs on a 2018 Nissan Titan SV (the "Truck") owned by Aaron Burnstein ("Burnstein"). (Haynes Aff. ¶ 3; R. at ____). Grand Strand also sold parts to Performance Collision, a body shop that completed other repairs on the Truck. (*Id.* ¶ 6, R. at ____). On October 14, 2019, after the Truck was repaired, Burnstein sold the Truck to Grand Strand for $24,000.00. (*Id.* ¶ 8, R. at ____). Shortly thereafter, Grand Strand entered the Truck into an online auction owned and operated by Manheim. (*Id.* ¶ 10, R. at ____). All parties that participate in the Manheim auction agree to be bound by the Manheim Terms and Conditions and an arbitration policy requiring all disputes between buyers and sellers to be arbitrated by Manheim. (Memorandum in Opp, with Exhibits 10–11, R. at ____). At the auction, the Truck was placed under a green light, indicating that the Truck did not have structural damage. (Amended Complaint ¶ 17, R. at ____). When the Truck was sold by Grand Strand to Grainger, it had been fully and completely repaired. (Haynes Aff. ¶ 9, R. at ____).

On November 14, 2019, Grainger purchased the Truck through Manheim's auction for $21,000.00. (*Id.* ¶ 11, R. at ____). Grand Strand was not involved in any further transactions with the Truck. (*Id.* ¶¶ 12–13, R. at ____). Roughly two weeks after Grainger purchased the Truck, Grainger tried to sell the Truck through the Charleston Auto Auction. (Amended Complaint ¶ 18; Grainger Ans. to Grand Strand Int. p. 3, R. at ____). Grainger removed from the Charleston Auto Auction after the auction company pulled an AutoCheck report showing structural damage to the Truck as the result of a wreck. (*Id.*, R. at ____). Grainger notified Manheim about the discovered structural damage. (Amended Complaint ¶ 19; Grainger Answer to Grand Strand Int. p. 4, R. at ____).

Grainger commenced an arbitration, and Grainger resolved its claim related to the Truck by accepting a 50% refund on the Truck. (Grainger Ans. to Grand Strand Int. p. 3, R. at ____). After resolving Grainger's claims, and despite the AutoCheck report, Manheim and Grainger decided to sell the vehicle through the Manheim auction. (Amended Complaint ¶¶ 23–24; Grainger Ans. to Grand Strand Int. p. 3; Plaintiff's Ans. to Grainger Int. No. 9, R. at ____). On December 12, 2019, Grainger sold the Truck at Manheim's auction under a green light. (Amended Complaint ¶¶ 25–30, R. at ____). The sale was under a green light, and no disclosure of the wreck damage was made at the Manheim auction. (*Id.*; Grainger Ans. to Grand Strand Int. 11, R. at ____).

Target Motors purchased the Truck from Grainger through the Manheim auction on January 2, 2020. (Amended Complaint ¶ 32, R. at ____). Before purchasing the Truck, Target Motors consulted a Carfax report, an AutoCheck report, a report from the NADA, and a Manheim Market Report. (Plaintiff Ans. to Grand Strand Int. No. 6, R. at ____).

By participating in the auction, Target Motors agreed that any claims about the purchase of the Truck would be handled pursuant to the Arbitration Policy. (Memorandum in Opp, with

Exhibits 10-11, R. at ____). After Target Motors purchased the Truck, it sold the Truck to a customer on January 25, 2020. (Amended Complaint ¶ 35, R. at ____). Shortly thereafter, the costumer complained to Target Motors after discovering the Truck's structural damage. (Amended Complaint ¶ 36, R. at ____). As a result, Target Motors compensated the costumer $4,000.00. (Amended Complaint ¶ 37, R. at ____).

Target Motors admitted the following key facts: (1) Grand Strand was not involved in any transaction with Target Motors; (2) there was no contract between Grand Strand and Target Motors; (3) Target Motors did not communicate with Grand Strand regarding the condition of the Truck prior to Target Motors purchasing the Truck; (4) Target Motors did not rely on or review any information provided by Grand Strand regarding the Truck; (5) Target Motors did not rely on any information provided by Grand Strand to Grainger regarding the Truck; and (6) Target Motors solely relied on Grainger's representations in its purchase of the Truck. (Memorandum in Opp,; Hearing Transcript; *see* Hickman Aff., R. at ____).

STANDARD OF REVIEW

On appeal from a grant of summary judgment, this Court's standard of review is the same as that of the circuit court. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Rule 56(c), SCRCP. "Summary judgment is appropriate in those cases in which plain, palpable and indisputable facts exist on which reasonable minds cannot differ." *Main v. Corley*, 281 S.C. 525, 526, 316 S.E.2d 406, 407 (1984).

This Court must view the facts and inferences in the light most favorable to the nonmoving party. *See, e.g., Thomas v. Waters*, 315 S.C. 524, 526, 445 S.E.2d 659, 661 (Ct. App. 1994). When the nonmoving party bears the burden of proof on an issue, the moving party is entitled to summary

judgment if "there is an absence of evidence to support the nonmoving party's case." *Richardson v. State-Record Co., Inc.*, 330 S.C. 562, 566, 499 S.E.2d 822, 825 (Ct. App. 1998). "[W]hen ruling on a summary judgment motion, a court must determine whether the plaintiff has established a prima facie case as to each element of a claim . . . ." *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 358, 650 S.E.2d 68, 71 (2007). If a plaintiff cannot establish facts on each element of the cause of action asserted, summary judgment is mandated by Rule 56(c), SCRCP. *Id.*

If a motion has been properly made and supported in accordance with Rule 56, the nonmoving party may not rest on its pleadings but must come forward with specific facts showing that there is a genuine issue for trial. Rule 56(e), SCRCP; *Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 580, 602 S.E.2d 389, 392 (2004). A nonmoving party cannot evade summary judgment by creating and relying on "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).

Nor can the non-moving party avoid summary judgment by casual reference to additional discovery that might be done. Rule 56(f), SCRCP. "Rule 56(f) requires the party opposing summary judgment to at least present affidavits explaining why he needs more time for discovery." *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 321, 548 S.E.2d 854, 857 (2001).

ARGUMENT

I. This appeal should be limited to the issue presented by Target Motors in its statement of issues on appeal.

Target Motors presents one issue on appeal, "[w]hen 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?" "A party is bound by his statement of an issue on appeal." *Town of Sullivan's Island v. Felger*, 318 S.C. 340, 350, 457 S.E.2d 626, 631 (Ct. App. 1995).

As set forth in Rule 208(b), SCACR, the statement of issues on appeal is "[a] statement of each of the issues presented for review. The statement shall be concise and direct as to each issue, and may be stated in question form. Broad general statements may be disregarded by the appellate court. Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." South Carolina appellate courts have not been shy about declining to address issues not fairly subsumed within the stated issues on appeal. Jean H. Toal *et al., Appellate Practice in South Carolina* 429 (3d ed. 2016) (listing cases where courts have declined to reach the merits of arguments not presented in the statement of issues).

Here, the orders on appeal do not include any finding that a "dealer [is] automatically immune from liability to all purchasers after the first purchaser." Nor has Grand Strand made any argument to that effect. Instead, Grand Strand argued and the circuit court found that based on the undisputed facts of this case, that there was no question of material fact as to the claims asserted against Grand Strand.

The order methodically addresses each claim and finds that summary judgment was appropriate because: (1) Grand Strand did not owe any duty to Target Motors; (2) Grand Strand did not cause any damage to Target Motors; (3) Grand Strand did not make any representations to Target Motors; (4) Grand Strand did not act unfairly or deceptively with respect to Target Motors so as to trigger the UTPA; and (5) Target Motors did not have a claim against Grand Strand under the Dealer's Act. (Order, R. at ____). The statement presented by Target Motors does not reach any of these specific findings by the circuit court. As such, this Court should find those rulings are the law of the case and affirm. *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding unappealed ruling is law of the case); *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based

on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case.").[3]

II. In the event the Court is inclined to reach the merits, Grand Strand was entitled to summary judgment as to each of the causes of action pursued by Target Motors.

A. Grand Strand did not owe any duties to Target Motors sufficient to support a claim in negligence.

South Carolina law does not impose a general obligation to act in any certain way with respect to third parties (or in other words, the law does not recognize a wrong) without a duty. *Hendricks v. Clemson Univ.*, 353 S.C. 449, 456–57, 578 S.E.2d 711, 714 (2003) ("An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance. Ordinarily, the common law imposes no duty on a person to act." (citation omitted)). Issues of existence and scope of duty are questions of law for the court. *Id.*; *Staples v. Duell*, 329 S.C. 503, 506–07, 494 S.E.2d 639, 641 (Ct. App. 1997).

South Carolina has not recognized a theory of liability where a previous vehicle owner could be held liable to a future purchaser for failing to disclose wreck damage where the parties had no relationship or interaction and there was no reliance by the plaintiff on any representation made by the defendant. More generally, Target Motors seeks to recover for a nondisclosure with respect to a transaction to which it was not a party. As a general rule, courts are reluctant to create new duties or to expand tort liability. *Staples*, 329 S.C. at 510–11, 494 S.E.2d at 643; *see Wyatt v. Fowler*, 326 S.C. 97, 101, 484 S.E.2d 590, 592 (1997) (holding that the state does not owe its citizens a duty of care to proceed without error when it brings legal action against them); *Byerly v.*

[3] In addition, the body of the brief does not include any specific argument as to the UTPA, negligent misrepresentation, or fraud causes of action. As such, there is no basis for reversal as to Sections 2 and 3 of the circuit court's January 19 order.

Connor, 307 S.C. 441, 443-44, 415 S.E.2d 796, 798 (1992) (holding that the South Carolina Public Service Authority had no duty to discover and warn of a latent hazardous condition on land that it leased to another).

In response to Grand Strand's motion for summary judgment, Target Motors argued that there was a common law duty to disclose based on the "circumstances of the case, the nature of [the parties'] dealings, or their position towards each other," citing *Wright v. Craft*, 372 S.C. 1, 25, 640 S.E.2d 486, 499 (Ct. App. 2006). (Memorandum in Opp. at 5, R. at ____). Under *Wright*, a duty to disclose can arise under the following circumstances:

> (1) where it arises from a preexisting definite fiduciary relation between the parties; (2) where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; (3) where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties.

372 S.C. at 25, 640 S.E.2d at 499.

The circuit court correctly rejected this argument because there was no relationship or communication between Grand Strand and Target Motors and it was undisputed that Target Motors did not rely on any representations or disclosures by Grand Strand in buying the Truck.[4] *See S.C. State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 376, 346 S.E.2d 324, 325–26 (1986) ("A tortfeasor's duty arises from his relationship to the injured party."); *Ravan v. Greenville Cnty.*, 315 S.C. 447, 467, 434 S.E.2d 296, 308 (Ct. App. 1993) ("[T]he parties shall have sustained a relationship recognized by law as the foundation of a duty of care."). The parties did not have a

[4] This is a disclosure case, not a traffic case or a case involving personal injury. As such, this Court should follow the rule in *Wright* as opposed to the cases cited by Target Motors relating to "duty to the public" or "actors that indirectly injured the victims in the motor vehicle context" as cited in Argument IV(A)(1) of the Appellant's Brief.

pre-existing definite fiduciary relationship. The parties did not enter into a contract or transaction. And finally, a duty based on trust and confidence cannot be implied from the circumstances because Target Motors admitted that it did not communicate with Grand Strand regarding the Truck and admitted that it did not have a relationship with Grand Strand, contractual or otherwise.

This admitted lack of reliance distinguishes this case from the limited South Carolina case law finding that a duty can extend to third parties to a transaction if the defendant intended for third parties to rely on a representation and *if there was, in fact, reliance by a third party*. *See ML-Lee Acquisition Fund, L.P. v. Deloitte v. Touche*, 320 S.C. 143, 160-62, 463 S.E.2d 618, 628-29 (Ct. App. 1995) (finding an accountant owed a duty to third parties whom the accountant intended the information to benefit and when the third parties relied on an audit report prepared by the accountant), affirmed on this ground 327 S.C. at 241-42, 489 S.E.2d at 472; *Priv. Mortg. Inv. Servs., Inc. v. Hotel & Club Assocs., Inc.*, 296 F.3d 308, 313-15 (4th Cir. 2002) (finding an appraiser could be liable to a third party for negligent misrepresentation for information in an appraisal where the appraiser knew the appraiser would be used by third parties and the third party actually relied on the information); *Britt v. Sorin Grp. Deutschland GMBH*, No. 6:18-CV-03117-DCC, 2023 WL 5757306, at *6 (D.S.C. Sept. 6, 2023) (stating "that the Supreme Court of South Carolina has yet to extend negligent misrepresentation beyond the accounting or consulting contexts" in third party reliance cases).

Target Motors also argued at the summary judgment stage that there was a contractual duty. (Memorandum in Opp. at 6–7, R. at ____). However, there is no dispute that there was not a contractual relationship between the parties. As such, the circuit court correctly found that this theory did not give rise to a duty. The circuit court correctly noted that even if there were a contract, any claim in tort would be barred by the economic loss rule. (Order at 7 n. 3, citing *Tommy L.*

Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 320 S.C. 49, 54–55, 463 S.E.2d 85, 88 (1995) ("In most instances, a negligence action will not lie when the parties are in privity of contract.")).

In its brief in Argument IV(A)(1), Target Motors has abandoned these first two arguments and has instead argued that the UTPA creates a statutory duty on the facts of this case and raised new arguments that there is a duty to the public and that the presence of alleged reckless conduct somehow negates the requirement that there be a duty. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998); *Shealy v. Doe*, 370 S.C. 194, 205–06, 634 S.E.2d 45, 51 (Ct. App. 2006) ("[W]hen an appellant fails to cite any supporting authority for his position and makes conclusory arguments, the appellant abandons the issue on appeal.").[5] Of these arguments relating to duty, only the UTPA argument is preserved. *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 734 (holding that an argument must have been raised to and ruled on by the circuit court to be preserved for appellate review).[6] Target Motors does not and cannot cite to South Carolina case law standing for the proposition that there is not a duty requirement for allegations of recklessness. As such, this argument lacks merit and has been abandoned.

Based on a review of the Appellant's Brief and the record, the only preserved issue relating to duty is limited to the UTPA. Although it is true that a statute may give rise to a duty in tort, the UTPA creates a separate statutory cause of action distinct from a common law tort claim. *See Reynolds v. Ryland Grp., Inc.*, 340 S.C. 331, 531 S.E.2d 917, 921 (2000) ("[T]he conduct prohibited by the SCUTPA is not merely duplicative of that addressed by the law of torts, contracts,

[5] Target Motors cannot correct this failure in its reply brief. *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) ("Additionally, even though [Appellant] more fully addressed the issue in its reply brief, an argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief.").

and warranties."); *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 743 S.E.2d 808, 815 (2013) (treating the UTPA as its own tort for the purposes of the South Carolina Tort Claims Act). As a result, the UTPA does not create a duty supporting the negligence claims brought by Target Motors.

This is not a case involving a direct purchaser. Grainger, the direct purchaser of the Truck from Grand Strand, has sued Grand Strand in a separate action. In addition, Target Motors has sued Grainger. Thus, Target Motors is not left without a remedy if Grand Strand is dismissed from this action. For all of these reasons, the circuit court's order correctly analyzed the duty issue in granting the motion for summary judgment as to the negligence allegations, and the Order should be affirmed.

B. Grand Strand did not cause any harm to Target Motors.

Target Motors also contends that the circuit court erred in ruling that Grand Strand was not the proximate cause of Target Motors' damages. A claim for "[n]egligence is not actionable unless it is a proximate cause of the injury." *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 88, 502 S.E.2d 78, 83 (1998). "Proximate cause requires proof of both causation in fact and legal cause." *Id.* "Causation in fact is proved by establishing the plaintiff's injury would not have occurred 'but for' the defendant's action." *Mellen v. Lane*, 377 S.C. 261, 278, 659 S.E.2d 236, 245 (Ct. App. 2008). "Legal cause is proved by establishing foreseeability." *Id*. "Foreseeability of some injury from an act or omission is a prerequisite to its being a proximate cause of the injury for which recovery is sought." *Stone v. Bethea*, 251 S.C. 157, 161, 161 S.E.2d 171, 173 (1968). To determine foreseeability, courts look to the "natural and probable consequences of the complained of act." *Young v. Tide Craft, Inc.*, 270 S.C. 453, 468, 242 S.E.2d 671, 678 (1978). A defendant cannot be charged with "that which is unpredictable or that which could not be expected to happen." *Id*.

When the evidence permits but one reasonable inference as to causation, a question of law is presented for the court. *Id.* at 464, 242 S.E.2d at 676.

The allegations against Grand Strand boil down to an alleged misrepresentation/ nondisclosure. Accordingly, Target Motors was required to show a question of material fact existed as to whether Grand Strand's misrepresentation was the proximate cause of its damages in order to defeat Grand Strand's properly made and supported summary judgment motion.

1. There is no connection between Grand Strand's sale of the Truck to Grainger and the representations made at that time and the later alleged injury to Target Motors. As such, there is not a question of material fact as to whether Grand Strand's actions were a "but for" cause of the alleged injuries to Target Motors.

Again, the claim here is that Target Motors was harmed when it purchased the Truck at auction without being told the Truck had structural damage. Turning first to causation in fact, Target Motors has admitted it did not rely on any acts or omissions of Grand Strand. (Memorandum in Opp,; Hearing Transcript; *see* Hickman Aff., R. at ____). Similarly, Target Motors admitted that it solely relied on the representations made by Grainger regarding the Truck. (Memorandum in Opp,; Hearing Transcript; *see* Hickman Aff., R. at ____). Further, it is undisputed that Grainger had knowledge of the frame damage at the time it sold the Truck to Target Motors. (Amended Complaint ¶¶ 19–27, R. at ____). This is not a case where the seller lacked knowledge at the time of the second sale. Grainger and Manheim were both aware of the Truck's condition and history at the time of the sale to Target Motors.

By conceding that Target Motors did not rely on any of Grand Strand's actions, Target Motors has effectively conceded that Grand Strand was not the "but for" cause of its damages. In other words, how can Grand Strand be the proximate cause of Target Motors' damages when Target Motors admittedly never saw or relied on any representation by Grand Strand? Therefore,

the circuit court correctly concluded that there can only be one inference: that Grainger is the sole "but for" cause of Target Motors' damages.

2. With respect to legal cause, the subsequent knowing failure to disclose by Target Motors and Manheim broke the causal chain as a matter of law.

Target Motors argues that the harm was foreseeable and the circuit court erred by finding that intervening causes broke the causal connection.

> One is not charged with foreseeing that which is unpredictable or that which could not be expected to happen. When the [original wrongdoer's] negligence appears merely to have brought about a condition of affairs, or a situation in which another and entirely independent and efficient agency intervenes to cause the injury, the latter is to be deemed the direct or proximate cause, and the former only the indirect or remote cause.

Stone v. Bethea, 251 S.C. at 161–62, 161 S.E.2d at 173. When the evidence permits but one reasonable inference, a question of law is presented for the court. *Young*, 270 S.C. at 464, 242 S.E.2d at 676.

The actions of Grainger and Manheim in sending the Truck back through the auction despite having knowledge of the structural damage are independent acts that were not foreseeable to Grand Strand. It is these actions that were the legal cause of the alleged injury and the actions of Grand Strand are only an indirect or remote cause. Therefore, the circuit court's ruling as to causation should be affirmed.

C. Grand Strand did not communicate with Target Motors nor did Target Motors rely on any representation made by Grand Strand; therefore, Target Motors cannot prevail on its fraud and negligent misrepresentation claims.

As discussed in Footnote 3 above, Target Motors has not appealed the findings in Section 2 of the Circuit Court's order relating to fraud and negligent misrepresentation and those rulings are the law of the case and must be affirmed. In addition, the circuit correctly determined that Grand Strand was entitled to summary judgment on the fraud and negligent misrepresentation

claims based on the absence of any representation coupled with the absence of any reliance by Target Motors.

To establish a claim for negligent misrepresentation, the plaintiff must show that "(1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation." *Beneficial Fin. I, Inc. v. Windham*, 431 S.C. 256, 273, 847 S.E.2d 793, 802–03 (Ct. App. 2020).

Target Motors admitted that it did not communicate with Grand Strand regarding the condition of the Truck prior to its purchase. (Memorandum in Opp,; Hearing Transcript; *see* Hickman Aff., R. at ____). It also admitted that Target Motors did not rely on or review any information provided by Grand Strand regarding the Truck. (Memorandum in Opp,; Hearing Transcript; *see* Hickman Aff., R. at ____). Based on these admissions, Target Motors cannot prove a single element required to establish a negligent misrepresentation claim.

To prove fraud, the plaintiff must establish: "(1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury." *Sorin Equip. Co. v. The Firm, Inc.*, 323 S.C. 359, 366, 474 S.E.2d 819, 823 (Ct. App. 1996). And "[f]ailure to prove any element of fraud is fatal to the action." *Id.* Fraud based on a misrepresentation, as with a negligent misrepresentation, "require[s] that the plaintiff justifiably

rel[y] on the representation made by the defendant." *West v. Gladney*, 341 S.C. 127, 134, 533 S.E.2d 334, 338 (Ct. App. 2000).

Again, Target Motors has admitted that it did not communicate with Grand Strand regarding the condition of the Truck and that it did not rely on or review any information provided by Grand Strand or on any information Grand Strand provided to Grainger. (Memorandum in Opp,; Hearing Transcript; *see* Hickman Aff., R. at ____). As a result, Target Motors cannot prove a single element of its fraud claim.[7]

D. The circuit court correctly found that Target Motors cannot prevail on its UTPA and Dealer's Act claims because there is no evidence of harm to Target Motors caused by Grand Strand.

The UTPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C. Code Ann. § 39-5-20(a). To prove a claim under the UTPA, the plaintiff must establish that "(1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected the public interest; and (3) the plaintiff suffered monetary or property loss as *a result* of the defendant's unfair or deceptive act(s)." *Health Promotion Specialists, LLC*, 403 S.C. at 638, 743 S.E.2d at 816

[7] In Section IV(B) of its Appellant's Brief, Target Motors cites cases where other jurisdictions have adopted section 533 of the Restatement (Second) of Torts. *See Varwig v. Anderson-Behel Porsche/Audi, Inc.*, 74 Cal. App. 3d 578, 540, 141 Cal. Rptr. 539, 581 (Cal. Ct. App. 1977) (relying on Restatement (Second) of Torts § 533); *Clark v. McDaniel*, 546 N.W.2d 590, 593 (Iowa 1996) (same). South Carolina has not adopted this section. Even so, Target Motors' argument fails. Restatement (Second) of Torts § 533 (1977) provides that "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 . . . ." Section 533 is intended to provide recourse for individuals who rely on information passed on from one party to another. For example, in both *Varwig* and *Clark*, the injured party relied on information passed from the original seller through the intermediate seller. That is not the case here where Target Motors relied solely on the representations of Grainger and Manheim, each of whom knew about the structural damage, and did not rely on or review any information from Grand Strand.

(emphasis added). Target Motors argues that the circuit court erred in granting summary judgment on the UTPA claim because a UTPA claim can be brought by "any person," including remote purchasers. This argument fails to consider the causal connection requirement as addressed by the circuit court and as identified in *Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc.*, 379 S.C. 181, 195, 666 S.E.2d 247, 255 (2008)

The UTPA "requires a causal connection" between the injury and the complained of deceptive act or practice, which in this case is an alleged misrepresentation. *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharms., Inc.*, 414 S.C. 33, 57–58, 777 S.E.2d 176, 189 (2015). Although the UTPA does not require privity of contract, a remote purchaser must prove that its damages were "a result of" the deceptive act. *Colleton Preparatory Acad., Inc.*, 379 S.C. at 194, 666 S.E.2d at 254 ("Persons or any legal entity suffering an ascertainable loss of money or real or personal property '*as a result of* the use or employment by another person of an unfair or deceptive method, act or practice' may bring an action to cover recover actual damages." (emphasis in original)). "Establishing this causal connection in a misrepresentation case necessarily requires proof that the plaintiff detrimentally relied on the defendant's deceptive conduct." *Doe 1 v. Varsity Brands, LLC*, No. CV 6:22-2957-HMH, 2023 WL 4088483, at *13 (D.S.C. June 20, 2023).

Here, the circuit court concluded that Target Motors was not harmed by any unfair or deceptive act committed by Grand Strand because it did not contract with Target Motors and Target Motors did not rely on any representations made by Grand Strand in making its purchase. These facts are not in dispute and do not give rise to any inference or question of material fact that "plaintiff detrimentally relied on the defendant's deceptive conduct."

Similarly, the Dealer's Act prohibits "unfair or deceptive acts or practices." S.C. Code Ann. § 56–15–30(a). It is violation of the Dealer's Act "to engage in any arbitrary, in bad faith, or

unconscionable and *which causes damage to* any of the parties or to the public." S.C. Code Ann. § 56–15–40(B) (emphasis added). A necessary part of the claim requires that the plaintiff prove that the alleged act caused the plaintiff's damages. This is identical to the causal connection requirement under the UTPA.

Again, Target Motors, by admitting that it solely relied on information provided by Grainger and not Grand Strand, has essentially admitted that Grand Strand did not cause damage to Target Motors. If Target Motors did not rely on or review any information provided by Grand Strand or any information provided by Grand Strand to Grainger, how could Grand Strand be the cause of Target Motors' damages?

CONCLUSION

Based on the above, the circuit court did not err by granting summary judgment in favor of Grand Strand on the claims asserted by Target Motors. For these reasons, the Court should affirm the circuit court's ruling.

Respectfully submitted,

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December 6, 2023