

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Joseph M. Strickland, Master in Equity

Appellate Case No. 2022-001160
Case No: 2016-CP-49-6794

Mathes Auto Sales, Inc.

Respondent

v.

Otis Morris, Jr., Pro Bowl Motors, Inc., Travelers Casualty & Surety Co., of America, Inc.; Gerald Scott Dixon, Michael Tyrone Moore, and Dixon's Automotive, LLC, Defendants, of whom, Gerald Scott Dixon, Michael Tyrone Moore, and Dixon's Automotive, LLC are the Petitioners.

Of Whom Gerald Scott Dixon and Michael Tyrone Moore are the Appellants.

BRIEF OF GERALD SCOTT DIXON AND MICHAEL TYRONE MOORE

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TABLE OF CONTENTS

Table Of Authorities.....3

Certificate of Counsel.....4

Question Presented.....4

Statement of the Case.....4

Arguments

1. THE TRIAL COURT ERRED, AND VIOLATED DIXON’S AND MOORE’S CONSTITUTIONAL RIGHT TO DUE PROCESS, IN GRANTING PLAINTIFF’S MOTION TO AMEND THE PLEADINGS BY ADDING GERALD S. DIXON AND MICHAEL T. MOORE AS INDIVIDUAL DEFENDANTS AFTER THE PLAINTIFF RESTED7

Conclusion.....12

TABLE OF AUTHORITIES

Constitutions and Statutes

Constitution of the United States

5th Amendment.....9
7th Amendment.....9

South Carolina State Constitution, Section 3.....9, 10

Caselaw

Collins Ent. Inc. v. White 363 S.C. 546, 611 S.E.2d 262 (S.C. Ct. App. 2005).....9

Curtis v. State, 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2001).....12

Grannis v. Ordean, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363 (1914).....11

In the Matter of Anonymous Member of The South Carolina Bar, 392 S.C. 328, 709
S.E.2d 633 (S.C. 2011).....12

Moore v. Timmerman, 276 S.C. 104, 276 S.E.2d 290 (S.C. 1981).....11

S.C. Dep't of Soc. Servs. v. Holden, 319 S.C. 72, , 459 S.E.2d 846, 849 (1995).....11

State v. Albert, 257 S.C. 131, 184 S.E.2d 605, (1971).....11

Tryron Fed. Sav. & Loan Ass'n v. Phelps, 307 S.C. 361, 415 S.E.2d 397,
(1992).....11

Rules

Rule 15, South Carolina Rules of Civil Procedure.....10

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the trial court's granting of the Plaintiff's Motion to Amend the Pleadings which violated the constitutional right to due process by adding Gerald S. Dixon and Michael T. Moore as Defendants in the lawsuit after the Plaintiff had concluded the presentation of its case, thus denying them the opportunity to present any defense and participate in the case.

STATEMENT OF THE CASE

Plaintiff filed suit on November 11, 2016 against Otis Morris, Jr., owner of Pro Bowl Motors, Inc., Pro Bowl Motors, Inc., and Tamika Worthy regarding the purchase of a vehicle on behalf of the Plaintiff when Defendant Morris, prior to such time, had allegedly sold the vehicle to Ms. Worthy. Mr. Morris' fraud on the Plaintiff was based upon his sale of the same car twice, first to Ms. Worthy, and then to the Plaintiff at the Darlington auto auction.

On February 1, 2017 Plaintiff amended the Complaint by adding additional defendants including Dixon Automotive, LLC (R. pp. 425-433). At no time prior to the end of Plaintiff's case at trial were Gerald S. Dixon and Michael T. Moore made defendants in the case.

This matter came before the Honorable Joseph M. Strickland, Master of Equity for Richland County for a non-jury trial over the two days of February 8, 2018 and February 12, 2018. At the time of the hearing the remaining defendants in the matter were Otis Morris, Jr., Pro Bowl Motors Inc. and Dixon Automotive, LLC.

Plaintiff's first witness Tamika Worthy was the purchaser of the car in May 2016. Her testimony was substantial regarding her dealings with Mr. Morris. However, she offered no evidence regarding Mr. Dixon or Mr. Moore. Following her testimony Plaintiff read from the testimony of Otis Morris, Jr. Mr. Morris was never called to the stand by the Plaintiff. The deposition offered no evidence against Mr. Dixon or Mr. Moore, regarding the matter before the Court.

Plaintiff then read portions of the deposition of Michael T. Moore. Mr. Moore, an owner of Dixon Automotive, LLC, discussed the purchase of the vehicle by Dixon Automotive, LLC from an auction in Florida via OVE. At the time he purchased it he stated that Mr. Morris indicated to him he may have a buyer for the vehicle. He further stated that subsequently Mr. Morris indicated that the buyer was unable to secure financing, which was later found to be a lie, and so Mr. Morris had the vehicle brought to Dixon Automotive, LLC in York County, South Carolina where it stayed until the car was taken to Darlington when it was purchased on behalf of the Plaintiff by Mr. Morris. The car had been financed by Dixon Automotive, LLC by way of its floorplan with Nextgear, Inc. At the time the car was sold in Darlington and the sale confirmed, Nextgear, Inc. applied the sales proceeds to the account of Dixon Automotive, LLC. Lastly, Mr. Moore stated that no one at Dixon Automotive, LLC knew of the previous sale by Morris to Worthy until October 2016, two months after the sale to Plaintiff. Additionally, because of this Dixon Automotive, LLC had its floor plan of \$250,000.00 shut down. No evidence was offered by Plaintiff to dispute this.

Plaintiff then called Donald Dease of Capitol City Rides of Columbia, South Carolina. Mr. Dease testified about his business history with Mr. Morris but offered no evidence regarding Mr. Dixon or Mr. Moore.

Following Mr. Dease's testimony, Plaintiff read portions of the deposition of Mr. Dixon which showed that he was the owner of Dixon Automotive, LLC; that he knew little, if anything about the transaction involved in this matter, and that he is retired as a player from the National Football League. As was read into the record from his deposition, Plaintiff's attorney characterized Mr. Dixon's lack of knowledge as "You don't know nothin' 'bout birthing any babies." Mitchell, Margaret, *Gone with the Wind*, (1936).

Plaintiff then called Investigator Chauncey Duckett of the Columbia Police Department. Investigator Duckett indicated he investigated the transaction between Mr. Morris and Ms. Worthy but pursued no criminal action. He offered no testimony regarding Mr. Dixon or Mr. Moore.

The last witness was the Plaintiff. His testimony centered around the transaction wherein Mr. Morris purchased the car for his dealership in Florence, South Carolina; his conversation with Mr. Morris; the car being purchased with proceeds from his floorplan, Nextgear, Inc., being the same floorplan as used by Dixon Automotive, LLC; and finally, his alleged damages arising from Mr. Morris' actions in the sale to Ms. Worthy.

Additionally, the documentary evidence entered by Plaintiff were either records not regarding this matter, or records which confirmed the sales that were performed.

However, none of it in any way linked Mr. Dixon, or Mr. Moore to the wrongdoing perpetrated by Mr. Morris.

The Order of Judgment in this matter contains more than 120 findings of fact by the Court. None of the findings of fact show that Mr. Dixon, or Mr. Moore knew of the transaction Mr. Morris had with Ms. Worthy.

At the close of Plaintiff's case Plaintiff moved to amend the pleadings by adding Gerald S. Dixon and Michael T. Moore as defendants. (R. pp. 322-335). Defendants objected and the issue was taken under advisement. Defendants Dixon Automotive, LLC and Gerald S. Dixon, and Michael T. Moore, if they were to be included as defendants, moved for a non-suit pursuant to Rule 41(b) of the South Carolina Rules of Civil Procedure at the close of Plaintiff's case (R. pp. 336-337) and it was taken under advisement. The Court issued its judgment in favor of the Plaintiff against all defendants, including Gerald S. Dixon and Michael T. Moore, both who the court added as parties in the same Order of Judgment on June 20, 2018. (R. pp. 1-16) All Defendants filed Motions for the Court to reconsider its ruling. A hearing was held on January 3, 2019 and all of Defendants' motions were denied.

The Court of Appeals affirmed the judgment of the Master in Equity, in part, and amended, in part, as to the punitive damages awarded. *Mathes Auto Sales, Inc. v. Otis Morris, Jr., et al.*, No. 2022-UP-253 (S.C. Ct. App. filed June 8, 2022 and withdrawn, substituted, and refiled July 20, 2022). By Order dated October 27, 2023 the South Carolina Supreme Court granted Petitioner's petition for writ of certiorari as to Question 2 in the Petition which is briefed here.

ARGUMENT

1. THE TRIAL COURT ERRED, AND VIOLATED DIXON'S AND MOORE'S CONSTITUTIONAL RIGHT TO DUE PROCESS, IN GRANTING PLAINTIFF'S MOTION TO AMEND THE PLEADINGS BY ADDING GERALD S. DIXON AND MICHAEL T. MOORE AS INDIVIDUAL DEFENDANTS AFTER PLAINTIFF RESTED.

Rule 15(c), SCRCivP provides, "An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him the party to be brought in by the amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for mistake concerning the identity of the proper party, the action would have been brought against him." Thus, there are two requirements that must be met before the Court is to add a party.

The first is whether the party had sufficient notice so that he would not be prejudiced in maintaining his defense on the merits. Mr. Dixon and Mr. Moore were aware that an action had been brought against Dixon Automotive, LLC regarding the sale of a vehicle at the time the company was served with the Complaint in the fall of 2016. Yet at the time and throughout the proceedings, and despite the fact that Plaintiff's attorney had included Mr. Morris as an individual defendant, there was no indication that Plaintiff would attempt to involve them in their individual capacities. Up until the time of Plaintiff's motion to amend following the closing of Plaintiff's case, both were merely treated as witnesses in the matter. Neither of them had legal counsel. Neither of them participated, nor had the opportunity to participate in the suit, nor in the final hearing on the merits of Plaintiff's case.

The Court of Appeals cited *Collins Ent. Inc. v. White* 363 S.C. 546, 611 S.E.2d 262 (S.C. Ct. App. 2005) for the law that it is in the sound discretion of the Court as to whether the pleadings should be amended. It further stated that the party opposing the motion must show prejudice. The irony here is that in the *Collins* matter, the Court ruled that there was prejudice and didn't allow the amendment to be made. The Court stated that the prejudice that Rule 15 envisions is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it.

Mr. Dixon and Mr. Moore had no notice. Mr. Dixon and Mr. Moore had no opportunity. There was extreme prejudice to Mr. Dixon and Mr. Moore, for at the time they were given notice of being added as individual defendants, the trial had ended. At the same time they were given notice that they were now issued a six figure judgment against each of them. And until that time, neither of them had been in the case. Thus, at the time they were given notice they were now defendants subject to the judgment:

1. They had no opportunity to demand their constitutional right to have the matter heard by a jury of their peers (7th Amendment, United States Constitution);
2. They had no opportunity to consult with and retain their own attorneys to defend them individually against the allegations which were leveled against them at the end. (5th Amendment, United States Constitution; Section 3, South Carolina Constitution);
3. They had no opportunity to demand that they be sued in their home county of York County where they may have been known to a jury panel, especially due to Mr. Dixon having played for the National Football League for several years.

4. They had no opportunity to due process for they were not parties to the action and thus lacked standing to participate in the matter at all but were only included at the time the Court assigned blame and judgment. (Section 3, South Carolina Constitution).

South Carolina Courts has a large collection of appellate decisions dealing with persons who have alleged their rights to due process have been violated. The three primary aspects required for due process are notice, being heard, and having the decision reviewed if sought. The Court held in 1981 regarding a forfeiture statute, "Notice must be given to the owner of the property seized and those claiming an interest therein of the proceedings; there must be either personal notice to the owner, or at least a proceeding in rem with notice by publication; and a hearing must be had at which they can be heard, except in a few cases of necessity. A statute or ordinance which allows the seizure and confiscation of a person's property by ministerial officers without inquiry before a court or an opportunity of being heard in his own defense is a violation of the elementary principles of law and the constitution." *Moore v. Timmerman*, 276 S.C. 104, 276 S.E.2d 290 (S.C. 1981). No judgment or order affecting the rights of a party to the cause shall be made or rendered without notice to the party whose rights are to be affected." Generally, a person against whom a judgment or order is taken without notice may rightly ignore it and may assume that no court will enforce it against his person or property. *Tryron Fed. Sav. & Loan Ass'n v. Phelps*, 307 S.C. 361, 362, 415 S.E.2d 397, 398 (1992).

In The requirements of due process not only include notice, but also include an opportunity to be heard in a meaningful way, and judicial review. *Grannis v. Ordean*,

234 U.S. 385, 394, 34 S.Ct. 779, 58 L.Ed. 1363 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard."); *S.C. Dep't of Soc. Servs. v. Holden*, 319 S.C. 72, 78, 459 S.E.2d 846, 849 (1995). In this case, the Appellants ultimately were given notice of being added to the case as parties at the same time the Court imposed the case's Judgment on them. Thus, they were able to act accordingly and have it reviewed, and they are now before this Court. However, before that there was (1) no notice, nor (2) an opportunity to be heard as to the allegations being directed at them individually.

The Respondent may argue that the litigation against their company was sufficient to put the individual appellants on notice of a possible claim. However, such argument cannot overcome the principle of vagueness as it applies in constitutional law. The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *State v. Albert*, 257 S.C. 131, 134, 184 S.E.2d 605, 606 (1971). "A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application." *Curtis v. State*, 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2001). Also see *In the Matter of Anonymous Member of The South Carolina Bar*, 392 S.C. 328, 709 S.E.2d 633 (S.C. 2011) If the Court allows this ruling to be upheld, it will be a foreboding, dangerous precedence for any owners of small businesses. Additionally, it is even more vague, or indefinite, caused by the fact that there was one owner being sued through the entire litigation as well as his company.

This could be interpreted Respondents didn't intend to include the Appellants individually as Defendants.

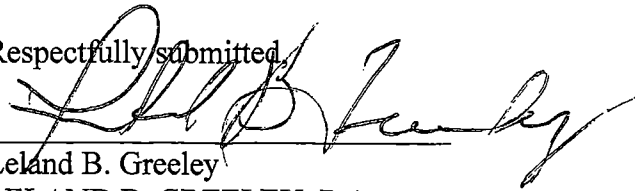
As to an opportunity to be heard, there was none at the trial level. The Appellants were never parties prior to the conclusion of the case with final Order by the Judge. The never had standing to take advantage of any of the litigation rules provided by the South Carolina Rule of Civil Procedure for building a possible defense through Discovery, through Motion Practice, and by way of formally asserting possible defenses against the allegations. They were not afforded the opportunity for a trial in their county before a jury of their peers. Although the tools provided in the opportunity to be heard aren't endless, they are many. But they are reserved for parties to the action during the time for being heard which is litigation, mediation, and trial. For one to be heard, one must have standing. The Appellants had none.

Thus, it is respectfully submitted that the prejudice existing in this matter caused by the Master allowing the amendment to the Complaint in adding Mr. Dixon and Mr. Moore as individual defendants is clear. If this Court found prejudice in *Collins* due to the lack of notice and opportunity to adequately address an added single affirmative defense, then the existence of prejudice in this case where an individual is made a party to the action and handed a judgment with no notice or opportunity to address and defend it in any way is unquestionable.

CONCLUSION

For the reasons stated, Appellants Gerald Scott Dixon and Michael Tyrone Moore respectfully request this Court reverse the Judgment against each of them in this matter.

Respectfully submitted,



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