THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Roger M. Young Sr., Circuit Court Judge

Circuit Court Case No. 2019-CP-10-05392
S.C. Court of Appeals Case No. 2022-001795

Kevin Staveley-O-Carroll,

Appellant,

v.

Fenix Automotive, LLC

Respondent.

RECORD ON APPEAL

Volume 1

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP1005392

Kevin Staveley O'Carroll
PLAINTIFF(S)

Fenix Automotive Llc
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

Damages hearing held in this matter on August 25, 2021. Plaintiff Counsel has ten (10) days from the date of this Order to propose an Order for Damages to Defendant Counsel and the Court. Defendant Counsel has five (5) days from service of that proposed Order to present his own proposed Order to the Court.

ORDER INFORMATION

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

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 08/25/2021 .

Damien Andreas Sobieraj for Fenix Automotive Llc
Warren W. Wills, III for Kevin Staveley O'Carroll

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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

Charleston Common Pleas

Case Caption: Kevin Staveley O'Carroll VS Fenix Automotive Llc

Case Number: 2019CP1005392

Type: Order/Electronic Form 4

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	Case No.: 2019-CP-10-05392
KEVIN STAVELEY-O'CARROLL,	)	
	)	
Plaintiff,	)	ORDER
-vs-	)	OF
	)	JUDGMENT FOR DAMAGES
FENIX AUTOMOTIVE, LLC,	)	
	)	
Defendant.	)	
	)	

Plaintiff Kevin Staveley-O'Carroll ("Plaintiff" or "Staveley-O'Carroll") brought this action against Defendant Fenix Automotive, LLC ("Defendant" or "Fenix") on October 21, 2019 alleging causes of action for breach of contract, negligence, conversion, and unjust enrichment. The record reflects that Plaintiff properly served Defendant with a copy of the Summons and Complaint on November 13, 2019. On January 28, 2020, after Defendant failed to file an answer or otherwise respond to the Complaint, Plaintiff filed and Affidavit of Default and Motion for Default Judgment, which the Court granted its Order dated January 29, 2020. Subsequently, Plaintiff filed his Motion for Damages and requested for a damages hearing.

On August 25, 2021, the parties having been duly and properly notified, the Court held a hearing on the issue of damages via WebEx. Present at the damages hearing via video/audio were Plaintiff appearing with his counsel W. Westbrook Wills III, Esq. and Axel Reinert ("Mr. Reinert"), his expert witness in automotive restoration. Damien A. Sobieraj, Esq. appeared on behalf of Defendant. Plaintiff's expert witness was duly qualified, without objection, to give expert testimony as to issues related to the damages in the matter. Plaintiff and Mr. Reinert's testimony was taken, evidence was received, and the entire record in the case was considered by

the Court.[1] The Court makes the following Findings of Fact and Conclusions of Law as required by SCRCP, Rule 52. Any Finding of Fact which is more appropriately characterized as a Conclusion of Law shall be treated as such, and vice-versa.

FINDINGS OF FACT

Based on Defendant's admissions by default of the allegations of Plaintiff's Complaint, and having considered the testimony and evidence presented at the damages hearing, Plaintiff has established the following facts by a preponderance of the evidence, unless otherwise specified.

1. Plaintiff is an individual residing in Columbia, Missouri.

2. Defendant is South Carolina company engaged in the business of automotive restoration.

3. The parties are properly subject to the jurisdiction of the Court, and the Court has subject matter over the matters raised in the pleadings.

4. Defendant was properly served with a copy of Plaintiff's Summons and Complaint, which it failed to answer or otherwise respond, resulting in the entry of default judgment against it.

5. In 2015, Plaintiff entered into a contract with Defendant to restore his classic 1969 Mercedes 280 SL ("the Mercedes"), which he delivered into Defendant's possession and care at Defendant's place of business for that purpose.

6. Plaintiff inherited the Mercedes from his mother, and it had special value to him, which fact Plaintiff communicated to Defendant.

7. At the time Plaintiff delivered the Mercedes to Defendant, the vehicle was in fair

[1] As Defendant was in default and default judgment having been entered against it, the Court took testimony and received evidence from and on behalf of Plaintiff only, and limited Defendant's participation in the hearing to cross-examination and objecting to evidence by its counsel. See Howard v. Holiday, Inc. 271 S.C. 238, 246 S.E.2d 880 (1978)(limiting a defendant's participation in a post-default hearing to cross-examination and objection to plaintiff's evidence); see also Limehouse v. Hulsey, 404 S.C. 93, 116, S.E.2d 566, 579 (S.C. 2013)(reaffirming Howard).

condition and had a value of between $41,000 and $45,000, based on the testimony of Mr. Reinert.

8. Plaintiff and Defendant agreed Defendant would restore the Mercedes to a "daily driver" condition, and that Defendant would provide Plaintiff a detailed estimate of the total cost and time required to perform the restoration project after completely disassembling the Mercedes.

9. Between September of 2015 and March of 2016, Defendant performed initial work on the Mercedes including completely disassemble it and preparing the body for anticipated metalwork and submitted invoices to Plaintiff for such work totaling $5,825.00, which Plaintiff paid in full.

10. 22 months later, in December of 2017, Defendant provided Plaintiff a detailed estimate for the remainder of the restoration of the Mercedes, which it represented would cost approximately $60,000, and would take approximately six months.

11. To keep the total cost of the remainder of the restoration process as close to the $60,000 estimate as possible, Plaintiff and Defendant specifically agreed that, wherever possible, Defendant would make use of the Mercedes's existing parts and components.

12. At Defendant's request, Plaintiff provided it a $20,000 deposit, which Defendant specifically represented it would maintain, in trust, in a separate account, and against which it would bill for restoration work on the Mercedes going forward. Defendant also represented to Plaintiff that any unused portion of the $20,000 would be returned to Plaintiff upon his request.

13. The evidence and testimony before the Court demonstrates, and the Court finds, that after Plaintiff provided the $20,000 deposit, Defendant failed to perform any further work on the Mercedes, as agreed, and it remains to this day in an unrestored and completely disassembled state, in Defendant's possession.

14. Moreover, the evidence, testimony, and Defendant's admissions establish that after

disassembling the Mercedes, Defendant stored a great many of its parts and components outdoors on the ground or in plastic bins, exposed to the elements and weather, where they have remained since the end of 2017.

15. From the photographs submitted in evidence and personal observation, Mr. Reinert identified many of the parts and components of the Mercedes, including the vehicle's motor, windshield, suspension, drivetrain, exterior finishes and chrome, and an array of interior components, which he testified were in a severe degradation condition or ruined as a direct result of Defendant leaving them outdoors in the weather over a number of years. Mr. Reinert further testified that, in their previous condition, a great many of those parts and components could have been reused in the restoration of the Mercedes. However, due to their present condition, which Mr. Reinert characterized as unusable "junk," those parts and components are either no longer usable for the restoration project, or would now require very extensive refurbishment.

16. Mr. Reinert testified that, based on Plaintiff and Defendant's agreement, the total actual cost of the restoration of the Mercedes at the time of the parties' original agreement would reasonably have been between $60,000 and $70,000 dollars. However, because of the severely degraded or ruined condition of much of the Mercedes due to Defendant failure to properly protect it from damage, the current cost to restore the vehicle is likely to be double or triple that figure.

17. Plaintiff alleged, Mr. Reinert testified, and the Court finds, that Defendant knew or should have known that storing the subject parts and components of Plaintiff's Mercedes outdoors, exposed to the elements over a period of years would result in their severe degradation or ruination. Mr. Reinert testified that by doing so, Defendant unquestionably deviated from the standards of care, professionalism, and best practices for businesses in the automotive restoration

industry.

18. Furthermore, Mr. Reinert testified that given the obviousness of the damage to the parts and components of the Mercedes, which would result from exposing them to the elements over a period of years, the Defendant, in doing so, acted recklessly and with conscious disregard for Plaintiff's property, particularly in light of the particular sentimental value of the Mercedes to Plaintiff and his reason for wanting to restoring it.

19. Based on the uncontroverted testimony of Mr. Reinert, the Court finds the Mercedes would have had a value of between $115,000 and $120,000 had Defendant restored it as agreed in its contract with Plaintiff. Instead, in its present condition and state, the Mercedes currently has a value of $2,500.

20. In September of 2019, as Defendant had still failed to perform any further work on the Mercedes, Plaintiff made a demand on Defendant for the return of his $20,000 deposit, which Defendant also failed to return to him.

CONCLUSIONS OF LAW

Plaintiff filed his action against Defendant alleging causes of action for breach of contract, negligence, conversion, and unjust enrichment for which he has prayed for actual, consequential, special, and punitive damages as proven at trial, together with attorney's fees and costs of the action. The Defendant failed to answer or otherwise respond to Plaintiff's Complaint, and default judgment was entered against it.

A defendant in default admits liability but not the damages as set forth in the prayer for relief. Solley v. Navy Fed. Credit Union, Inc., 397 S.C. 192, 203 723 S.E.2d 597, 603 (S.C. App. 2012); see also Renney v. Dobbs House, Inc., 275 S.C. 562, 566, 274 S.E.2d 290, 292 (1981). The amount of damages in a default action must be proved by the preponderance of the evidence.

Id.; see Jackson v. Midlands Human Res. Ctr., 296 S.C. 526, 529, 374 S.E.2d 505, 507 (Ct. App.1988) ("A judgment for money damages must be warranted by the proof of the party in whose favor it is rendered."). As to punitive or exemplary damages, the Plaintiff has the burden of proving by clear and convincing evidence the Defendant's demonstrated misconduct was willful, wanton, or with reckless disregard for the Plaintiff's rights. See Mishoe v. Qhg of Lake City, Inc., 621 S.E.2d 363, 366, 366 S.C. 195 (S.C. 2005). "A conscious failure to exercise due care constitutes willfulness." Id.

Based on the pleadings, admissions, and the uncontroverted evidence and testimony presented by Plaintiff and his expert witness at the damages hearing, the Court finds and concludes as follows:

Breach of Contract

Plaintiff and Defendant entered into a valid contract for the restoration of Plaintiff's Mercedes, supported by consideration, and creating rights and obligations between the parties, under which Defendant agreed to restore the vehicle to a "daily driver" condition, and Plaintiff agreed to pay Defendant for parts and labor associated with the restoration. Pursuant to the parties' contract, Defendant invoiced Plaintiff for the initial restoration work it performed in the amounts totaling $5,825.00, which Plaintiff paid in full. Thereafter, Plaintiff provided Defendant a $20,000 deposit towards the remainder of the vehicle restoration, which Defendant was to hold in a separate account, as agreed, however, Defendant performed no further work on the Mercedes, and failed to complete the renovation. Furthermore, after Plaintiff discovered Defendant had not performed its obligations, as promised, and demanded the return of his $20,000 deposit, as agreed, Defendant failed to deliver it. The Court finds Defendant has breach its contract with Plaintiff entitling Plaintiff to contract damages.

Damages in a breach of contract action are to put the non-breaching party in the position he or she would have been in had the breach not occurred and the contract were performed. See Minter v. GOCT, Inc., 322 S.C. 525, 473 S.E.2d 67(Ct. App. 1996)(purpose of damages for breach of contract is to put plaintiff in as good a position as he or she would have been if the contract had been performed). Compensation for lost profits or value is recoverable as damage in a breach of contract action where the estimate of such lost profit or value is not based wholly on speculation and conjecture. Charles v. Texas Co., 199 S.C. 156, 18 S.E.2d 719 (1942); South Carolina Federal Savings Bank v. Thorton-Crosby Development Co., 303 S.C. 74, 399 S.E.2d 8 (Ct. App. 1990); Global Protection Corp. v Halbersberg, 332 S.C. 149, 503 S.E.2d 483 (1998)(absolute certainly of data on which lost profits are estimated not required; must be such reasonable certainty that damages are not based wholly on speculation and conjecture and certain standard or fixed method by which profits or value may be estimated and determined with a fair degree of accuracy is sufficient).

The proper measure of damages for breach of contract is the loss actually suffered by the contractee as the result of the breach. Tomlinson v. Mixon, 626 S.E.2d 43, 50, 367 S.C. 467 (S.C. App. 2006); South Carolina Fin. Corp. v. West Side Fin. Co., 236 S.C. 109, 113 S.E.2d 329 (1960). "In the normal case, the damage will consist of two distinct elements: (1) out-of-pocket costs actually incurred as a result of the contract; and (2) the gain above costs that would have been realized had the contract been performed." Id; Collins Entm't., Inc. v. White, 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005).

Here, therefore, as damages for Defendant's breach of contract, Plaintiff is entitled to the difference between the fair market value of the Mercedes as restored to the agreed upon condition and its present value, minus the difference between the cost of the restoration work and

the amount the Plaintiff already paid toward that cost. According to the uncontroverted testimony of Mr. Reinert, the fair market value for the Mercedes as restored to the agreed "daily driver" condition would have been between $115,000 and $120,000, the average of which amounts to $117,500. He further testified the value of the Mercedes in its present state and condition is $2,500, and that based on the parties agreement at the time of its making, the reasonable cost of the labor and parts would have been between $60,000 and $70,000 dollars, the average of which amounts to $65,000. Plaintiff also paid Defendant a total of $25,825 towards the total cost of the restoration. Plaintiff's actual damage resulting from Defendant's breach of contract can, therefore, be expressed as ($117,500 - $2,500) – ($65,000 - $25,825) and totals $75,825.

Under the foregoing measure, Plaintiff is also entitled to the return of the vehicle in its present state. Mr. Reinert testified that shipping of the vehicle in its present disassembled state to a Charleston location will cost a fee of $525 which includes tarping, and two hours of loading and unloading, plus $100 dollars per hour for additional time. Mr. Reinert testified that in his opinion, loading and unloading the Mercedes in its disassembled condition would likely take several hours. The Court finds Plaintiff is entitled to consequential damages associated with shipping the Mercedes to another location in Charleston in the amount of $1,125.

Plaintiff is entitled to actual and consequential damages as a result of Defendant's breach of contract in the total amount of $76,950, plus the costs and expenses of the action.

Negligence

Plaintiff's contract with Defendant for the restoration of the Mercedes and his delivery of the vehicle to Defendant for that purpose created a bailment. "A bailment is created by the delivery of personal property by one person to another in trust for a specific purpose, pursuant to

an express or implied contract to fulfill that trust." Hadfield v. Gilchrist, 538 S.E.2d 268, 343 S.C. 88, 95 (S.C. App. 2000); Home Indent Co. v. Harleysville Mut. Ins. Co., 252 S.C. 452, 460, 166 S.E.2d 819, 824 (1969)("Bailment has been defined as the delivery of a chattel for some express or particular purpose upon a contract, express or implied, that, after the purpose has been fulfilled, then the chattel shall be redelivered to the bailor, or otherwise dealt with according to his directions.").

The bailment contract between Plaintiff and Defendant created a duty in Defendant to exercise due care in safekeeping of Plaintiff's Mercedes, see Harris v. Burnside, 261 S.C. 190, 199 S.E. 2d 65, 67-8 (1973)(citing Fortner v. Carnes, 258 S.C. 455, 189 S.E.2d 24), and in its repair, see id. (citing Edwards v. Charleston Sheet Metal, 253 S.C. 537, 172 S.E.2d 120). Breach of the duty of care arising under a bailment contract constitutes a tort. Id. at 195, 68.

In action involving a bailment alleging the tort of negligence, the bailor is entitled to be compensated for all losses that are the natural consequence and proximate result of the bailee's negligence. Dixon v. Besco Engineering, Inc., 320 S.C. 174, 180, 463 S.E.2d 636 (S.C. App. 1995)(citing 8 Am.Jur.2d Bailments § 346 (1980)). Damages are proximately caused if they are the foreseeable result of the defendant's tortious act. Id. (citing Young v. Tide Craft, Inc., 270 S.C. 453, 242 S.E.2d 671 (1978)). Further, the liability of a bailee under a bailment for mutual benefit, as we have here, arises upon a showing that (1) the goods were delivered to the bailee in good condition, (2) they were lost or returned in a damaged condition, and (3) the loss or damage to the goods was due to the failure of the bailee to exercise ordinary care in the safekeeping of the property. Hadfield v. Gilchrest, 343 S.C. 88 at 99. Importantly, the burden is on the bailee, and not on the bailor, to demonstrate the bailee used ordinary care in storing and safekeeping the property. Id.

Punitive damages are recoverable for negligence, which is so reckless of consequences as to imply or to assume the nature of wantonness, willfulness or recklessness. Solanki v. Wal-Mart Store # 2806, 410 S.C. 229, 237, 763 S.E.2d 615 (S.C. App. 2014)(referencing Bell v. Atl. Coast Line R. Co., 202 S.C. 160, 171, 24 S.E.2d 177, 182 (1943)). "If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care." Berberich v. Jack, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011).

In the present action, pursuant to the parties' agreement, Plaintiff delivered his Mercedes into the Defendant's possession which created a bailment for mutual benefit. As such, Defendant (bailee) owed Plaintiff (bailor) a duty of care both in the safekeeping and in the repair of Plaintiff's vehicle. Based on the admitted allegations in Plaintiff's Complaint and the evidence and testimony of Plaintiff and Mr. Reinert at the damages hearing, the Court finds the Defendant failed to exercise due care in restoring the Plaintiff's vehicle and in safekeeping its parts and components by storing many of them outdoors in such a manner as to allow them to be directly exposed to the weather over a period of several years. Such failure to exercise due care by Defendant proximately resulted in the severe degradation or ruination of parts and components of Plaintiff's Mercedes, which not only reduced its value from the time Plaintiff delivered it to the Defendant, but also more than doubled the cost to restore the vehicle to the "daily driver" condition.

Furthermore, based on the testimony of the Plaintiff and Mr. Reinert and the photographic evidence entered into the record, the Court finds by a standard of clear and convincing evidence, that Defendant knew or should have know that storing the parts and

components of Plaintiff's Mercedes on the outdoors on the ground or in bins and completely exposed to the weather and elements over a period of several years would result in the very damage that was ultimately occasioned by such failure to exercise even slight care in safeguarding them. Additionally, the evidence and testimony before the Court indicates that Defendant, in fact, was responsible for the extraordinary delay in performing the restoration, that it changed locations without informing Plaintiff for months, and that it intentionally misled Plaintiff with regard to the condition of the parts and components and the status of the restoration, all which served to prolong the amount of time those parts and components sat outside in the weather and elements and increased the amount of damage to them. Mr. Reinert testified that Defendant's actions constituted an absolute departure from industry standards and best practices, that Defendant or it's agents or employees were conscious of such departure and the damage that would result, and that such acts or omissions amounted to a reckless disregard for Plaintiff's property. The Court finds such damages were foreseeable and avoidable by Defendant. That Defendant was also aware of the particular sentimental value the Mercedes had for Plaintiff makes its failure to exercise even slight care all the more egregious.

As stated above, based on the evidence and testimony, at the time Plaintiff delivered the Mercedes to Defendant, the vehicle had a value of between $41,000 and $45,000, the average of which amounts to $43,000. Presently the vehicle is worth $2,500. The damage occasioned to the Mercedes by the negligence of the Defendant has reduced its value by $40,500, and Defendant is liable to Plaintiff in that amount. Furthermore, Plaintiff is entitled to punitive damages in the additional amount of $121,500 in consideration of Defendant's knowing, reckless, and deceitful conduct and the particular harm it caused to Plaintiff.

Under the theory of negligence, Defendant is liable to Plaintiff for the return of the

Mercedes, for compensatory damages in the amount of $41,625, including the cost of transport, and punitive damages in the amount of $121,000 for a combined total of $162,625, plus the costs and expenses of the action.

Conversion

Plaintiff's claim of conversion relates the $20,000 deposit Plaintiff provided Defendant, and that Defendant failed to return upon Plaintiff's demand, as agreed.

Conversion is the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights." Green v. Waidner, 284 S.C. 35, 324 S.E.2d 331 (S.C. App., 1984); Powell v. A.K. Brown Motor Co., 200 S.C. 75, 78, 20 S.E.2d 636, 637 (1942). Money may be the subject of conversion, when it is capable of being identified, and there may be conversion of determinate sums even though the specific coin and bills are not identified. See Owens v. Andrews Bank & Trust Co., 220 S.E.2d 116, 265 S.C. 490, 497 (S.C. 1975); 89 C.J.S. Trover and Conversion § 23, p. 541 (1955).

The measure of actual damages in an action for conversion of personal property is the value of the property with interest thereon from the date of conversion to the date of trial. Id.; Long v. Gibbs Auto Wrecking Company, 253 S.C. 370, 171 S.E.2d 155 (1969), Mims v. Bennett, 160 S.C. 39, 158 S.E. 124 (1931).

The measure of damages for a willful and intentional conversion, where the property is converted with knowledge of the owner's rights in the property, is the highest market value of the property with interest up to the time of trial, including any additional value due to additions or improvements made by the converter. See Green, 284 S.C. 35, 324 S.E.2d 331; Industrial Welding Supplies, Inc. v. Atlas Vending Co., 276 S.C. 196, 277 S.E.2d 885 (1981); Gregg v.

Bank of Columbia, 72 S.C. 458, 52 S.E. 195 (1905); Restatement (Second) of Torts Section 927 (1981); 1 Am.Jur.2d Accession and Confusion Section 29 (1962). Punitive damages are permitted in a conversion claim where the evidence shows the conversion was done recklessly and with conscious indifference to the owner's rights. Long v. Gibbs Auto Wrecking Co., 253 S.C. 370, 171 S.E.2d 155 (1969); Lumpkin v. Allstate Insurance Co., 251 S.C. 19, 159 S.E.2d 852 (1968).

In the present case, based on the admitted allegations of the pleadings and the testimony and evidence presented to the Court, the Plaintiff, after paying for the totality of the restoration work performed on his Mercedes to a certain point, provided Defendant a $20,000 deposit in advance of the remainder of the work. Defendant was to maintain the $20,000, in trust, a separate account to bill against for restoration work going forward, and of which any unused portion would be refundable to Plaintiff on demand. Thereafter, Defendant failed to perform any further work on Plaintiff's vehicle. When Plaintiff discovered that fact some 43 months later and demanded the return of his deposit money, Defendant refused to or was unable to return it to him, and has still not returned it. Defendant has knowingly, consciously, and willfully deprived Plaintiff of possession and ownership of a determinant sum of money, and is liable to Plaintiff for conversion of his deposit money in the amount of $20,000, plus interest at the legal rate since Plaintiff demand on September 11, 2019 for its return in the amount of $3,095 totaling $23,095. For Defendant's conscious and willful conduct in converting Plaintiff's funds, which the Court finds by a standard of clear and convincing evidence, Plaintiff is also entitled to punitive damages against Defendant in the amount of $60,000.

Under a theory of conversion, Defendant is liable to Plaintiff for actual in the amount of

$23,095, and punitive damages in the amount of $60,000, for a combined total of $83,095, plus costs and expenses of the action.

Costs of Action

Based on the record, including the attorney's fee and expenses affidavit filed in the case by his attorney, Plaintiff has been caused to incur costs and expenses associated with bringing and prosecuting the action in the amount of $1,694, which includes the fee of $1,000 charged by his expert witness for his services, as attested to by Mr. Reinert during the damages hearing. Plaintiff is entitled to recover from Defendant his costs and expenses in the total amount of $1,694.

Summary of Judgment

The Court finds Defendant is liable to Plaintiff, as described above, on Plaintiff's causes of action for breach of contract, negligence, and conversion. Because the Court is awarding Plaintiff contract damages on the basis of a valid contract between the parties, the Court has not considered Plaintiff's unjust enrichment claim. See Gantt v. Morgan, 199 S.C. 138, 18 S.E.2d 672 (1942)(Relief under a theory of unjust enrichment is not available if an action is based on the existence of a contract).

Plaintiff is not permitted a double recovery for a single wrong. To prevent that outcome, Plaintiff is required to elect his remedies. See Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (S.C. 1996) (citing Thompson v. Watts, 281 S.C. 504, 316 S.E.2d 393 (1984)(The purpose of election of remedies is to prevent a double recovery for a single wrong.)). However, an election of remedies is not applicable where remedies are addressed to different wrongs, requiring different or additional elements and standards of proof. See Thompson v. Watts, 316 S.E.2d 393, 281 S.C. 504 (S.C. 1984)(citing Tzouvelekas v. Tzouvelekas, 206 S.C. 90, 33 S.E.2d 73, 74

(1945)(Election of remedies is the act of choosing between different remedies allowed by law on the same state of facts.)).

Plaintiff also prayed for an award of attorney's fees he incurred in bringing and prosecuting the present action. However, generally, attorney's fees are not recoverable unless authorized by contract or statute. Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 383, 377 S.E.2d 296, 297 (1989). The Court has, nevertheless, considered the attorney's fees Plaintiff has been caused to incur, as evidenced by the attorney fee affidavit of record, in its award of punitive damages.

Based on Defendant's liability to Plaintiff on his causes of action for breach of contract, negligence, and conversion, as set out above, and applying the doctrine of election of remedies, the Court finds judgment for the Plaintiff is appropriate in the following amounts:

a) for breach of contract in the amount of $76,950;

b) for willful and wanton negligence, including punitive damages, in the amount of $121,500, reduced by $76,950 for a total of $44,500;

c) for willful and knowing conversion, including punitive damages and interest, in the amount of $83,095, reduced by $20,000 (as it also factored into the breach of contract damages) for a total of $63,095;

d) for the return of the Mercedes to Plaintiff; and

e) for Plaintiffs costs and expenses in the amount of $1,694.

IT IS HEREBY ORDERED AND ADJUDGED that judgment against Defendant be and is hereby entered in favor of Plaintiff in the total amount of **$186,239**. Defendant is also hereby ordered to prepare the Mercedes and its parts and components is such a manner that

within 30 days of this Order becoming final, they may be available for pick-up and transport to a location in Charleston, South Carolina to be designated by Plaintiff.

IT IS SO ORDERED in Charleston, South Carolina, this _____ day of September 2021.

_____
Hon. Roger M. Young
Circuit Court Judge

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	Case No.: 2019-CP-10-05392
KEVIN STAVELEY-O'CARROLL,	)	
	)	
Plaintiff,	)	ORDER
-vs-	)	OF
	)	JUDGMENT FOR DAMAGES
FENIX AUTOMOTIVE, LLC,	)	
	)	
Defendant.	)	
	)	

Plaintiff Kevin Staveley-O'Carroll ("Plaintiff" or "Staveley-O'Carroll") brought this action against Defendant Fenix Automotive, LLC ("Defendant" or "Fenix") on October 21, 2019 alleging causes of action for breach of contract, negligence, conversion, and unjust enrichment. The record reflects that Plaintiff properly served Defendant with a copy of the Summons and Complaint on November 13, 2019. On January 28, 2020, after Defendant failed to file an answer or otherwise respond to the Complaint, Plaintiff filed and Affidavit of Default and Motion for Default Judgment, which the Court granted its Order dated January 29, 2020. Subsequently, Plaintiff filed his Motion for Damages and requested for a damages hearing.

On August 25, 2021, the parties having been duly and properly notified, the Court held a hearing on the issue of damages via WebEx. Present at the damages hearing via video/audio were Plaintiff appearing with his counsel W. Westbrook Wills III, Esq. and Axel Reinert ("Mr. Reinert"), his expert witness in automotive restoration. Damien A. Sobieraj, Esq. appeared on behalf of Defendant. Plaintiff's expert witness was duly qualified, without objection, to give expert testimony as to issues related to the damages in the matter. Plaintiff and Mr. Reinert's testimony was taken, evidence was received, and the entire record in the case was considered by

the Court.[1] The Court makes the following Findings of Fact and Conclusions of Law as required by SCRCP, Rule 52. Any Finding of Fact which is more appropriately characterized as a Conclusion of Law shall be treated as such, and vice-versa.

FINDINGS OF FACT

Based on Defendant's admissions by default of the allegations of Plaintiff's Complaint, and having considered the testimony and evidence presented at the damages hearing, Plaintiff has established the following facts by a preponderance of the evidence, unless otherwise specified.

1. Plaintiff is an individual residing in Columbia, Missouri.

2. Defendant is South Carolina company engaged in the business of automotive restoration.

3. The parties are properly subject to the jurisdiction of the Court, and the Court has subject matter over the matters raised in the pleadings.

4. Defendant was properly served with a copy of Plaintiff's Summons and Complaint, which it failed to answer or otherwise respond, resulting in the entry of default judgment against it.

5. In 2015, Plaintiff entered into a contract with Defendant to restore his classic 1969 Mercedes 280 SL ("the Mercedes"), which he delivered into Defendant's possession and care at Defendant's place of business for that purpose.

6. Plaintiff inherited the Mercedes from his mother, and it had special value to him, which fact Plaintiff communicated to Defendant.

7. At the time Plaintiff delivered the Mercedes to Defendant, the vehicle was in fair

[1] As Defendant was in default and default judgment having been entered against it, the Court took testimony and received evidence from and on behalf of Plaintiff only, and limited Defendant's participation in the hearing to cross-examination and objecting to evidence by its counsel. See Howard v. Holiday, Inc. 271 S.C. 238, 246 S.E.2d 880 (1978)(limiting a defendant's participation in a post-default hearing to cross-examination and objection to plaintiff's evidence); see also Limehouse v. Hulsey, 404 S.C. 93, 116, S.E.2d 566, 579 (S.C. 2013)(reaffirming Howard).

condition and had a value of between $41,000 and $45,000, based on the testimony of Mr. Reinert.

8. Plaintiff and Defendant agreed Defendant would restore the Mercedes to a "daily driver" condition, and that Defendant would provide Plaintiff a detailed estimate of the total cost and time required to perform the restoration project after completely disassembling the Mercedes.

9. Between September of 2015 and March of 2016, Defendant performed initial work on the Mercedes including completely disassemble it and preparing the body for anticipated metalwork and submitted invoices to Plaintiff for such work totaling $5,825.00, which Plaintiff paid in full.

10. 22 months later, in December of 2017, Defendant provided Plaintiff a detailed estimate for the remainder of the restoration of the Mercedes, which it represented would cost approximately $60,000, and would take approximately six months.

11. To keep the total cost of the remainder of the restoration process as close to the $60,000 estimate as possible, Plaintiff and Defendant specifically agreed that, wherever possible, Defendant would make use of the Mercedes's existing parts and components.

12. At Defendant's request, Plaintiff provided it a $20,000 deposit, which Defendant specifically represented it would maintain, in trust, in a separate account, and against which it would bill for restoration work on the Mercedes going forward. Defendant also represented to Plaintiff that any unused portion of the $20,000 would be returned to Plaintiff upon his request.

13. The evidence and testimony before the Court demonstrates, and the Court finds, that after Plaintiff provided the $20,000 deposit, Defendant failed to perform any further work on the Mercedes, as agreed, and it remains to this day in an unrestored and completely disassembled state, in Defendant's possession.

14. Moreover, the evidence, testimony, and Defendant's admissions establish that after

disassembling the Mercedes, Defendant stored a great many of its parts and components outdoors on the ground or in plastic bins, exposed to the elements and weather, where they have remained since the end of 2017.

15. From the photographs submitted in evidence and personal observation, Mr. Reinert identified many of the parts and components of the Mercedes, including the vehicle's motor, windshield, suspension, drivetrain, exterior finishes and chrome, and an array of interior components, which he testified were in a severe degradation condition or ruined as a direct result of Defendant leaving them outdoors in the weather over a number of years. Mr. Reinert further testified that, in their previous condition, a great many of those parts and components could have been reused in the restoration of the Mercedes. However, due to their present condition, which Mr. Reinert characterized as unusable "junk," those parts and components are either no longer usable for the restoration project, or would now require very extensive refurbishment.

16. Mr. Reinert testified that, based on Plaintiff and Defendant's agreement, the total actual cost of the restoration of the Mercedes at the time of the parties' original agreement would reasonably have been between $60,000 and $70,000 dollars. However, because of the severely degraded or ruined condition of much of the Mercedes due to Defendant failure to properly protect it from damage, the current cost to restore the vehicle is likely to be double or triple that figure.

17. Plaintiff alleged, Mr. Reinert testified, and the Court finds, that Defendant knew or should have known that storing the subject parts and components of Plaintiff's Mercedes outdoors, exposed to the elements over a period of years would result in their severe degradation or ruination. Mr. Reinert testified that by doing so, Defendant unquestionably deviated from the standards of care, professionalism, and best practices for businesses in the automotive restoration

industry.

18. Furthermore, Mr. Reinert testified that given the obviousness of the damage to the parts and components of the Mercedes, which would result from exposing them to the elements over a period of years, the Defendant, in doing so, acted recklessly and with conscious disregard for Plaintiff's property, particularly in light of the particular sentimental value of the Mercedes to Plaintiff and his reason for wanting to restoring it.

19. Based on the uncontroverted testimony of Mr. Reinert, the Court finds the Mercedes would have had a value of between $115,000 and $120,000 had Defendant restored it as agreed in its contract with Plaintiff. Instead, in its present condition and state, the Mercedes currently has a value of $2,500.

20. In September of 2019, as Defendant had still failed to perform any further work on the Mercedes, Plaintiff made a demand on Defendant for the return of his $20,000 deposit, which Defendant also failed to return to him.

CONCLUSIONS OF LAW

Plaintiff filed his action against Defendant alleging causes of action for breach of contract, negligence, conversion, and unjust enrichment for which he has prayed for actual, consequential, special, and punitive damages as proven at trial, together with attorney's fees and costs of the action. The Defendant failed to answer or otherwise respond to Plaintiff's Complaint, and default judgment was entered against it.

A defendant in default admits liability but not the damages as set forth in the prayer for relief. Solley v. Navy Fed. Credit Union, Inc., 397 S.C. 192, 203 723 S.E.2d 597, 603 (S.C. App. 2012); see also Renney v. Dobbs House, Inc., 275 S.C. 562, 566, 274 S.E.2d 290, 292 (1981). The amount of damages in a default action must be proved by the preponderance of the evidence.

Id.; see Jackson v. Midlands Human Res. Ctr., 296 S.C. 526, 529, 374 S.E.2d 505, 507 (Ct. App.1988) ("A judgment for money damages must be warranted by the proof of the party in whose favor it is rendered."). As to punitive or exemplary damages, the Plaintiff has the burden of proving by clear and convincing evidence the Defendant's demonstrated misconduct was willful, wanton, or with reckless disregard for the Plaintiff's rights. See Mishoe v. Qhg of Lake City, Inc., 621 S.E.2d 363, 366, 366 S.C. 195 (S.C. 2005). "A conscious failure to exercise due care constitutes willfulness." Id.

Based on the pleadings, admissions, and the uncontroverted evidence and testimony presented by Plaintiff and his expert witness at the damages hearing, the Court finds and concludes as follows:

Breach of Contract

Plaintiff and Defendant entered into a valid contract for the restoration of Plaintiff's Mercedes, supported by consideration, and creating rights and obligations between the parties, under which Defendant agreed to restore the vehicle to a "daily driver" condition, and Plaintiff agreed to pay Defendant for parts and labor associated with the restoration. Pursuant to the parties' contract, Defendant invoiced Plaintiff for the initial restoration work it performed in the amounts totaling $5,825.00, which Plaintiff paid in full. Thereafter, Plaintiff provided Defendant a $20,000 deposit towards the remainder of the vehicle restoration, which Defendant was to hold in a separate account, as agreed, however, Defendant performed no further work on the Mercedes, and failed to complete the renovation. Furthermore, after Plaintiff discovered Defendant had not performed its obligations, as promised, and demanded the return of his $20,000 deposit, as agreed, Defendant failed to deliver it. The Court finds Defendant has breach its contract with Plaintiff entitling Plaintiff to contract damages.

Damages in a breach of contract action are to put the non-breaching party in the position he or she would have been in had the breach not occurred and the contract were performed. See Minter v. GOCT, Inc., 322 S.C. 525, 473 S.E.2d 67(Ct. App. 1996)(purpose of damages for breach of contract is to put plaintiff in as good a position as he or she would have been if the contract had been performed). Compensation for lost profits or value is recoverable as damage in a breach of contract action where the estimate of such lost profit or value is not based wholly on speculation and conjecture. Charles v. Texas Co., 199 S.C. 156, 18 S.E.2d 719 (1942); South Carolina Federal Savings Bank v. Thorton-Crosby Development Co., 303 S.C. 74, 399 S.E.2d 8 (Ct. App. 1990); Global Protection Corp. v Halbersberg, 332 S.C. 149, 503 S.E.2d 483 (1998)(absolute certainly of data on which lost profits are estimated not required; must be such reasonable certainty that damages are not based wholly on speculation and conjecture and certain standard or fixed method by which profits or value may be estimated and determined with a fair degree of accuracy is sufficient).

The proper measure of damages for breach of contract is the loss actually suffered by the contractee as the result of the breach. Tomlinson v. Mixon, 626 S.E.2d 43, 50, 367 S.C. 467 (S.C. App. 2006); South Carolina Fin. Corp. v. West Side Fin. Co., 236 S.C. 109, 113 S.E.2d 329 (1960). "In the normal case, the damage will consist of two distinct elements: (1) out-of-pocket costs actually incurred as a result of the contract; and (2) the gain above costs that would have been realized had the contract been performed." Id; Collins Entm't., Inc. v. White, 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005).

Here, therefore, as damages for Defendant's breach of contract, Plaintiff is entitled to the difference between the fair market value of the Mercedes as restored to the agreed upon condition and its present value, minus the difference between the cost of the restoration work and

the amount the Plaintiff already paid toward that cost. According to the uncontroverted testimony of Mr. Reinert, the fair market value for the Mercedes as restored to the agreed "daily driver" condition would have been between $115,000 and $120,000, the average of which amounts to $117,500. He further testified the value of the Mercedes in its present state and condition is $2,500, and that based on the parties agreement at the time of its making, the reasonable cost of the labor and parts would have been between $60,000 and $70,000 dollars, the average of which amounts to $65,000. Plaintiff also paid Defendant a total of $25,825 towards the total cost of the restoration. Plaintiff's actual damage resulting from Defendant's breach of contract can, therefore, be expressed as ($117,500 - $2,500) – ($65,000 - $25,825) and totals $75,825.

Under the foregoing measure, Plaintiff is also entitled to the return of the vehicle in its present state. Mr. Reinert testified that shipping of the vehicle in its present disassembled state to a Charleston location will cost a fee of $525 which includes tarping, and two hours of loading and unloading, plus $100 dollars per hour for additional time. Mr. Reinert testified that in his opinion, loading and unloading the Mercedes in its disassembled condition would likely take several hours. The Court finds Plaintiff is entitled to consequential damages associated with shipping the Mercedes to another location in Charleston in the amount of $1,125.

Plaintiff is entitled to actual and consequential damages as a result of Defendant's breach of contract in the total amount of $76,950, plus the costs and expenses of the action.

Negligence

Plaintiff's contract with Defendant for the restoration of the Mercedes and his delivery of the vehicle to Defendant for that purpose created a bailment. "A bailment is created by the delivery of personal property by one person to another in trust for a specific purpose, pursuant to

an express or implied contract to fulfill that trust." Hadfield v. Gilchrist, 538 S.E.2d 268, 343 S.C. 88, 95 (S.C. App. 2000); Home Indent Co. v. Harleysville Mut. Ins. Co., 252 S.C. 452, 460, 166 S.E.2d 819, 824 (1969)("Bailment has been defined as the delivery of a chattel for some express or particular purpose upon a contract, express or implied, that, after the purpose has been fulfilled, then the chattel shall be redelivered to the bailor, or otherwise dealt with according to his directions.").

The bailment contract between Plaintiff and Defendant created a duty in Defendant to exercise due care in safekeeping of Plaintiff's Mercedes, see Harris v. Burnside, 261 S.C. 190, 199 S.E. 2d 65, 67-8 (1973)(citing Fortner v. Carnes, 258 S.C. 455, 189 S.E.2d 24), and in its repair, see id. (citing Edwards v. Charleston Sheet Metal, 253 S.C. 537, 172 S.E.2d 120). Breach of the duty of care arising under a bailment contract constitutes a tort. Id. at 195, 68.

In action involving a bailment alleging the tort of negligence, the bailor is entitled to be compensated for all losses that are the natural consequence and proximate result of the bailee's negligence. Dixon v. Besco Engineering, Inc., 320 S.C. 174, 180, 463 S.E.2d 636 (S.C. App. 1995)(citing 8 Am.Jur.2d Bailments § 346 (1980)). Damages are proximately caused if they are the foreseeable result of the defendant's tortious act. Id. (citing Young v. Tide Craft, Inc., 270 S.C. 453, 242 S.E.2d 671 (1978)). Further, the liability of a bailee under a bailment for mutual benefit, as we have here, arises upon a showing that (1) the goods were delivered to the bailee in good condition, (2) they were lost or returned in a damaged condition, and (3) the loss or damage to the goods was due to the failure of the bailee to exercise ordinary care in the safekeeping of the property. Hadfield v. Gilchrest, 343 S.C. 88 at 99. Importantly, the burden is on the bailee, and not on the bailor, to demonstrate the bailee used ordinary care in storing and safekeeping the property. Id.

Punitive damages are recoverable for negligence, which is so reckless of consequences as to imply or to assume the nature of wantonness, willfulness or recklessness. Solanki v. Wal-Mart Store # 2806, 410 S.C. 229, 237, 763 S.E.2d 615 (S.C. App. 2014)(referencing Bell v. Atl. Coast Line R. Co., 202 S.C. 160, 171, 24 S.E.2d 177, 182 (1943)). "If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care." Berberich v. Jack, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011).

In the present action, pursuant to the parties' agreement, Plaintiff delivered his Mercedes into the Defendant's possession which created a bailment for mutual benefit. As such, Defendant (bailee) owed Plaintiff (bailor) a duty of care both in the safekeeping and in the repair of Plaintiff's vehicle. Based on the admitted allegations in Plaintiff's Complaint and the evidence and testimony of Plaintiff and Mr. Reinert at the damages hearing, the Court finds the Defendant failed to exercise due care in restoring the Plaintiff's vehicle and in safekeeping its parts and components by storing many of them outdoors in such a manner as to allow them to be directly exposed to the weather over a period of several years. Such failure to exercise due care by Defendant proximately resulted in the severe degradation or ruination of parts and components of Plaintiff's Mercedes, which not only reduced its value from the time Plaintiff delivered it to the Defendant, but also more than doubled the cost to restore the vehicle to the "daily driver" condition.

Furthermore, based on the testimony of the Plaintiff and Mr. Reinert and the photographic evidence entered into the record, the Court finds by a standard of clear and convincing evidence, that Defendant knew or should have know that storing the parts and

components of Plaintiff's Mercedes on the outdoors on the ground or in bins and completely exposed to the weather and elements over a period of several years would result in the very damage that was ultimately occasioned by such failure to exercise even slight care in safeguarding them. Additionally, the evidence and testimony before the Court indicates that Defendant, in fact, was responsible for the extraordinary delay in performing the restoration, that it changed locations without informing Plaintiff for months, and that it intentionally misled Plaintiff with regard to the condition of the parts and components and the status of the restoration, all which served to prolong the amount of time those parts and components sat outside in the weather and elements and increased the amount of damage to them. Mr. Reinert testified that Defendant's actions constituted an absolute departure from industry standards and best practices, that Defendant or it's agents or employees were conscious of such departure and the damage that would result, and that such acts or omissions amounted to a reckless disregard for Plaintiff's property. The Court finds such damages were foreseeable and avoidable by Defendant. That Defendant was also aware of the particular sentimental value the Mercedes had for Plaintiff makes its failure to exercise even slight care all the more egregious.

As stated above, based on the evidence and testimony, at the time Plaintiff delivered the Mercedes to Defendant, the vehicle had a value of between $41,000 and $45,000, the average of which amounts to $43,000. Presently the vehicle is worth $2,500. The damage occasioned to the Mercedes by the negligence of the Defendant has reduced its value by $40,500, and Defendant is liable to Plaintiff in that amount. Furthermore, Plaintiff is entitled to punitive damages in the additional amount of $121,500 in consideration of Defendant's knowing, reckless, and deceitful conduct and the particular harm it caused to Plaintiff.

Under the theory of negligence, Defendant is liable to Plaintiff for the return of the

Mercedes, for compensatory damages in the amount of $41,625, including the cost of transport, and punitive damages in the amount of $121,000 for a combined total of $162,625, plus the costs and expenses of the action.

Conversion

Plaintiff's claim of conversion relates the $20,000 deposit Plaintiff provided Defendant, and that Defendant failed to return upon Plaintiff's demand, as agreed.

Conversion is the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights." Green v. Waidner, 284 S.C. 35, 324 S.E.2d 331 (S.C. App., 1984); Powell v. A.K. Brown Motor Co., 200 S.C. 75, 78, 20 S.E.2d 636, 637 (1942). Money may be the subject of conversion, when it is capable of being identified, and there may be conversion of determinate sums even though the specific coin and bills are not identified. See Owens v. Andrews Bank & Trust Co., 220 S.E.2d 116, 265 S.C. 490, 497 (S.C. 1975); 89 C.J.S. Trover and Conversion § 23, p. 541 (1955).

The measure of actual damages in an action for conversion of personal property is the value of the property with interest thereon from the date of conversion to the date of trial. Id.; Long v. Gibbs Auto Wrecking Company, 253 S.C. 370, 171 S.E.2d 155 (1969), Mims v. Bennett, 160 S.C. 39, 158 S.E. 124 (1931).

The measure of damages for a willful and intentional conversion, where the property is converted with knowledge of the owner's rights in the property, is the highest market value of the property with interest up to the time of trial, including any additional value due to additions or improvements made by the converter. See Green, 284 S.C. 35, 324 S.E.2d 331; Industrial Welding Supplies, Inc. v. Atlas Vending Co., 276 S.C. 196, 277 S.E.2d 885 (1981); Gregg v.

Bank of Columbia, 72 S.C. 458, 52 S.E. 195 (1905); Restatement (Second) of Torts Section 927 (1981); 1 Am.Jur.2d Accession and Confusion Section 29 (1962). Punitive damages are permitted in a conversion claim where the evidence shows the conversion was done recklessly and with conscious indifference to the owner's rights. Long v. Gibbs Auto Wrecking Co., 253 S.C. 370, 171 S.E.2d 155 (1969); Lumpkin v. Allstate Insurance Co., 251 S.C. 19, 159 S.E.2d 852 (1968).

In the present case, based on the admitted allegations of the pleadings and the testimony and evidence presented to the Court, the Plaintiff, after paying for the totality of the restoration work performed on his Mercedes to a certain point, provided Defendant a $20,000 deposit in advance of the remainder of the work. Defendant was to maintain the $20,000, in trust, a separate account to bill against for restoration work going forward, and of which any unused portion would be refundable to Plaintiff on demand. Thereafter, Defendant failed to perform any further work on Plaintiff's vehicle. When Plaintiff discovered that fact some 43 months later and demanded the return of his deposit money, Defendant refused to or was unable to return it to him, and has still not returned it. Defendant has knowingly, consciously, and willfully deprived Plaintiff of possession and ownership of a determinant sum of money, and is liable to Plaintiff for conversion of his deposit money in the amount of $20,000, plus interest at the legal rate since Plaintiff demand on September 11, 2019 for its return in the amount of $3,095 totaling $23,095. For Defendant's conscious and willful conduct in converting Plaintiff's funds, which the Court finds by a standard of clear and convincing evidence, Plaintiff is also entitled to punitive damages against Defendant in the amount of $60,000.

Under a theory of conversion, Defendant is liable to Plaintiff for actual in the amount of

$23,095, and punitive damages in the amount of $60,000, for a combined total of $83,095, plus costs and expenses of the action.

Costs of Action

Based on the record, including the attorney's fee and expenses affidavit filed in the case by his attorney, Plaintiff has been caused to incur costs and expenses associated with bringing and prosecuting the action in the amount of $1,694, which includes the fee of $1,000 charged by his expert witness for his services, as attested to by Mr. Reinert during the damages hearing. Plaintiff is entitled to recover from Defendant his costs and expenses in the total amount of $1,694.

Attorney's Fees

Plaintiff also requested an award of attorney's fees he incurred in pursuance of the default judgment, and his counsel filed an affidavit of attorney's fees in the case, which is part of the record. Plaintiff also testified at the hearing as to the attorney's fees he has incurred and that those fees were necessary in pursuing and obtaining default judgment. SCRCP, Rule 55(b)(3) allows for an award of attorney's fees incurred by the Plaintiff in pursuit a judgment by default. The Court finds that counsel for Plaintiff's fees as reflected in his affidavit are reasonable in amount and were necessary in Plaintiff's pursuit of default judgment against Defendant in this case. The Court, therefore, based on the testimony and evidence, and in consideration of the complexity of the claims and the work necessary to obtain judgment against the Defendant, the Court awards Plaintiff attorney's fees in the amount of $12,102.57.

Summary of Judgment

The Court finds Defendant is liable to Plaintiff, as described above, on Plaintiff's causes of action for breach of contract, negligence, and conversion. Because the Court is awarding

Plaintiff contract damages on the basis of a valid contract between the parties, the Court has not considered Plaintiff's unjust enrichment claim. See Gantt v. Morgan, 199 S.C. 138, 18 S.E.2d 672 (1942)(Relief under a theory of unjust enrichment is not available if an action is based on the existence of a contract).

Plaintiff is not permitted a double recovery for a single wrong. To prevent that outcome, Plaintiff is required to elect his remedies. See Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (S.C. 1996) (citing Thompson v. Watts, 281 S.C. 504, 316 S.E.2d 393 (1984)(The purpose of election of remedies is to prevent a double recovery for a single wrong.)). However, an election of remedies is not applicable where remedies are addressed to different wrongs, requiring different or additional elements and standards of proof. See Thompson v. Watts, 316 S.E.2d 393, 281 S.C. 504 (S.C. 1984)(citing Tzouvelekas v. Tzouvelekas, 206 S.C. 90, 33 S.E.2d 73, 74 (1945)(Election of remedies is the act of choosing between different remedies allowed by law on the same state of facts.))

Based on Defendant's liability to Plaintiff on his causes of action for breach of contract, negligence, and conversion, as set out above, and applying the doctrine of election of remedies, the Court finds judgment for the Plaintiff is appropriate in the following amounts:

a) for breach of contract in the amount of $76,950;

b) for willful and wanton negligence, including punitive damages, in the amount of $121,500, reduced by $76,950 for a total of $44,500;

c) for willful and knowing conversion, including punitive damages and interest, in the amount of $83,095, reduced by $20,000 (as it also factored into the breach of contract damages) for a total of $63,095;

d) for the return of the Mercedes to Plaintiff;

e) for attorney's fees in the amount of $12,102.57; and

f) for Plaintiffs costs and expenses in the amount of $1,694.

IT IS HEREBY ORDERED AND ADJUDGED that judgment against Defendant be and is hereby entered in favor of Plaintiff in the total amount of **$198,341**.57. Defendant is also hereby ordered to prepare the Mercedes and its parts and components is such a manner that within 30 days of this Order becoming final, they may be available for pick-up and transport to a location in Charleston, South Carolina to be designated by Plaintiff.

IT IS SO ORDERED in Charleston, South Carolina, this _____ day of September 2021.

_____
Hon. Roger M. Young
Circuit Court Judge

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	Case No.: 2019-CP-10-05392
KEVIN STAVELEY-O'CARROLL,	)	
	)	
Plaintiff,	)	ORDER
-vs-	)	OF
	)	JUDGMENT FOR DAMAGES
FENIX AUTOMOTIVE, LLC,	)	
	)	
Defendant.	)	
	)	

Plaintiff Kevin Staveley-O'Carroll ("Plaintiff" or "Staveley-O'Carroll") brought this action against Defendant Fenix Automotive, LLC ("Defendant" or "Fenix") on October 21, 2019 alleging causes of action for breach of contract, negligence, conversion, and unjust enrichment. The record reflects that Plaintiff properly served Defendant with a copy of the Summons and Complaint on November 13, 2019. On January 28, 2020, after Defendant failed to file an answer or otherwise respond to the Complaint, Plaintiff filed and Affidavit of Default and Motion for Default Judgment, which the Court granted its Order dated January 29, 2020. Subsequently, Plaintiff filed his Motion for Damages and requested for a damages hearing.

On August 25, 2021, the parties having been duly and properly notified, the Court held a hearing on the issue of damages via WebEx. Present at the damages hearing via video/audio were Plaintiff appearing with his counsel W. Westbrook Wills III, Esq. and Axel Reinert ("Mr. Reinert"), his expert witness in automotive restoration. Damien A. Sobieraj, Esq. appeared on behalf of Defendant. Plaintiff's expert witness was duly qualified, without objection, to give expert testimony as to issues related to the damages in the matter. Plaintiff and Mr. Reinert's testimony was taken, evidence was received, and the entire record in the case was considered by

the Court.[1] The Court makes the following Findings of Fact and Conclusions of Law as required by SCRCP, Rule 52. Any Finding of Fact which is more appropriately characterized as a Conclusion of Law shall be treated as such, and vice-versa.

FINDINGS OF FACT

Based on Defendant's admissions by default of the allegations of Plaintiff's Complaint, and having considered the testimony and evidence presented at the damages hearing, Plaintiff has established the following facts by a preponderance of the evidence, unless otherwise specified.

1. Plaintiff is an individual residing in Columbia, Missouri.

2. Defendant is a South Carolina limited liability company engaged in the business of automotive restoration.

3. The parties are properly subject to the jurisdiction of the Court, and the Court has subject matter over the matters raised in the pleadings.

4. Defendant was properly served with a copy of Plaintiff's Summons and Complaint, which it failed to answer or otherwise respond, resulting in the entry of default judgment against it.

5. In 2015, Plaintiff entered into a contract with Defendant to restore his classic 1969 Mercedes 280 SL ("the Mercedes"), which he delivered into Defendant's possession and care at Defendant's place of business for that purpose.

6. At the time Plaintiff delivered the Mercedes to Defendant, the vehicle was in poor

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[1] As Defendant was in default and default judgment having been entered against it, the Court took testimony and received evidence from and on behalf of Plaintiff only, and limited Defendant's participation in the hearing to cross-examination and objecting to evidence by its counsel. See Howard v. Holiday, Inc. 271 S.C. 238, 246 S.E.2d 880 (1978)(limiting a defendant's participation in a post-default hearing to cross-examination and objection to plaintiff's evidence); see also Limehouse v. Hulsey, 404 S.C. 93, 116, S.E.2d 566, 579 (S.C. 2013)(reaffirming Howard).

condition and had a value of between $20,000 and $25,000, based on the testimony of Mr. Reinert. Mr. Reinart testified that (i) he based his opinion regarding the value of the Mercedes on his observation of the Mercedes only after Defendant had disassembled the Mercedes and had already performed work on the vehicle, (ii) he did not personally observe the condition of the Mercedes when Plaintiff delivered the vehicle to Defendant, (iii) he did not review any photographs showing the condition of the Mercedes prior to Defendant disassembling the Mercedes and beginning work on the vehicle. Furthermore, Mr. Reinert did not identify any industry resources used by him to assist him with his valuation of the Mercedes as delivered to Defendant.

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Moved (insertion) [1]

7. Plaintiff and Defendant agreed Defendant would restore the Mercedes to a "daily driver" condition, and that Defendant would provide Plaintiff a detailed estimate of the total cost and time required to perform the restoration project after completely disassembling the Mercedes. Defendant informed Plaintiff in their conversations and emails that the total cost to restore the Mercedes may increase as the project progressed and Defendant determined what original parts could be reused versus rebuilt or replaced.

8. Between September of 2015 and March of 2016, Defendant performed initial work on the Mercedes including completely disassembling it and preparing the body for anticipated metalwork and submitted invoices to Plaintiff for such work totaling $5,825.00, which Plaintiff paid in full.

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9. 22 months later, in December of 2017, Defendant provided Plaintiff a detailed estimate for the remainder of the restoration of the Mercedes, which it represented would cost approximately $60,000, and would take approximately six months.

10. To keep the total cost of the remainder of the restoration process as close to the $60,000

estimate as possible, Plaintiff and Defendant specifically agreed that, wherever possible, Defendant would make use of the Mercedes's existing parts and components.

11. At Defendant's request, Plaintiff provided it a $20,000 deposit, which Defendant specifically represented it would maintain, in trust, in a separate account, and against which it would bill for restoration work on the Mercedes going forward. Defendant also represented to Plaintiff that any unused portion of the $20,000 would be returned to Plaintiff upon his request.

12. The evidence and testimony before the Court demonstrates, and the Court finds, that after Plaintiff provided the $20,000 deposit, Defendant failed to complete the restoration of the Mercedes, as agreed, and it remains to this day in an unrestored and completely disassembled state, in Defendant's possession.

13. Moreover, the evidence, testimony, and Defendant's admissions establish that after disassembling the Mercedes, Defendant stored a great many of its parts and components outdoors on the ground or in plastic bins, exposed to the elements and weather, where they have remained since April 2019.

14. From the photographs submitted in evidence and personal observation, Mr. Reinert identified many of the parts and components of the Mercedes, including the vehicle's motor, windshield, suspension, drivetrain, exterior finishes and chrome, and an array of interior components, which he testified were in a severe degradation condition or ruined as a direct result of Defendant leaving them outdoors in the weather over a a few years, but Mr. Reinart also conceded he did not have firsthand knowledge of the condition of these parts when the Plaintiff delivered the Mercedes to Defendant Mr. Reinert further testified that, if many of those parts and components were in good condition when the Mercedes was delivered to Defendant, then these parts could have been reused in the restoration of the Mercedes. However, due to their present

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condition, Mr. Reinert opined many of those parts and components may no longer be usable for the restoration project, or may now require very extensive refurbishment.

15. Mr. Reinert testified that, based on Plaintiff and Defendant's agreement, the total actual cost of the restoration of the Mercedes at the time of the parties' original agreement would reasonably have been between $60,000 and $70,000 dollars. However, Mr. Reinert believed that because of the degradation to many of the parts of the Mercedes due to Defendant failure to properly protect them from damage, the current cost to restore the vehicle is likely to be double that figure.

16. Plaintiff alleged, Mr. Reinert testified, and the Court finds, that Defendant knew or should have known that storing the subject parts and components of Plaintiff's Mercedes outdoors, exposed to the elements over a period of years could result in their degradation or ruination. Mr. Reinert testified that by doing so, Defendant deviated from the standards of care, professionalism, and best practices for businesses in the automotive restoration industry.

17. Based on the uncontroverted testimony of Mr. Reinert, the Court finds the Mercedes would have had a value of between $42,000 and $120,000 had Defendant restored it as agreed in its contract with Plaintiff. Instead, in its present condition and state, the Mercedes currently has a value of $10,000.

18. In September of 2019, as Defendant had still failed to complete the restoration of the Mercedes, Plaintiff made a demand on Defendant for the return of his $20,000 deposit, which Defendant also failed to return to him.

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CONCLUSIONS OF LAW

Plaintiff filed his action against Defendant alleging causes of action for breach of contract, negligence, conversion, and unjust enrichment for which he has prayed for actual,

consequential, special, and punitive damages as proven at trial, together with attorney's fees and costs of the action. The Defendant failed to answer or otherwise respond to Plaintiff's Complaint, and default judgment was entered against it.

A defendant in default admits liability but not the damages as set forth in the prayer for relief. Solley v. Navy Fed. Credit Union, Inc., 397 S.C. 192, 203 723 S.E.2d 597, 603 (S.C. App. 2012); see also Renney v. Dobbs House, Inc., 275 S.C. 562, 566, 274 S.E.2d 290, 292 (1981). The amount of damages in a default action must be proved by the preponderance of the evidence. Id.; see Jackson v. Midlands Human Res. Ctr., 296 S.C. 526, 529, 374 S.E.2d 505, 507 (Ct. App.1988) ("A judgment for money damages must be warranted by the proof of the party in whose favor it is rendered."). As to punitive or exemplary damages, the Plaintiff has the burden of proving by clear and convincing evidence the Defendant's demonstrated misconduct was willful, wanton, or with reckless disregard for the Plaintiff's rights. See Mishoe v. Qhg of Lake City, Inc., 621 S.E.2d 363, 366, 366 S.C. 195 (S.C. 2005). "A conscious failure to exercise due care constitutes willfulness." Id.

Based on the pleadings, admissions, and the uncontroverted evidence and testimony presented by Plaintiff and his expert witness at the damages hearing, the Court finds and concludes as follows:

Breach of Contract

Plaintiff and Defendant entered into a valid contract for the restoration of Plaintiff's Mercedes, supported by consideration, and creating rights and obligations between the parties, under which Defendant agreed to restore the vehicle to a "daily driver" condition, and Plaintiff agreed to pay Defendant for parts and labor associated with the restoration. Pursuant to the parties' contract, Defendant invoiced Plaintiff for the initial restoration work it performed in the

amounts totaling $5,825.00, which Plaintiff paid in full. Thereafter, Plaintiff provided Defendant a $20,000 deposit towards the remainder of the vehicle restoration, which Defendant was to hold in a separate account, as agreed, however, Defendant did complete the restoration of the Mercedes. Furthermore, after Plaintiff discovered Defendant had not performed its obligations, as promised, and demanded the return of his $20,000 deposit, as agreed, Defendant failed to deliver it. The Court finds Defendant has breached its contract with Plaintiff entitling Plaintiff to contract damages.

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Damages in a breach of contract action are to put the non-breaching party in the position he or she would have been in had the breach not occurred and the contract were performed. See Minter v. GOCT, Inc., 322 S.C. 525, 473 S.E.2d 67(Ct. App. 1996)(purpose of damages for breach of contract is to put plaintiff in as good a position as he or she would have been if the contract had been performed). Compensation for lost profits or value is recoverable as damage in a breach of contract action where the estimate of such lost profit or value is not based wholly on speculation and conjecture. Charles v. Texas Co., 199 S.C. 156, 18 S.E.2d 719 (1942); South Carolina Federal Savings Bank v. Thorton-Crosby Development Co., 303 S.C. 74, 399 S.E.2d 8 (Ct. App. 1990); Global Protection Corp. v Halbersberg, 332 S.C. 149, 503 S.E.2d 483 (1998)(absolute certainty of data on which lost profits are estimated not required; must be such reasonable certainty that damages are not based wholly on speculation and conjecture and certain standard or fixed method by which profits or value may be estimated and determined with a fair degree of accuracy is sufficient).

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The proper measure of damages for breach of contract is the loss actually suffered by the contractee as the result of the breach. Tomlinson v. Mixon, 626 S.E.2d 43, 50, 367 S.C. 467 (S.C. App. 2006); South Carolina Fin. Corp. v. West Side Fin. Co., 236 S.C. 109, 113 S.E.2d 329

(1960). "In the normal case, the damage will consist of two distinct elements: (1) out-of-pocket costs actually incurred as a result of the contract; and (2) the gain above costs that would have been realized had the contract been performed." Id; Collins Entm't., Inc. v. White, 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005).

Here, therefore, as damages for Defendant's breach of contract, Plaintiff is entitled to the difference between the fair market value of the Mercedes as restored to the agreed upon condition and its present value, minus the difference between the cost of the restoration work and the amount the Plaintiff already paid toward that cost. According to the uncontroverted testimony of Mr. Reinert, the fair market value for the Mercedes as restored to the agreed "daily driver" condition would have been between $42,000 and $120,000, the average of which amounts to $81,000. Mr. Reinert did not identify any industry resources from which he used information to formulate his estimated fair market value of the Mercedes, relying upon general internet searches for sales listings of similar Mercedes. He further testified that based on the parties agreement at the time of its making, the reasonable cost of the labor and parts would have been between $60,000 and $70,000 dollars, the average of which amounts to $65,000. Plaintiff also paid Defendant a total of $25,825 towards the total cost of the restoration. Plaintiff's actual damage resulting from Defendant's breach of contract can, therefore, be expressed as ($81,000 - $2,500) – ($65,000 - $25,825) and totals $39,325.

Under the foregoing measure, Plaintiff is also entitled to the return of the vehicle in its present state. Mr. Reinert testified that shipping of the vehicle in its present disassembled state to a Charleston location will cost a fee of $525 which includes tarping, and two hours of loading and unloading, plus $100 dollars per hour for additional time. Mr. Reinert testified that in his opinion, loading and unloading the Mercedes in its disassembled condition would likely take

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several hours. The Court finds Plaintiff is entitled to consequential damages associated with shipping the Mercedes to another location in Charleston in the amount of $1,125.

Plaintiff is entitled to actual and consequential damages as a result of Defendant's breach of contract in the total amount of $40,450, including the cost to return the vehicle, plus the costs and expenses of the action.

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Negligence

Plaintiff's contract with Defendant for the restoration of the Mercedes and his delivery of the vehicle to Defendant for that purpose created a bailment. "A bailment is created by the delivery of personal property by one person to another in trust for a specific purpose, pursuant to an express or implied contract to fulfill that trust." Hadfield v. Gilchrist, 538 S.E.2d 268, 343 S.C. 88, 95 (S.C. App. 2000); Home Indent Co. v. Harleysville Mut. Ins. Co., 252 S.C. 452, 460, 166 S.E.2d 819, 824 (1969)("Bailment has been defined as the delivery of a chattel for some express or particular purpose upon a contract, express or implied, that, after the purpose has been fulfilled, then the chattel shall be redelivered to the bailor, or otherwise dealt with according to his directions.").

The bailment contract between Plaintiff and Defendant created a duty in Defendant to exercise due care in safekeeping of Plaintiff's Mercedes, see Harris v. Burnside, 261 S.C. 190, 199 S.E. 2d 65, 67-8 (1973)(citing Fortner v. Carnes, 258 S.C. 455, 189 S.E.2d 24), and in its repair, see id. (citing Edwards v. Charleston Sheet Metal, 253 S.C. 537, 172 S.E.2d 120). Breach of the duty of care arising under a bailment contract constitutes a tort. Id. at 195, 68.

In action involving a bailment alleging the tort of negligence, the bailor is entitled to be compensated for all losses that are the natural consequence and proximate result of the bailee's negligence. Dixon v. Besco Engineering, Inc., 320 S.C. 174, 180, 463 S.E.2d 636 (S.C. App.

1995)(citing 8 Am.Jur.2d Bailments § 346 (1980)). Damages are proximately caused if they are the foreseeable result of the defendant's tortious act. Id. (citing Young v. Tide Craft, Inc., 270 S.C. 453, 242 S.E.2d 671 (1978)). Further, the liability of a bailee under a bailment for mutual benefit, as we have here, arises upon a showing that (1) the goods were delivered to the bailee in good condition, (2) they were lost or returned in a damaged condition, and (3) the loss or damage to the goods was due to the failure of the bailee to exercise ordinary care in the safekeeping of the property. Hadfield v. Gilchrest, 343 S.C. 88 at 99. Importantly, the burden is on the bailee, and not on the bailor, to demonstrate the bailee used ordinary care in storing and safekeeping the property. Id.

Punitive damages are recoverable for negligence, which is so reckless of consequences as to imply or to assume the nature of wantonness, willfulness or recklessness. Solanki v. Wal-Mart Store # 2806, 410 S.C. 229, 237, 763 S.E.2d 615 (S.C. App. 2014)(referencing Bell v. Atl. Coast Line R. Co., 202 S.C. 160, 171, 24 S.E.2d 177, 182 (1943)). "If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care." Berberich v. Jack, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011).

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In the present action, pursuant to the parties' agreement, Plaintiff delivered his Mercedes into the Defendant's possession which created a bailment for mutual benefit. As such, Defendant (bailee) owed Plaintiff (bailor) a duty of care both in the safekeeping and in the repair of Plaintiff's vehicle. Based on the admitted allegations in Plaintiff's Complaint and the evidence and testimony of Plaintiff and Mr. Reinert at the damages hearing, the Court finds the Defendant failed to exercise due care in restoring the Plaintiff's vehicle and in safekeeping its parts and components by storing many of them outdoors in such a manner as to allow them to be

directly exposed to the weather over a period of a few years. Such failure to exercise due care by Defendant proximately resulted in the severe degradation or ruination of some parts and components of Plaintiff's Mercedes, which not only reduced its value from the time Plaintiff delivered it to the Defendant, but also may have doubled the cost to restore the vehicle to the "daily driver" condition.

Furthermore, based on the testimony of the Plaintiff and Mr. Reinert and the photographic evidence entered into the record, the Court finds by a standard of clear and convincing evidence, that Defendant knew or should have know that storing the parts and components of Plaintiff's Mercedes on the outdoors on the ground or in bins and exposed to the weather and elements over a period of a few years would result in the very damage that was ultimately occasioned by such failure to exercise even slight care in safeguarding them. Mr. Reinert testified that Defendant's actions constituted an absolute departure from industry standards and best practices, that Defendant or it's agents or employees were conscious of such departure and the damage that would result, and that such acts or omissions amounted to a reckless disregard for Plaintiff's property. The Court finds such damages were foreseeable and avoidable by Defendant.

As stated above, based on the evidence and testimony, at the time Plaintiff delivered the Mercedes to Defendant, the vehicle had a value of between $20,000 and $25,000, the average of which amounts to $22,500. Presently the vehicle is worth $10,000. The damage occasioned to the Mercedes by the negligence of the Defendant has reduced its value by $12,500, and Defendant is liable to Plaintiff in that amount.

While Plaintiff has requested punitive damages, "to ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review…" Gamble v. Stevenson, 305 S.C. 104,

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112, 406 S.E.2d 350, 354 (S.C. 1991). The Court when conducting such a review may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) other factors deemed appropriate. *Id.* at 112. After conducting such review, this Court has found no evidence of (i) an excessive duration of conduct, (ii) concealment by Defendant, (iii) the existence of similar past conduct, or (iv) that Defendant has any ability to pay such an award, and this Court declines to award any punitive damages under Plaintiff's negligence cause of action.

Under the theory of negligence, Defendant is liable to Plaintiff for the return of the Mercedes and for compensatory damages in the amount of $13,625, including the cost of transport, plus the costs and expenses of the action.

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Conversion

Plaintiff's claim of conversion relates the $20,000 deposit Plaintiff provided Defendant, and that Defendant failed to return upon Plaintiff's demand, as agreed.

Conversion is the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights." Green v. Waidner, 284 S.C. 35, 324 S.E.2d 331 (S.C. App., 1984); Powell v. A.K. Brown Motor Co., 200 S.C. 75, 78, 20 S.E.2d 636, 637 (1942). Money may be the subject of conversion, when it is capable of being identified, and there may be conversion of determinate sums even though the specific coin and bills are not identified. See Owens v. Andrews Bank & Trust Co., 220 S.E.2d 116, 265 S.C. 490, 497 (S.C. 1975); 89 C.J.S. Trover and Conversion § 23, p. 541 (1955).

The measure of actual damages in an action for conversion of personal property is the value of the property with interest thereon from the date of conversion to the date of trial. Id.; Long v. Gibbs Auto Wrecking Company, 253 S.C. 370, 171 S.E.2d 155 (1969), Mims v. Bennett, 160 S.C. 39, 158 S.E. 124 (1931).

The measure of damages for a willful and intentional conversion, where the property is converted with knowledge of the owner's rights in the property, is the highest market value of the property with interest up to the time of trial, including any additional value due to additions or improvements made by the converter. See Green, 284 S.C. 35, 324 S.E.2d 331; Industrial Welding Supplies, Inc. v. Atlas Vending Co., 276 S.C. 196, 277 S.E.2d 885 (1981); Gregg v. Bank of Columbia, 72 S.C. 458, 52 S.E. 195 (1905); Restatement (Second) of Torts Section 927 (1981); 1 Am.Jur.2d Accession and Confusion Section 29 (1962). Punitive damages are permitted in a conversion claim where the evidence shows the conversion was done recklessly and with conscious indifference to the owner's rights. Long v. Gibbs Auto Wrecking Co., 253 S.C. 370, 171 S.E.2d 155 (1969); Lumpkin v. Allstate Insurance Co., 251 S.C. 19, 159 S.E.2d 852 (1968).

In the present case, based on the admitted allegations of the pleadings and the testimony and evidence presented to the Court, the Plaintiff, after paying for the totality of the restoration work performed on his Mercedes to a certain point, provided Defendant a $20,000 deposit in advance of the remainder of the work. Defendant was to maintain the $20,000, in trust, a separate account to bill against for restoration work going forward, and of which any unused portion would be refundable to Plaintiff on demand. Thereafter, Defendant failed to complete the restoration of Plaintiff's vehicle. When Plaintiff discovered that fact some 20 months later and demanded the return of his deposit money, Defendant did not return it to him, and has still

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not returned it. Defendant has knowingly, consciously, and willfully deprived Plaintiff of possession and ownership of a determinant sum of money, and is liable to Plaintiff for conversion of his deposit money in the amount of $20,000, plus interest at the legal rate since Plaintiff demand on September 11, 2019 for its return in the amount of $3,095 totaling $23,095.

Under his conversion action, Plaintiff has again requested punitive damages, "to ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review…" Gamble v. Stevenson, 305 S.C. 104, 112, 406 S.E.2d 350, 354 (S.C. 1991). The Court when conducting such a review may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) other factors deemed appropriate. *Id.* at 112. After conducting such review, this Court has found no evidence of (i) an excessive duration of conduct, (ii) concealment by Defendant, (iii) the existence of similar past conduct, or (iv) that Defendant has any ability to pay such an award, and the Court declines to award any punitive damages under Plaintiff's conversion cause of action.

Under a theory of conversion, Defendant is liable to Plaintiff for actual in the amount of $23,095, plus costs and expenses of the action.

Costs of Action

Based on the record, including the attorney's fee and expenses affidavit filed in the case by his attorney, Plaintiff has been caused to incur costs and expenses associated with bringing and prosecuting the action in the amount of $1,694, which includes the fee of $1,000 charged by his expert witness for his services, as attested to by Mr. Reinert during the damages hearing.

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Plaintiff is entitled to recover from Defendant his costs and expenses in the total amount of $1,694.

Attorney's Fees

Plaintiff also requested an award of attorney's fees. "Attorney's fees are not recoverable unless authorized by contract or statute." Jackson v. Speed, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997). Plaintiff and Defendant did not agree to the recovery of attorney's fees in any contract, and Plaintiff has not cited any statute by which this Court may award him attorney's fees. Consequently, the Court denies Plaintiff's request for an award of attorney's fees.

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Deleted: Plaintiff also testified at the hearing as to the attorney's fees he has incurred and that those fees were necessary in pursuing and obtaining default judgment. SCRCP, Rule 55(b)(3) allows for an award of attorney's fees incurred by the Plaintiff in pursuit a judgment by default. The Court finds that counsel for Plaintiff's fees as reflected in his affidavit are reasonable in amount and were necessary in Plaintiff's pursuit of default judgment against Defendant in this case. The Court, therefore, based on the testimony and evidence, and in consideration of the complexity of the claims and the work necessary to obtain judgment against the Defendant, the Court awards Plaintiff attorney's fees in the amount of $12,102.57"

Summary of Judgment

The Court finds Defendant is liable to Plaintiff, as described above, on Plaintiff's causes of action for breach of contract, negligence, and conversion. Because the Court is awarding Plaintiff contract damages on the basis of a valid contract between the parties, the Court has not considered Plaintiff's unjust enrichment claim. See Gantt v. Morgan, 199 S.C. 138, 18 S.E.2d 672 (1942)(Relief under a theory of unjust enrichment is not available if an action is based on the existence of a contract).

Plaintiff is not permitted a double recovery for a single wrong. To prevent that outcome, Plaintiff is required to elect his remedies. See Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (S.C. 1996) (citing Thompson v. Watts, 281 S.C. 504, 316 S.E.2d 393 (1984)(The purpose of election of remedies is to prevent a double recovery for a single wrong.)). However, an election of remedies is not applicable where remedies are addressed to different wrongs, requiring different or additional elements and standards of proof. See Thompson v. Watts, 316 S.E.2d 393, 281 S.C. 504 (S.C. 1984)(citing Tzouvelekas v. Tzouvelekas, 206 S.C. 90, 33 S.E.2d 73, 74

(1945)(Election of remedies is the act of choosing between different remedies allowed by law on the same state of facts.)).

Based on Defendant's liability to Plaintiff on his causes of action for breach of contract, negligence, and conversion, as set out above, and applying the doctrine of election of remedies, the Court finds judgment for the Plaintiff is appropriate in the following amounts:

a) for breach of contract in the amount of $40,450;

b) for negligence in the amount of $21,125, reduced by $40,450 for a total of $0;

c) for conversion in the amount of $23,095;

d) for the return of the Mercedes to Plaintiff; and

e) for Plaintiffs costs and expenses in the amount of $1,694.

IT IS HEREBY ORDERED AND ADJUDGED that judgment against Defendant be and is hereby entered in favor of Plaintiff in the total amount of $65,239. Defendant is also hereby ordered to prepare the Mercedes and its parts and components is such a manner that within 30 days of this Order becoming final, they may be available for pick-up and transport to a location in Charleston, South Carolina to be designated by Plaintiff.

IT IS SO ORDERED in Charleston, South Carolina, this _____ day of September 2021.

_____
Hon. Roger M. Young
Circuit Court Judge

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<#>for attorney's fees in the amount of $12,102.57; and¶

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	Case No.: 2019-CP-10-05392
KEVIN STAVELEY-O'CARROLL,	)	
	)	
Plaintiff,	)	ORDER
-vs-	)	OF
	)	JUDGMENT FOR DAMAGES
FENIX AUTOMOTIVE, LLC,	)	
	)	
Defendant.	)	
	)	

Plaintiff Kevin Staveley-O'Carroll ("Plaintiff" or "Staveley-O'Carroll") brought this action against Defendant Fenix Automotive, LLC ("Defendant" or "Fenix") on October 21, 2019 alleging causes of action for breach of contract, negligence, conversion, and unjust enrichment. The record reflects that Plaintiff properly served Defendant with a copy of the Summons and Complaint on November 13, 2019. On January 28, 2020, after Defendant failed to file an answer or otherwise respond to the Complaint, Plaintiff filed and Affidavit of Default and Motion for Default Judgment, which the Court granted its Order dated January 29, 2020. Subsequently, Plaintiff filed his Motion for Damages and requested for a damages hearing.

On August 25, 2021, the parties having been duly and properly notified, the Court held a hearing on the issue of damages via WebEx. Present at the damages hearing via video/audio were Plaintiff appearing with his counsel W. Westbrook Wills III, Esq. and Axel Reinert ("Mr. Reinert"), his expert witness in automotive restoration. Damien A. Sobieraj, Esq. appeared on behalf of Defendant. Plaintiff's expert witness was duly qualified, without objection, to give expert testimony as to issues related to the damages in the matter. Plaintiff and Mr. Reinert's testimony was taken, evidence was received, and the entire record in the case was considered by

the Court.[1] The Court makes the following Findings of Fact and Conclusions of Law as required by SCRCP, Rule 52. Any Finding of Fact which is more appropriately characterized as a Conclusion of Law shall be treated as such, and vice-versa.

FINDINGS OF FACT

Based on Defendant's admissions by default of the allegations of Plaintiff's Complaint, and having considered the testimony and evidence presented at the damages hearing, Plaintiff has established the following facts by a preponderance of the evidence, unless otherwise specified.

1. Plaintiff is an individual residing in Columbia, Missouri.

2. Defendant is a South Carolina limited liability company engaged in the business of automotive restoration.

3. The parties are properly subject to the jurisdiction of the Court, and the Court has subject matter over the matters raised in the pleadings.

4. Defendant was properly served with a copy of Plaintiff's Summons and Complaint, which it failed to answer or otherwise respond, resulting in the entry of default judgment against it.

5. In 2015, Plaintiff entered into a contract with Defendant to restore his classic 1969 Mercedes 280 SL ("the Mercedes"), which he delivered into Defendant's possession and care at Defendant's place of business for that purpose.

6. At the time Plaintiff delivered the Mercedes to Defendant, the vehicle was in poor

[1] As Defendant was in default and default judgment having been entered against it, the Court took testimony and received evidence from and on behalf of Plaintiff only, and limited Defendant's participation in the hearing to cross-examination and objecting to evidence by its counsel. See Howard v. Holiday, Inc. 271 S.C. 238, 246 S.E.2d 880 (1978)(limiting a defendant's participation in a post-default hearing to cross-examination and objection to plaintiff's evidence); see also Limehouse v. Hulsey, 404 S.C. 93, 116, S.E.2d 566, 579 (S.C. 2013)(reaffirming Howard).

condition and had a value of between $20,000 and $25,000, based on the testimony of Mr. Reinert, Mr. Reinart testified that (i) he based his opinion regarding the value of the Mercedes on his observation of the Mercedes only after Defendant had disassembled the Mercedes and had already performed work on the vehicle, (ii) he did not personally observe the condition of the Mercedes when Plaintiff delivered the vehicle to Defendant, (iii) he did not review any photographs showing the condition of the Mercedes prior to Defendant disassembling the Mercedes and beginning work on the vehicle. Furthermore, Mr. Reinert did not identify any industry resources used by him to assist him with his valuation of the Mercedes as delivered to Defendant.

7. Plaintiff and Defendant agreed Defendant would restore the Mercedes to a "daily driver" condition, and that Defendant would provide Plaintiff a detailed estimate of the total cost and time required to perform the restoration project after completely disassembling the Mercedes. Defendant informed Plaintiff in their conversations and emails that the total cost to restore the Mercedes may increase as the project progressed and Defendant determined what original parts could be reused versus rebuilt or replaced.

8. Between September of 2015 and March of 2016, Defendant performed initial work on the Mercedes including completely disassembling it and preparing the body for anticipated metalwork and submitted invoices to Plaintiff for such work totaling $5,825.00, which Plaintiff paid in full.

9. 22 months later, in December of 2017, Defendant provided Plaintiff a detailed estimate for the remainder of the restoration of the Mercedes, which it represented would cost approximately $60,000, and would take approximately six months.

10. To keep the total cost of the remainder of the restoration process as close to the $60,000

estimate as possible, Plaintiff and Defendant specifically agreed that, wherever possible, Defendant would make use of the Mercedes's existing parts and components.

11. At Defendant's request, Plaintiff provided it a $20,000 deposit, which Defendant specifically represented it would maintain, in trust, in a separate account, and against which it would bill for restoration work on the Mercedes going forward. Defendant also represented to Plaintiff that any unused portion of the $20,000 would be returned to Plaintiff upon his request.

12. The evidence and testimony before the Court demonstrates, and the Court finds, that after Plaintiff provided the $20,000 deposit, Defendant failed to complete the restoration of the Mercedes, as agreed, and it remains to this day in an unrestored and completely disassembled state, in Defendant's possession.

13. Moreover, the evidence, testimony, and Defendant's admissions establish that after disassembling the Mercedes, Defendant stored a great many of its parts and components outdoors on the ground or in plastic bins, exposed to the elements and weather, where they have remained since April 2019.

14. From the photographs submitted in evidence and personal observation, Mr. Reinert identified many of the parts and components of the Mercedes, including the vehicle's motor, windshield, suspension, drivetrain, exterior finishes and chrome, and an array of interior components, which he testified were in a severe degradation condition or ruined as a direct result of Defendant leaving them outdoors in the weather over a a few years, but Mr. Reinart also conceded he did not have firsthand knowledge of the condition of these parts when the Plaintiff delivered the Mercedes to Defendant Mr. Reinert further testified that, if many of those parts and components were in good condition when the Mercedes was delivered to Defendant, then these parts could have been reused in the restoration of the Mercedes. However, due to their present

condition, Mr. Reinert opined many of those parts and components may no longer be usable for the restoration project, or may now require very extensive refurbishment.

15. Mr. Reinert testified that, based on Plaintiff and Defendant's agreement, the total actual cost of the restoration of the Mercedes at the time of the parties' original agreement would reasonably have been between $60,000 and $70,000 dollars. However, Mr. Reinert believed that because of the degradation to many of the parts of the Mercedes due to Defendant failure to properly protect them from damage, the current cost to restore the vehicle is likely to be double that figure.

16. Plaintiff alleged, Mr. Reinert testified, and the Court finds, that Defendant knew or should have known that storing the subject parts and components of Plaintiff's Mercedes outdoors, exposed to the elements over a period of years could result in their degradation or ruination. Mr. Reinert testified that by doing so, Defendant deviated from the standards of care, professionalism, and best practices for businesses in the automotive restoration industry.

17. Based on the uncontroverted testimony of Mr. Reinert, the Court finds the Mercedes would have had a value of between $42,000 and $120,000 had Defendant restored it as agreed in its contract with Plaintiff. Instead, in its present condition and state, the Mercedes currently has a value of $10,000.

18. In September of 2019, as Defendant had still failed to complete the restoration of the Mercedes, Plaintiff made a demand on Defendant for the return of his $20,000 deposit, which Defendant also failed to return to him.

CONCLUSIONS OF LAW

Plaintiff filed his action against Defendant alleging causes of action for breach of contract, negligence, conversion, and unjust enrichment for which he has prayed for actual,

consequential, special, and punitive damages as proven at trial, together with attorney's fees and costs of the action. The Defendant failed to answer or otherwise respond to Plaintiff's Complaint, and default judgment was entered against it.

A defendant in default admits liability but not the damages as set forth in the prayer for relief. Solley v. Navy Fed. Credit Union, Inc., 397 S.C. 192, 203 723 S.E.2d 597, 603 (S.C. App. 2012); see also Renney v. Dobbs House, Inc., 275 S.C. 562, 566, 274 S.E.2d 290, 292 (1981). The amount of damages in a default action must be proved by the preponderance of the evidence. Id.; see Jackson v. Midlands Human Res. Ctr., 296 S.C. 526, 529, 374 S.E.2d 505, 507 (Ct. App.1988) ("A judgment for money damages must be warranted by the proof of the party in whose favor it is rendered."). As to punitive or exemplary damages, the Plaintiff has the burden of proving by clear and convincing evidence the Defendant's demonstrated misconduct was willful, wanton, or with reckless disregard for the Plaintiff's rights. See Mishoe v. Qhg of Lake City, Inc., 621 S.E.2d 363, 366, 366 S.C. 195 (S.C. 2005). "A conscious failure to exercise due care constitutes willfulness." Id.

Based on the pleadings, admissions, and the uncontroverted evidence and testimony presented by Plaintiff and his expert witness at the damages hearing, the Court finds and concludes as follows:

Breach of Contract

Plaintiff and Defendant entered into a valid contract for the restoration of Plaintiff's Mercedes, supported by consideration, and creating rights and obligations between the parties, under which Defendant agreed to restore the vehicle to a "daily driver" condition, and Plaintiff agreed to pay Defendant for parts and labor associated with the restoration. Pursuant to the parties' contract, Defendant invoiced Plaintiff for the initial restoration work it performed in the

amounts totaling $5,825.00, which Plaintiff paid in full. Thereafter, Plaintiff provided Defendant a $20,000 deposit towards the remainder of the vehicle restoration, which Defendant was to hold in a separate account, as agreed, however, Defendant did complete the restoration of the Mercedes. Furthermore, after Plaintiff discovered Defendant had not performed its obligations, as promised, and demanded the return of his $20,000 deposit, as agreed, Defendant failed to deliver it. The Court finds Defendant has breached its contract with Plaintiff entitling Plaintiff to contract damages.

Damages in a breach of contract action are to put the non-breaching party in the position he or she would have been in had the breach not occurred and the contract were performed. See Minter v. GOCT, Inc., 322 S.C. 525, 473 S.E.2d 67(Ct. App. 1996)(purpose of damages for breach of contract is to put plaintiff in as good a position as he or she would have been if the contract had been performed). Compensation for lost profits or value is recoverable as damage in a breach of contract action where the estimate of such lost profit or value is not based wholly on speculation and conjecture. Charles v. Texas Co., 199 S.C. 156, 18 S.E.2d 719 (1942); South Carolina Federal Savings Bank v. Thorton-Crosby Development Co., 303 S.C. 74, 399 S.E.2d 8 (Ct. App. 1990); Global Protection Corp. v Halbersberg, 332 S.C. 149, 503 S.E.2d 483 (1998)(absolute certainty of data on which lost profits are estimated not required; must be such reasonable certainty that damages are not based wholly on speculation and conjecture and certain standard or fixed method by which profits or value may be estimated and determined with a fair degree of accuracy is sufficient).

The proper measure of damages for breach of contract is the loss actually suffered by the contractee as the result of the breach. Tomlinson v. Mixon, 626 S.E.2d 43, 50, 367 S.C. 467 (S.C. App. 2006); South Carolina Fin. Corp. v. West Side Fin. Co., 236 S.C. 109, 113 S.E.2d 329

(1960). "In the normal case, the damage will consist of two distinct elements: (1) out-of-pocket costs actually incurred as a result of the contract; and (2) the gain above costs that would have been realized had the contract been performed." Id; Collins Entm't., Inc. v. White, 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005).

Here, therefore, as damages for Defendant's breach of contract, Plaintiff is entitled to the difference between the fair market value of the Mercedes as restored to the agreed upon condition and its present value, minus the difference between the cost of the restoration work and the amount the Plaintiff already paid toward that cost. According to the uncontroverted testimony of Mr. Reinert, the fair market value for the Mercedes as restored to the agreed "daily driver" condition would have been between $42,000 and $120,000, the average of which amounts to $81,000. Mr. Reinert did not identify any industry resources from which he used information to formulate his estimated fair market value of the Mercedes, relying upon general internet searches for sales listings of similar Mercedes. He further testified that based on the parties agreement at the time of its making, the reasonable cost of the labor and parts would have been between $60,000 and $70,000 dollars, the average of which amounts to $65,000. Plaintiff also paid Defendant a total of $25,825 towards the total cost of the restoration. Plaintiff's actual damage resulting from Defendant's breach of contract can, therefore, be expressed as ($81,000 - $2,500) – ($65,000 - $25,825) and totals $39,325.

Under the foregoing measure, Plaintiff is also entitled to the return of the vehicle in its present state. Mr. Reinert testified that shipping of the vehicle in its present disassembled state to a Charleston location will cost a fee of $525 which includes tarping, and two hours of loading and unloading, plus $100 dollars per hour for additional time. Mr. Reinert testified that in his opinion, loading and unloading the Mercedes in its disassembled condition would likely take

several hours. The Court finds Plaintiff is entitled to consequential damages associated with shipping the Mercedes to another location in Charleston in the amount of $1,125.

Plaintiff is entitled to actual and consequential damages as a result of Defendant's breach of contract in the total amount of $40,450, including the cost to return the vehicle, plus the costs and expenses of the action.

Negligence

Plaintiff's contract with Defendant for the restoration of the Mercedes and his delivery of the vehicle to Defendant for that purpose created a bailment. "A bailment is created by the delivery of personal property by one person to another in trust for a specific purpose, pursuant to an express or implied contract to fulfill that trust." Hadfield v. Gilchrist, 538 S.E.2d 268, 343 S.C. 88, 95 (S.C. App. 2000); Home Indent Co. v. Harleysville Mut. Ins. Co., 252 S.C. 452, 460, 166 S.E.2d 819, 824 (1969)("Bailment has been defined as the delivery of a chattel for some express or particular purpose upon a contract, express or implied, that, after the purpose has been fulfilled, then the chattel shall be redelivered to the bailor, or otherwise dealt with according to his directions.").

The bailment contract between Plaintiff and Defendant created a duty in Defendant to exercise due care in safekeeping of Plaintiff's Mercedes, see Harris v. Burnside, 261 S.C. 190, 199 S.E. 2d 65, 67-8 (1973)(citing Fortner v. Carnes, 258 S.C. 455, 189 S.E.2d 24), and in its repair, see id. (citing Edwards v. Charleston Sheet Metal, 253 S.C. 537, 172 S.E.2d 120). Breach of the duty of care arising under a bailment contract constitutes a tort. Id. at 195, 68.

In action involving a bailment alleging the tort of negligence, the bailor is entitled to be compensated for all losses that are the natural consequence and proximate result of the bailee's negligence. Dixon v. Besco Engineering, Inc., 320 S.C. 174, 180, 463 S.E.2d 636 (S.C. App.

1995)(citing 8 Am.Jur.2d Bailments § 346 (1980)). Damages are proximately caused if they are the foreseeable result of the defendant's tortious act. Id. (citing Young v. Tide Craft, Inc., 270 S.C. 453, 242 S.E.2d 671 (1978)). Further, the liability of a bailee under a bailment for mutual benefit, as we have here, arises upon a showing that (1) the goods were delivered to the bailee in good condition, (2) they were lost or returned in a damaged condition, and (3) the loss or damage to the goods was due to the failure of the bailee to exercise ordinary care in the safekeeping of the property. Hadfield v. Gilchrest, 343 S.C. 88 at 99. Importantly, the burden is on the bailee, and not on the bailor, to demonstrate the bailee used ordinary care in storing and safekeeping the property. Id.

Punitive damages are recoverable for negligence, which is so reckless of consequences as to imply or to assume the nature of wantonness, willfulness or recklessness. Solanki v. Wal-Mart Store # 2806, 410 S.C. 229, 237, 763 S.E.2d 615 (S.C. App. 2014)(referencing Bell v. Atl. Coast Line R. Co., 202 S.C. 160, 171, 24 S.E.2d 177, 182 (1943)). "If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care." Berberich v. Jack, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011).

In the present action, pursuant to the parties' agreement, Plaintiff delivered his Mercedes into the Defendant's possession which created a bailment for mutual benefit. As such, Defendant (bailee) owed Plaintiff (bailor) a duty of care both in the safekeeping and in the repair of Plaintiff's vehicle. Based on the admitted allegations in Plaintiff's Complaint and the evidence and testimony of Plaintiff and Mr. Reinert at the damages hearing, the Court finds the Defendant failed to exercise due care in restoring the Plaintiff's vehicle and in safekeeping its parts and components by storing many of them outdoors in such a manner as to allow them to be

directly exposed to the weather over a period of a few years. Such failure to exercise due care by Defendant proximately resulted in the severe degradation or ruination of some parts and components of Plaintiff's Mercedes, which not only reduced its value from the time Plaintiff delivered it to the Defendant, but also may have doubled the cost to restore the vehicle to the "daily driver" condition.

Furthermore, based on the testimony of the Plaintiff and Mr. Reinert and the photographic evidence entered into the record, the Court finds by a standard of clear and convincing evidence, that Defendant knew or should have know that storing the parts and components of Plaintiff's Mercedes on the outdoors on the ground or in bins and exposed to the weather and elements over a period of a few years would result in the very damage that was ultimately occasioned by such failure to exercise even slight care in safeguarding them. Mr. Reinert testified that Defendant's actions constituted an absolute departure from industry standards and best practices, that Defendant or it's agents or employees were conscious of such departure and the damage that would result, and that such acts or omissions amounted to a reckless disregard for Plaintiff's property. The Court finds such damages were foreseeable and avoidable by Defendant.

As stated above, based on the evidence and testimony, at the time Plaintiff delivered the Mercedes to Defendant, the vehicle had a value of between $20,000 and $25,000, the average of which amounts to $22,500. Presently the vehicle is worth $10,000. The damage occasioned to the Mercedes by the negligence of the Defendant has reduced its value by $12,500, and Defendant is liable to Plaintiff in that amount.

While Plaintiff has requested punitive damages, "to ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review…" Gamble v. Stevenson, 305 S.C. 104,

112, 406 S.E.2d 350, 354 (S.C. 1991). The Court when conducting such a review may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) other factors deemed appropriate. *Id.* at 112. After conducting such review, this Court has found no evidence of (i) an excessive duration of conduct, (ii) concealment by Defendant, (iii) the existence of similar past conduct, or (iv) that Defendant has any ability to pay such an award, and this Court declines to award any punitive damages under Plaintiff's negligence cause of action.

Under the theory of negligence, Defendant is liable to Plaintiff for the return of the Mercedes and for compensatory damages in the amount of $13,625, including the cost of transport, , plus the costs and expenses of the action.

Conversion

Plaintiff's claim of conversion relates the $20,000 deposit Plaintiff provided Defendant, and that Defendant failed to return upon Plaintiff's demand, as agreed.

Conversion is the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights." Green v. Waidner, 284 S.C. 35, 324 S.E.2d 331 (S.C. App., 1984); Powell v. A.K. Brown Motor Co., 200 S.C. 75, 78, 20 S.E.2d 636, 637 (1942). Money may be the subject of conversion, when it is capable of being identified, and there may be conversion of determinate sums even though the specific coin and bills are not identified. See Owens v. Andrews Bank & Trust Co., 220 S.E.2d 116, 265 S.C. 490, 497 (S.C. 1975); 89 C.J.S. Trover and Conversion § 23, p. 541 (1955).

The measure of actual damages in an action for conversion of personal property is the value of the property with interest thereon from the date of conversion to the date of trial. Id.; Long v. Gibbs Auto Wrecking Company, 253 S.C. 370, 171 S.E.2d 155 (1969), Mims v. Bennett, 160 S.C. 39, 158 S.E. 124 (1931).

The measure of damages for a willful and intentional conversion, where the property is converted with knowledge of the owner's rights in the property, is the highest market value of the property with interest up to the time of trial, including any additional value due to additions or improvements made by the converter. See Green, 284 S.C. 35, 324 S.E.2d 331; Industrial Welding Supplies, Inc. v. Atlas Vending Co., 276 S.C. 196, 277 S.E.2d 885 (1981); Gregg v. Bank of Columbia, 72 S.C. 458, 52 S.E. 195 (1905); Restatement (Second) of Torts Section 927 (1981); 1 Am.Jur.2d Accession and Confusion Section 29 (1962). Punitive damages are permitted in a conversion claim where the evidence shows the conversion was done recklessly and with conscious indifference to the owner's rights. Long v. Gibbs Auto Wrecking Co., 253 S.C. 370, 171 S.E.2d 155 (1969); Lumpkin v. Allstate Insurance Co., 251 S.C. 19, 159 S.E.2d 852 (1968).

In the present case, based on the admitted allegations of the pleadings and the testimony and evidence presented to the Court, the Plaintiff, after paying for the totality of the restoration work performed on his Mercedes to a certain point, provided Defendant a $20,000 deposit in advance of the remainder of the work. Defendant was to maintain the $20,000, in trust, a separate account to bill against for restoration work going forward, and of which any unused portion would be refundable to Plaintiff on demand. Thereafter, Defendant failed to complete the restoration of Plaintiff's vehicle. When Plaintiff discovered that fact some 20 months later and demanded the return of his deposit money, Defendant did not return it to him, and has still

not returned it. Defendant has knowingly, consciously, and willfully deprived Plaintiff of possession and ownership of a determinant sum of money, and is liable to Plaintiff for conversion of his deposit money in the amount of $20,000, plus interest at the legal rate since Plaintiff demand on September 11, 2019 for its return in the amount of $3,095 totaling $23,095.

Under his conversion action, Plaintiff has again requested punitive damages, "to ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review…" Gamble v. Stevenson, 305 S.C. 104, 112, 406 S.E.2d 350, 354 (S.C. 1991). The Court when conducting such a review may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) other factors deemed appropriate. *Id.* at 112. After conducting such review, this Court has found no evidence of (i) an excessive duration of conduct, (ii) concealment by Defendant, (iii) the existence of similar past conduct, or (iv) that Defendant has any ability to pay such an award, and the Court declines to award any punitive damages under Plaintiff's conversion cause of action.

Under a theory of conversion, Defendant is liable to Plaintiff for actual in the amount of $23,095, plus costs and expenses of the action.

Costs of Action

Based on the record, including the attorney's fee and expenses affidavit filed in the case by his attorney, Plaintiff has been caused to incur costs and expenses associated with bringing and prosecuting the action in the amount of $1,694, which includes the fee of $1,000 charged by his expert witness for his services, as attested to by Mr. Reinert during the damages hearing.

Plaintiff is entitled to recover from Defendant his costs and expenses in the total amount of $1,694.

Attorney's Fees

Plaintiff also requested an award of attorney's fees. "Attorney's fees are not recoverable unless authorized by contract or statute." Jackson v. Speed, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997). Plaintiff and Defendant did not agree to the recovery of attorney's fees in any contract, and Plaintiff has not cited any statute by which this Court may award him attorney's fees. Consequently, the Court denies Plaintiff's request for an award of attorney's fees.

Summary of Judgment

The Court finds Defendant is liable to Plaintiff, as described above, on Plaintiff's causes of action for breach of contract, negligence, and conversion. Because the Court is awarding Plaintiff contract damages on the basis of a valid contract between the parties, the Court has not considered Plaintiff's unjust enrichment claim. See Gantt v. Morgan, 199 S.C. 138, 18 S.E.2d 672 (1942)(Relief under a theory of unjust enrichment is not available if an action is based on the existence of a contract).

Plaintiff is not permitted a double recovery for a single wrong. To prevent that outcome, Plaintiff is required to elect his remedies. See Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (S.C. 1996) (citing Thompson v. Watts, 281 S.C. 504, 316 S.E.2d 393 (1984)(The purpose of election of remedies is to prevent a double recovery for a single wrong.)). However, an election of remedies is not applicable where remedies are addressed to different wrongs, requiring different or additional elements and standards of proof. See Thompson v. Watts, 316 S.E.2d 393, 281 S.C. 504 (S.C. 1984)(citing Tzouvelekas v. Tzouvelekas, 206 S.C. 90, 33 S.E.2d 73, 74

(1945)(Election of remedies is the act of choosing between different remedies allowed by law on the same state of facts.)).

Based on Defendant's liability to Plaintiff on his causes of action for breach of contract, negligence, and conversion, as set out above, and applying the doctrine of election of remedies, the Court finds judgment for the Plaintiff is appropriate in the following amounts:

a) for breach of contract in the amount of $40,450;

b) for negligence in the amount of $21,125, reduced by $40,450 for a total of $0;

c) for conversion in the amount of $23,095;

d) for the return of the Mercedes to Plaintiff; and

e) for Plaintiffs costs and expenses in the amount of $1,694.

IT IS HEREBY ORDERED AND ADJUDGED that judgment against Defendant be and is hereby entered in favor of Plaintiff in the total amount of **$65,239**. Defendant is also hereby ordered to prepare the Mercedes and its parts and components is such a manner that within 30 days of this Order becoming final, they may be available for pick-up and transport to a location in Charleston, South Carolina to be designated by Plaintiff.

IT IS SO ORDERED in Charleston, South Carolina, this _____ day of September 2021.

_____
Hon. Roger M. Young
Circuit Court Judge

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019- CP-10-05392

KEVIN STAVELEY-O'CARROLL — PLAINTIFF(S)

FENIX AUTOMOTIVE, LLC — DEFENDANT(S)

Submitted by: W. Westbrook Wills III	**Attorney for :** ☒ Plaintiff ☐ Defendant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☒ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	**Judgment Against (List name(s) below)**	**Judgment Amount To be Enrolled (List amount(s) below)**
Kevin Staveley-O'Carroll	Fenix Automotive, LLC	$ **198,341.57**
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge | **Judge Code** | **Date**

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

W. Westbrook Wills III, Esq.

ATTORNEY(S) FOR THE PLAINTIFF(S)

Damien A. Sobieraj, Esq.

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

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

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

****

FORM 4C INSTRUCTIONS—JUDGMENT IN A CIVIL CASE

(Instructions for Information Only-Not to be filed with Form 4C)

1. Form 4C-Judgment in a Civil Case has been modified to add order information and enrollment instructions for the clerk of court. The purpose of Form 4 has not changed with the exception that judgment information is provided when applicable.

2. Please note that the Form 4C must be attached to all orders that include information to enroll in the judgment index. The clerk will not be responsible for reading the order to determine enrollment information.

   The attorney or prevailing party will prepare and attach the Form 4C when submitting the proposed order that includes judgment enrollment information for the judgment index. The judge will review and sign Form 4C when he or she signs an order that includes judgment enrollment information for the judgment index.

3. Form 4C is not required to be submitted to the Court with orders that do not include information to enroll in the judgment index. If the clerk receives such an order without Form 4C attached, the clerk should enter and process the order pursuant to Rule 58 and Rule 77(d), SC Rules of Civil Procedure (i.e., the clerk should serve notice of entry of the judgment by mail or provide the attorneys with copies of the signed order by other means).

4. The "Information for the Judgment Index" section should be completed when the judgment affects title to real or personal property or if any amount should be enrolled. In the "Judgment in Favor of" column, enter the name of the party to whom the judgment is awarded. In the "Judgment Against" column, enter the name of the person to whom the judgment is against. The judgment amount to be enrolled should be noted in the "Judgment Amount" column. As necessary, describe any property referenced in the order if it is to be enrolled in the judgment index. If there is no judgment information to enroll, indicate "N/A" in one of the boxes in this section of the form.

5. To enter information to accommodate multiple parties, additional Form 4Cs may be used as necessary. Additional space may be inserted on the form as necessary.

6. The section "For the Clerk of Court Office Use Only" should be completed by the clerk as it has been with the previous version of Form 4.

7. If the matter is on appeal to the Circuit Court, then the parties on the form should be changed from Plaintiff and Defendant to Appellant and Respondent.

8. If an arbitrator prepares an order after arbitration, the arbitrator should strike through "Circuit Court Judge" and indicate "Arbitrator" in the signature block.

9. If a Special Circuit Court Judge, Master in Equity, or Special Referee prepares an order after hearing a Circuit Court matter, then he or she should strike through the title "Circuit Court Judge" below the signature line and indicate the appropriate title.

10. When an Order of Foreclosure is filed, neither the parties or debt owed should be listed in the Information for the Judgment Index Section, unless the foreclosure order specifically requires entry of the full judgment amount before the foreclosure sale, pursuant to Section 29-3-650 of the SC Code.

11. If the deficiency judgment is waived in a Foreclosure action, indicate N/A in the "Judgment Amount To Be Enrolled" box.

12. Foreclosure actions should be ended by the Clerk of Court upon receipt of the Order of Foreclosure. Subsequent information, including deficiency judgments, can be added to the action after the case is ended. The Master in Equity should end the action in the MIE system upon the receipt of the Order of Foreclosure.

13. When judgment enrollment information is included in the Information for the Judgment Index Section (for example, when there is a deficiency judgment), only the parties who the judgment is for and against should be included in the Section. Subordinate parties and lienholders should not be included in the box if there is not a judgment amount specifically for or against them.

14. Form 4C is not required to be attached to Transcripts of Judgment and Confession of Judgment.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP10-05392

KEVIN STAVELEY-O'CARROLL	FEXNIX AUTOMOTIVE, LLC
PLAINTIFF(S)	DEFENDANT(S)

Submitted by: Damien A. Sobieraj	**Attorney for :** ☐ Plaintiff ☒ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
KEVIN STAVELEY-O'CARROLL	FENIX AUTOMOTIVE, LLC	$65,239.00
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge **Judge Code** **Date**

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

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

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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FORM 4C INSTRUCTIONS—JUDGMENT IN A CIVIL CASE

(Instructions for Information Only-Not to be filed with Form 4C)

1. Form 4C-Judgment in a Civil Case has been modified to add order information and enrollment instructions for the clerk of court. The purpose of Form 4 has not changed with the exception that judgment information is provided when applicable.

2. Please note that the Form 4C must be attached to all orders that include information to enroll in the judgment index. The clerk will not be responsible for reading the order to determine enrollment information.

   The attorney or prevailing party will prepare and attach the Form 4C when submitting the proposed order that includes judgment enrollment information for the judgment index. The judge will review and sign Form 4C when he or she signs an order that includes judgment enrollment information for the judgment index.

3. Form 4C is not required to be submitted to the Court with orders that do not include information to enroll in the judgment index. If the clerk receives such an order without Form 4C attached, the clerk should enter and process the order pursuant to Rule 58 and Rule 77(d), SC Rules of Civil Procedure (i.e., the clerk should serve notice of entry of the judgment by mail or provide the attorneys with copies of the signed order by other means).

4. The "Information for the Judgment Index" section should be completed when the judgment affects title to real or personal property or if any amount should be enrolled. In the "Judgment in Favor of" column, enter the name of the party to whom the judgment is awarded. In the "Judgment Against" column, enter the name of the person to whom the judgment is against. The judgment amount to be enrolled should be noted in the "Judgment Amount" column. As necessary, describe any property referenced in the order if it is to be enrolled in the judgment index. If there is no judgment information to enroll, indicate "N/A" in one of the boxes in this section of the form.

5. To enter information to accommodate multiple parties, additional Form 4Cs may be used as necessary. Additional space may be inserted on the form as necessary.

6. The section "For the Clerk of Court Office Use Only" should be completed by the clerk as it has been with the previous version of Form 4.

7. If the matter is on appeal to the Circuit Court, then the parties on the form should be changed from Plaintiff and Defendant to Appellant and Respondent.

8. If an arbitrator prepares an order after arbitration, the arbitrator should strike through "Circuit Court Judge" and indicate "Arbitrator" in the signature block.

9. If a Special Circuit Court Judge, Master in Equity, or Special Referee prepares an order after hearing a Circuit Court matter, then he or she should strike through the title "Circuit Court Judge" below the signature line and indicate the appropriate title.

10. When an Order of Foreclosure is filed, neither the parties or debt owed should be listed in the Information for the Judgment Index Section, unless the foreclosure order specifically requires entry of the full judgment amount before the foreclosure sale, pursuant to Section 29-3-650 of the SC Code.

11. If the deficiency judgment is waived in a Foreclosure action, indicate N/A in the "Judgment Amount To Be Enrolled" box.

12. Foreclosure actions should be ended by the Clerk of Court upon receipt of the Order of Foreclosure. Subsequent information, including deficiency judgments, can be added to the action after the case is ended. The Master in Equity should end the action in the MIE system upon the receipt of the Order of Foreclosure.

13. When judgment enrollment information is included in the Information for the Judgment Index Section (for example, when there is a deficiency judgment), only the parties who the judgment is for and against should be included in the Section. Subordinate parties and lienholders should not be included in the box if there is not a judgment amount specifically for or against them.

14. Form 4C is not required to be attached to Transcripts of Judgment and Confession of Judgment.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	Case No.: 2019-CP-10-05392
KEVIN STAVELEY-O'CARROLL,	)	
	)	
Plaintiff,	)	AMENDED ORDER
-vs-	)	OF
	)	JUDGMENT FOR DAMAGES
FENIX AUTOMOTIVE, LLC,	)	
	)	
Defendant.	)	
	)	

Plaintiff Kevin Staveley-O'Carroll ("Plaintiff" or "Staveley-O'Carroll") brought this action against Defendant Fenix Automotive, LLC ("Defendant" or "Fenix") on October 21, 2019 alleging causes of action for breach of contract, negligence, conversion, and unjust enrichment. The record reflects that Plaintiff properly served Defendant with a copy of the Summons and Complaint on November 13, 2019. On January 28, 2020, after Defendant failed to file an answer or otherwise respond to the Complaint, Plaintiff filed and Affidavit of Default and Motion for Default Judgment, which the Court granted its Order dated January 29, 2020. Subsequently, Plaintiff filed his Motion for Damages and requested for a damages hearing.

On August 25, 2021, the parties having been duly and properly notified, the Court held a hearing on the issue of damages via WebEx. Present at the damages hearing via video/audio were Plaintiff appearing with his counsel W. Westbrook Wills III, Esq. and Axel Reinert ("Mr. Reinert"), his expert witness in automotive restoration. Damien A. Sobieraj, Esq. appeared on behalf of Defendant. Plaintiff's expert witness was duly qualified, without objection, to give expert testimony as to issues related to the damages in the matter. Plaintiff and Mr. Reinert's testimony was taken, evidence was received, and the entire record in the case was considered by

the Court.[1] The Court makes the following Findings of Fact and Conclusions of Law as required by SCRCP, Rule 52. Any Finding of Fact which is more appropriately characterized as a Conclusion of Law shall be treated as such, and vice-versa.

FINDINGS OF FACT

Based on Defendant's admissions by default of the allegations of Plaintiff's Complaint, and having considered the testimony and evidence presented at the damages hearing, Plaintiff has established the following facts by a preponderance of the evidence, unless otherwise specified.

1. Plaintiff is an individual residing in Columbia, Missouri.

2. Defendant is a South Carolina limited liability company engaged in the business of automotive restoration.

3. The parties are properly subject to the jurisdiction of the Court, and the Court has subject matter over the matters raised in the pleadings.

4. Defendant was properly served with a copy of Plaintiff's Summons and Complaint, which it failed to answer or otherwise respond, resulting in the entry of default judgment against it.

5. In 2015, Plaintiff entered into a contract with Defendant to restore his classic 1969 Mercedes 280 SL ("the Mercedes"), which he delivered into Defendant's possession and care at Defendant's place of business for that purpose.

6. At the time Plaintiff delivered the Mercedes to Defendant, the vehicle was in poor

[1] As Defendant was in default and default judgment having been entered against it, the Court took testimony and received evidence from and on behalf of Plaintiff only, and limited Defendant's participation in the hearing to cross-examination and objecting to evidence by its counsel. See Howard v. Holiday, Inc. 271 S.C. 238, 246 S.E.2d 880 (1978)(limiting a defendant's participation in a post-default hearing to cross-examination and objection to plaintiff's evidence); see also Limehouse v. Hulsey, 404 S.C. 93, 116, S.E.2d 566, 579 (S.C. 2013)(reaffirming Howard).

condition and had a value of between $20,000 and $25,000, based on the testimony of Mr. Reinert, Mr. Reinart testified that (i) he based his opinion regarding the value of the Mercedes on his observation of the Mercedes only after Defendant had disassembled the Mercedes and had already performed work on the vehicle, (ii) he did not personally observe the condition of the Mercedes when Plaintiff delivered the vehicle to Defendant, (iii) he did not review any photographs showing the condition of the Mercedes prior to Defendant disassembling the Mercedes and beginning work on the vehicle. Furthermore, Mr. Reinert did not identify any industry resources used by him to assist him with his valuation of the Mercedes as delivered to Defendant.

7. Plaintiff and Defendant agreed Defendant would restore the Mercedes to a "daily driver" condition, and that Defendant would provide Plaintiff a detailed estimate of the total cost and time required to perform the restoration project after completely disassembling the Mercedes. Defendant informed Plaintiff in their conversations and emails that the total cost to restore the Mercedes may increase as the project progressed and Defendant determined what original parts could be reused versus rebuilt or replaced.

8. Between September of 2015 and March of 2016, Defendant performed initial work on the Mercedes including completely disassembling it and preparing the body for anticipated metalwork and submitted invoices to Plaintiff for such work totaling $5,825.00, which Plaintiff paid in full.

9. 22 months later, in December of 2017, Defendant provided Plaintiff a detailed estimate for the remainder of the restoration of the Mercedes, which it represented would cost approximately $60,000, and would take approximately six months.

10. To keep the total cost of the remainder of the restoration process as close to the $60,000

estimate as possible, Plaintiff and Defendant specifically agreed that, wherever possible, Defendant would make use of the Mercedes's existing parts and components.

11. At Defendant's request, Plaintiff provided it a $20,000 deposit, which Defendant specifically represented it would maintain, in trust, in a separate account, and against which it would bill for restoration work on the Mercedes going forward. Defendant also represented to Plaintiff that any unused portion of the $20,000 would be returned to Plaintiff upon his request.

12. The evidence and testimony before the Court demonstrates, and the Court finds, that after Plaintiff provided the $20,000 deposit, Defendant failed to complete the restoration of the Mercedes, as agreed, and it remains to this day in an unrestored and completely disassembled state, in Defendant's possession.

13. Moreover, the evidence, testimony, and Defendant's admissions establish that after disassembling the Mercedes, Defendant stored a great many of its parts and components outdoors on the ground or in plastic bins, exposed to the elements and weather, where they have remained since April 2019.

14. From the photographs submitted in evidence and personal observation, Mr. Reinert identified many of the parts and components of the Mercedes, including the vehicle's motor, windshield, suspension, drivetrain, exterior finishes and chrome, and an array of interior components, which he testified were in a severe degradation condition or ruined as a direct result of Defendant leaving them outdoors in the weather over a a few years, but Mr. Reinart also conceded he did not have firsthand knowledge of the condition of these parts when the Plaintiff delivered the Mercedes to Defendant Mr. Reinert further testified that, if many of those parts and components were in good condition when the Mercedes was delivered to Defendant, then these parts could have been reused in the restoration of the Mercedes. However, due to their present

condition, Mr. Reinert opined many of those parts and components may no longer be usable for the restoration project, or may now require very extensive refurbishment.

15. Mr. Reinert testified that, based on Plaintiff and Defendant's agreement, the total actual cost of the restoration of the Mercedes at the time of the parties' original agreement would reasonably have been between $60,000 and $70,000 dollars. However, Mr. Reinert believed that because of the degradation to many of the parts of the Mercedes due to Defendant failure to properly protect them from damage, the current cost to restore the vehicle is likely to be double that figure.

16. Plaintiff alleged, Mr. Reinert testified, and the Court finds, that Defendant knew or should have known that storing the subject parts and components of Plaintiff's Mercedes outdoors, exposed to the elements over a period of years could result in their degradation or ruination. Mr. Reinert testified that by doing so, Defendant deviated from the standards of care, professionalism, and best practices for businesses in the automotive restoration industry.

17. Based on the uncontroverted testimony of Mr. Reinert, the Court finds the Mercedes would have had a value of between $42,000 and $120,000 had Defendant restored it as agreed in its contract with Plaintiff. Instead, in its present condition and state, the Mercedes currently has a value of $10,000.

18. In September of 2019, as Defendant had still failed to complete the restoration of the Mercedes, Plaintiff made a demand on Defendant for the return of his $20,000 deposit, which Defendant also failed to return to him.

CONCLUSIONS OF LAW

Plaintiff filed his action against Defendant alleging causes of action for breach of contract, negligence, conversion, and unjust enrichment for which he has prayed for actual,

consequential, special, and punitive damages as proven at trial, together with attorney's fees and costs of the action. The Defendant failed to answer or otherwise respond to Plaintiff's Complaint, and default judgment was entered against it.

A defendant in default admits liability but not the damages as set forth in the prayer for relief. Solley v. Navy Fed. Credit Union, Inc., 397 S.C. 192, 203 723 S.E.2d 597, 603 (S.C. App. 2012); see also Renney v. Dobbs House, Inc., 275 S.C. 562, 566, 274 S.E.2d 290, 292 (1981). The amount of damages in a default action must be proved by the preponderance of the evidence. Id.; see Jackson v. Midlands Human Res. Ctr., 296 S.C. 526, 529, 374 S.E.2d 505, 507 (Ct. App.1988) ("A judgment for money damages must be warranted by the proof of the party in whose favor it is rendered."). As to punitive or exemplary damages, the Plaintiff has the burden of proving by clear and convincing evidence the Defendant's demonstrated misconduct was willful, wanton, or with reckless disregard for the Plaintiff's rights. See Mishoe v. Qhg of Lake City, Inc., 621 S.E.2d 363, 366, 366 S.C. 195 (S.C. 2005). "A conscious failure to exercise due care constitutes willfulness." Id.

Based on the pleadings, admissions, and the uncontroverted evidence and testimony presented by Plaintiff and his expert witness at the damages hearing, the Court finds and concludes as follows:

Breach of Contract

Plaintiff and Defendant entered into a valid contract for the restoration of Plaintiff's Mercedes, supported by consideration, and creating rights and obligations between the parties, under which Defendant agreed to restore the vehicle to a "daily driver" condition, and Plaintiff agreed to pay Defendant for parts and labor associated with the restoration. Pursuant to the parties' contract, Defendant invoiced Plaintiff for the initial restoration work it performed in the

amounts totaling $5,825.00, which Plaintiff paid in full. Thereafter, Plaintiff provided Defendant a $20,000 deposit towards the remainder of the vehicle restoration, which Defendant was to hold in a separate account, as agreed, however, Defendant did complete the restoration of the Mercedes. Furthermore, after Plaintiff discovered Defendant had not performed its obligations, as promised, and demanded the return of his $20,000 deposit, as agreed, Defendant failed to deliver it. The Court finds Defendant has breached its contract with Plaintiff entitling Plaintiff to contract damages.

Damages in a breach of contract action are to put the non-breaching party in the position he or she would have been in had the breach not occurred and the contract were performed. See Minter v. GOCT, Inc., 322 S.C. 525, 473 S.E.2d 67(Ct. App. 1996)(purpose of damages for breach of contract is to put plaintiff in as good a position as he or she would have been if the contract had been performed). Compensation for lost profits or value is recoverable as damage in a breach of contract action where the estimate of such lost profit or value is not based wholly on speculation and conjecture. Charles v. Texas Co., 199 S.C. 156, 18 S.E.2d 719 (1942); South Carolina Federal Savings Bank v. Thorton-Crosby Development Co., 303 S.C. 74, 399 S.E.2d 8 (Ct. App. 1990); Global Protection Corp. v Halbersberg, 332 S.C. 149, 503 S.E.2d 483 (1998)(absolute certainty of data on which lost profits are estimated not required; must be such reasonable certainty that damages are not based wholly on speculation and conjecture and certain standard or fixed method by which profits or value may be estimated and determined with a fair degree of accuracy is sufficient).

The proper measure of damages for breach of contract is the loss actually suffered by the contractee as the result of the breach. Tomlinson v. Mixon, 626 S.E.2d 43, 50, 367 S.C. 467 (S.C. App. 2006); South Carolina Fin. Corp. v. West Side Fin. Co., 236 S.C. 109, 113 S.E.2d 329

(1960). "In the normal case, the damage will consist of two distinct elements: (1) out-of-pocket costs actually incurred as a result of the contract; and (2) the gain above costs that would have been realized had the contract been performed." Id; Collins Entm't., Inc. v. White, 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005).

Here, therefore, as damages for Defendant's breach of contract, Plaintiff is entitled to the difference between the fair market value of the Mercedes as restored to the agreed upon condition and its present value, minus the difference between the cost of the restoration work and the amount the Plaintiff already paid toward that cost. According to the uncontroverted testimony of Mr. Reinert, the fair market value for the Mercedes as restored to the agreed "daily driver" condition would have been between $42,000 and $120,000, the average of which amounts to $81,000. Mr. Reinert did not identify any industry resources from which he used information to formulate his estimated fair market value of the Mercedes, relying upon general internet searches for sales listings of similar Mercedes. He further testified that based on the parties agreement at the time of its making, the reasonable cost of the labor and parts would have been between $60,000 and $70,000 dollars, the average of which amounts to $65,000. Plaintiff also paid Defendant a total of $25,825 towards the total cost of the restoration. Plaintiff's actual damage resulting from Defendant's breach of contract can, therefore, be expressed as ($81,000 - **$10,000**) – ($65,000 - $25,825) and totals **$31,825**.

Under the foregoing measure, Plaintiff is also entitled to the return of the vehicle in its present state. Mr. Reinert testified that shipping of the vehicle in its present disassembled state to a Charleston location will cost a fee of $525 which includes tarping, and two hours of loading and unloading, plus $100 dollars per hour for additional time. Mr. Reinert testified that in his opinion, loading and unloading the Mercedes in its disassembled condition would likely take

several hours. The Court finds Plaintiff is entitled to consequential damages associated with shipping the Mercedes to another location in Charleston in the amount of $1,125.

Plaintiff is entitled to actual and consequential damages as a result of Defendant's breach of contract in the total amount of **$32,950**, including the cost to return the vehicle, plus the costs and expenses of the action.

Negligence

Plaintiff's contract with Defendant for the restoration of the Mercedes and his delivery of the vehicle to Defendant for that purpose created a bailment. "A bailment is created by the delivery of personal property by one person to another in trust for a specific purpose, pursuant to an express or implied contract to fulfill that trust." Hadfield v. Gilchrist, 538 S.E.2d 268, 343 S.C. 88, 95 (S.C. App. 2000); Home Indent Co. v. Harleysville Mut. Ins. Co., 252 S.C. 452, 460, 166 S.E.2d 819, 824 (1969)("Bailment has been defined as the delivery of a chattel for some express or particular purpose upon a contract, express or implied, that, after the purpose has been fulfilled, then the chattel shall be redelivered to the bailor, or otherwise dealt with according to his directions.").

The bailment contract between Plaintiff and Defendant created a duty in Defendant to exercise due care in safekeeping of Plaintiff's Mercedes, see Harris v. Burnside, 261 S.C. 190, 199 S.E. 2d 65, 67-8 (1973)(citing Fortner v. Carnes, 258 S.C. 455, 189 S.E.2d 24), and in its repair, see id. (citing Edwards v. Charleston Sheet Metal, 253 S.C. 537, 172 S.E.2d 120). Breach of the duty of care arising under a bailment contract constitutes a tort. Id. at 195, 68.

In action involving a bailment alleging the tort of negligence, the bailor is entitled to be compensated for all losses that are the natural consequence and proximate result of the bailee's negligence. Dixon v. Besco Engineering, Inc., 320 S.C. 174, 180, 463 S.E.2d 636 (S.C. App.

1995)(citing 8 Am.Jur.2d Bailments § 346 (1980)). Damages are proximately caused if they are the foreseeable result of the defendant's tortious act. Id. (citing Young v. Tide Craft, Inc., 270 S.C. 453, 242 S.E.2d 671 (1978)). Further, the liability of a bailee under a bailment for mutual benefit, as we have here, arises upon a showing that (1) the goods were delivered to the bailee in good condition, (2) they were lost or returned in a damaged condition, and (3) the loss or damage to the goods was due to the failure of the bailee to exercise ordinary care in the safekeeping of the property. Hadfield v. Gilchrest, 343 S.C. 88 at 99. Importantly, the burden is on the bailee, and not on the bailor, to demonstrate the bailee used ordinary care in storing and safekeeping the property. Id.

Punitive damages are recoverable for negligence, which is so reckless of consequences as to imply or to assume the nature of wantonness, willfulness or recklessness. Solanki v. Wal-Mart Store # 2806, 410 S.C. 229, 237, 763 S.E.2d 615 (S.C. App. 2014)(referencing Bell v. Atl. Coast Line R. Co., 202 S.C. 160, 171, 24 S.E.2d 177, 182 (1943)). "If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care." Berberich v. Jack, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011).

In the present action, pursuant to the parties' agreement, Plaintiff delivered his Mercedes into the Defendant's possession which created a bailment for mutual benefit. As such, Defendant (bailee) owed Plaintiff (bailor) a duty of care both in the safekeeping and in the repair of Plaintiff's vehicle. Based on the admitted allegations in Plaintiff's Complaint and the evidence and testimony of Plaintiff and Mr. Reinert at the damages hearing, the Court finds the Defendant failed to exercise due care in restoring the Plaintiff's vehicle and in safekeeping its parts and components by storing many of them outdoors in such a manner as to allow them to be

directly exposed to the weather over a period of a few years. Such failure to exercise due care by Defendant proximately resulted in the severe degradation or ruination of some parts and components of Plaintiff's Mercedes, which not only reduced its value from the time Plaintiff delivered it to the Defendant, but also may have doubled the cost to restore the vehicle to the "daily driver" condition.

Furthermore, based on the testimony of the Plaintiff and Mr. Reinert and the photographic evidence entered into the record, the Court finds by a standard of clear and convincing evidence, that Defendant knew or should have know that storing the parts and components of Plaintiff's Mercedes on the outdoors on the ground or in bins and exposed to the weather and elements over a period of a few years would result in the very damage that was ultimately occasioned by such failure to exercise even slight care in safeguarding them. Mr. Reinert testified that Defendant's actions constituted an absolute departure from industry standards and best practices, that Defendant or it's agents or employees were conscious of such departure and the damage that would result, and that such acts or omissions amounted to a reckless disregard for Plaintiff's property. The Court finds such damages were foreseeable and avoidable by Defendant.

As stated above, based on the evidence and testimony, at the time Plaintiff delivered the Mercedes to Defendant, the vehicle had a value of between $20,000 and $25,000, the average of which amounts to $22,500. Presently the vehicle is worth $10,000. The damage occasioned to the Mercedes by the negligence of the Defendant has reduced its value by $12,500, and Defendant is liable to Plaintiff in that amount.

While Plaintiff has requested punitive damages, "to ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review…" Gamble v. Stevenson, 305 S.C. 104,

112, 406 S.E.2d 350, 354 (S.C. 1991). The Court when conducting such a review may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) other factors deemed appropriate. *Id.* at 112. After conducting such review, this Court has found no evidence of (i) an excessive duration of conduct, (ii) concealment by Defendant, (iii) the existence of similar past conduct, or (iv) that Defendant has any ability to pay such an award, and this Court declines to award any punitive damages under Plaintiff's negligence cause of action.

Under the theory of negligence, Defendant is liable to Plaintiff for the return of the Mercedes and for compensatory damages in the amount of $13,625, including the cost of transport, , plus the costs and expenses of the action.

Conversion

Plaintiff's claim of conversion relates the $20,000 deposit Plaintiff provided Defendant, and that Defendant failed to return upon Plaintiff's demand, as agreed.

Conversion is the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights." Green v. Waidner, 284 S.C. 35, 324 S.E.2d 331 (S.C. App., 1984); Powell v. A.K. Brown Motor Co., 200 S.C. 75, 78, 20 S.E.2d 636, 637 (1942). Money may be the subject of conversion, when it is capable of being identified, and there may be conversion of determinate sums even though the specific coin and bills are not identified. See Owens v. Andrews Bank & Trust Co., 220 S.E.2d 116, 265 S.C. 490, 497 (S.C. 1975); 89 C.J.S. Trover and Conversion § 23, p. 541 (1955).

The measure of actual damages in an action for conversion of personal property is the value of the property with interest thereon from the date of conversion to the date of trial. Id.; Long v. Gibbs Auto Wrecking Company, 253 S.C. 370, 171 S.E.2d 155 (1969), Mims v. Bennett, 160 S.C. 39, 158 S.E. 124 (1931).

The measure of damages for a willful and intentional conversion, where the property is converted with knowledge of the owner's rights in the property, is the highest market value of the property with interest up to the time of trial, including any additional value due to additions or improvements made by the converter. See Green, 284 S.C. 35, 324 S.E.2d 331; Industrial Welding Supplies, Inc. v. Atlas Vending Co., 276 S.C. 196, 277 S.E.2d 885 (1981); Gregg v. Bank of Columbia, 72 S.C. 458, 52 S.E. 195 (1905); Restatement (Second) of Torts Section 927 (1981); 1 Am.Jur.2d Accession and Confusion Section 29 (1962). Punitive damages are permitted in a conversion claim where the evidence shows the conversion was done recklessly and with conscious indifference to the owner's rights. Long v. Gibbs Auto Wrecking Co., 253 S.C. 370, 171 S.E.2d 155 (1969); Lumpkin v. Allstate Insurance Co., 251 S.C. 19, 159 S.E.2d 852 (1968).

In the present case, based on the admitted allegations of the pleadings and the testimony and evidence presented to the Court, the Plaintiff, after paying for the totality of the restoration work performed on his Mercedes to a certain point, provided Defendant a $20,000 deposit in advance of the remainder of the work. Defendant was to maintain the $20,000, in trust, a separate account to bill against for restoration work going forward, and of which any unused portion would be refundable to Plaintiff on demand. Thereafter, Defendant failed to complete the restoration of Plaintiff's vehicle. When Plaintiff discovered that fact some 20 months later and demanded the return of his deposit money, Defendant did not return it to him, and has still

not returned it. Defendant has knowingly, consciously, and willfully deprived Plaintiff of possession and ownership of a determinant sum of money, and is liable to Plaintiff for conversion of his deposit money in the amount of $20,000, plus interest at the legal rate since Plaintiff demand on September 11, 2019 for its return in the amount of $3,095 totaling $23,095.

Under his conversion action, Plaintiff has again requested punitive damages, "to ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review…" Gamble v. Stevenson, 305 S.C. 104, 112, 406 S.E.2d 350, 354 (S.C. 1991). The Court when conducting such a review may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) other factors deemed appropriate. *Id.* at 112. After conducting such review, this Court has found no evidence of (i) an excessive duration of conduct, (ii) concealment by Defendant, (iii) the existence of similar past conduct, or (iv) that Defendant has any ability to pay such an award, and the Court declines to award any punitive damages under Plaintiff's conversion cause of action.

Under a theory of conversion, Defendant is liable to Plaintiff for actual in the amount of $23,095, plus costs and expenses of the action.

Costs of Action

Based on the record, including the attorney's fee and expenses affidavit filed in the case by his attorney, Plaintiff has been caused to incur costs and expenses associated with bringing and prosecuting the action in the amount of $1,694, which includes the fee of $1,000 charged by his expert witness for his services, as attested to by Mr. Reinert during the damages hearing.

Plaintiff is entitled to recover from Defendant his costs and expenses in the total amount of $1,694.

Attorney's Fees

Plaintiff also requested an award of attorney's fees. "Attorney's fees are not recoverable unless authorized by contract or statute." Jackson v. Speed, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997). Plaintiff and Defendant did not agree to the recovery of attorney's fees in any contract, and Plaintiff has not cited any statute by which this Court may award him attorney's fees. Consequently, the Court denies Plaintiff's request for an award of attorney's fees.

Summary of Judgment

The Court finds Defendant is liable to Plaintiff, as described above, on Plaintiff's causes of action for breach of contract, negligence, and conversion. Because the Court is awarding Plaintiff contract damages on the basis of a valid contract between the parties, the Court has not considered Plaintiff's unjust enrichment claim. See Gantt v. Morgan, 199 S.C. 138, 18 S.E.2d 672 (1942)(Relief under a theory of unjust enrichment is not available if an action is based on the existence of a contract).

Plaintiff is not permitted a double recovery for a single wrong. To prevent that outcome, Plaintiff is required to elect his remedies. See Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (S.C. 1996) (citing Thompson v. Watts, 281 S.C. 504, 316 S.E.2d 393 (1984)(The purpose of election of remedies is to prevent a double recovery for a single wrong.)). However, an election of remedies is not applicable where remedies are addressed to different wrongs, requiring different or additional elements and standards of proof. See Thompson v. Watts, 316 S.E.2d 393, 281 S.C. 504 (S.C. 1984)(citing Tzouvelekas v. Tzouvelekas, 206 S.C. 90, 33 S.E.2d 73, 74

(1945)(Election of remedies is the act of choosing between different remedies allowed by law on the same state of facts.)).

Based on Defendant's liability to Plaintiff on his causes of action for breach of contract, negligence, and conversion, as set out above, and applying the doctrine of election of remedies, the Court finds judgment for the Plaintiff is appropriate in the following amounts:

a) for breach of contract in the amount of **$32,950**;

b) for negligence in the amount of $21,125, reduced by **$32,950** for a total of $0;

c) for conversion in the amount of $23,095;

d) for the return of the Mercedes to Plaintiff; and

e) for Plaintiffs costs and expenses in the amount of $1,694.

IT IS HEREBY ORDERED AND ADJUDGED that judgment against Defendant be and is hereby entered in favor of Plaintiff in the total amount of **$57,739**. Defendant is also hereby ordered to prepare the Mercedes and its parts and components is such a manner that within 30 days of this Order becoming final, they may be available for pick-up and transport to a location in Charleston, South Carolina to be designated by Plaintiff.

IT IS SO ORDERED in Charleston, South Carolina, this _____ day of October 2021.

_____
Hon. Roger M. Young
Circuit Court Judge

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP10-05392

KEVIN STAVELEY-O'CARROLL	FEXNIX AUTOMOTIVE, LLC
PLAINTIFF(S)	DEFENDANT(S)

Submitted by: Damien A. Sobieraj	**Attorney for :** ☐ Plaintiff ☒ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
KEVIN STAVELEY-O'CARROLL	FENIX AUTOMOTIVE, LLC	$57,739.00
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge **Judge Code** **Date**

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

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

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

****

FORM 4C INSTRUCTIONS—JUDGMENT IN A CIVIL CASE

(Instructions for Information Only-Not to be filed with Form 4C)

1. Form 4C-Judgment in a Civil Case has been modified to add order information and enrollment instructions for the clerk of court. The purpose of Form 4 has not changed with the exception that judgment information is provided when applicable.

2. Please note that the Form 4C must be attached to all orders that include information to enroll in the judgment index. The clerk will not be responsible for reading the order to determine enrollment information.

   The attorney or prevailing party will prepare and attach the Form 4C when submitting the proposed order that includes judgment enrollment information for the judgment index. The judge will review and sign Form 4C when he or she signs an order that includes judgment enrollment information for the judgment index.

3. Form 4C is not required to be submitted to the Court with orders that do not include information to enroll in the judgment index. If the clerk receives such an order without Form 4C attached, the clerk should enter and process the order pursuant to Rule 58 and Rule 77(d), SC Rules of Civil Procedure (i.e., the clerk should serve notice of entry of the judgment by mail or provide the attorneys with copies of the signed order by other means).

4. The "Information for the Judgment Index" section should be completed when the judgment affects title to real or personal property or if any amount should be enrolled. In the "Judgment in Favor of" column, enter the name of the party to whom the judgment is awarded. In the "Judgment Against" column, enter the name of the person to whom the judgment is against. The judgment amount to be enrolled should be noted in the "Judgment Amount" column. As necessary, describe any property referenced in the order if it is to be enrolled in the judgment index. If there is no judgment information to enroll, indicate "N/A" in one of the boxes in this section of the form.

5. To enter information to accommodate multiple parties, additional Form 4Cs may be used as necessary. Additional space may be inserted on the form as necessary.

6. The section "For the Clerk of Court Office Use Only" should be completed by the clerk as it has been with the previous version of Form 4.

7. If the matter is on appeal to the Circuit Court, then the parties on the form should be changed from Plaintiff and Defendant to Appellant and Respondent.

8. If an arbitrator prepares an order after arbitration, the arbitrator should strike through "Circuit Court Judge" and indicate "Arbitrator" in the signature block.

9. If a Special Circuit Court Judge, Master in Equity, or Special Referee prepares an order after hearing a Circuit Court matter, then he or she should strike through the title "Circuit Court Judge" below the signature line and indicate the appropriate title.

10. When an Order of Foreclosure is filed, neither the parties or debt owed should be listed in the Information for the Judgment Index Section, unless the foreclosure order specifically requires entry of the full judgment amount before the foreclosure sale, pursuant to Section 29-3-650 of the SC Code.

11. If the deficiency judgment is waived in a Foreclosure action, indicate N/A in the "Judgment Amount To Be Enrolled" box.

12. Foreclosure actions should be ended by the Clerk of Court upon receipt of the Order of Foreclosure. Subsequent information, including deficiency judgments, can be added to the action after the case is ended. The Master in Equity should end the action in the MIE system upon the receipt of the Order of Foreclosure.

13. When judgment enrollment information is included in the Information for the Judgment Index Section (for example, when there is a deficiency judgment), only the parties who the judgment is for and against should be included in the Section. Subordinate parties and lienholders should not be included in the box if there is not a judgment amount specifically for or against them.

14. Form 4C is not required to be attached to Transcripts of Judgment and Confession of Judgment.

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Kevin Staveley-O'Carroll, Plaintiff, v. Fenix Automotive, LLC, Defendant.	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT C/A NO.: 2019-CP-10-05392 **ORDER DENYING MOTION TO ALTER OR AMEND A JUDGEMENT PURSUANT TO RULE 59(e)**

The Plaintiff Kevin Staveley-O'Carroll filed a motion asking this Court to reconsider its Order dated October 6, 2021. Specifically, Plaintiff asks this Court to reconsider the following findings within the Order: 1) in awarding damages, the Court based some or all of its calculations on monetary figures supplied by the Defendant in his proposed order of judgment; the Court declined to award punitive damages based on Plaintiff's negligence claim or conversion claim.

STANDARD OF REVIEW

Motions for reconsideration will not be granted absent "highly unusual circumstances." U.S. ex rel. Becker v. Washington Savanah River Co., 305 F.3d 284, 290 (4th Cir. 2002) (stating that simple disagreements with the court's ruling will not support Rule 59(e) relief).[1] Courts have recognized three circumstances in which a court should grant a Rule 59(e) motion: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." Hutchinston v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). Importantly, a motion for reconsideration is not

1 Rule 59 is substantially the same as the Federal Rule. *See* Elam v. S.C. Dep't of Transp., 361 S.C. 9, 21, 602 S.E. 2d 772, 779 (2004) ("Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical.").

a vehicle to re-litigate previously raised issues or "to raise argument or present evidence that could have been presented prior to the entry of judgment." Dash v. Mayweather, C/A No. 3:10-1036-JFA, 2010 U.S. Dist. LEXIS 95277, *2 (D.S.C. Sept. 13, 2010) (quoting Exxon Shipping Co. v. Baker, 554 U.S. 471, n.5 (2008)). In other words, "[a] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014); Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995). Nor does "[a] party's mere disagreement with the court's ruling . . . warrant a Rule 59(e) motion." In re Pella Corp. Architect & Designer Series Windows Mktg., Sales Practices & Prods. Liab. Litig., 269 F.Supp. 3d 685, 691 (D.S.C. 2017); *see also* Lyons v. Fid. Nat'l Title Ins. Co., 415 S.C. 115, 135, 781 S.E.2d 126, 137 (Ct. App. 2015).

After consideration of the issues raised in Plaintiff's motion, Plaintiff's Motion to Alter or Amend a Judgment is DENIED.

AND IT IS SO ORDERED.

ELECTRONIC SIGNATURE PAGE TO FOLLOW

Charleston Common Pleas

Case Caption: Kevin Staveley O'Carroll VS Fenix Automotive Llc

Case Number: 2019CP1005392

Type: Order/Amend

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

The South Carolina Court of Appeals

Kevin Staveley-O'Carroll, Appellant,

v.

Fenix Automotive, LLC, Respondent.

Appellate Case No. 2021-001351

ORDER

Respondent has filed a motion to dismiss and remand to the circuit court for consideration of Respondent's Rule 59(e), SCRCP, motion. Respondent's motion is hereby granted and this appeal is dismissed without prejudice. *See Hudson v. Hudson*, 290 S.C. 215, 349 S.E.2d 341 (1986) ("[I]n the event timely post-trial motions are filed under Rule 59, simultaneously with or subsequent to the filing of a Notice of Appeal, the appellant shall notify the Clerk of . . . Court in writing. Upon receipt of such notice, the appeal shall be dismissed without prejudice. Any party can appeal within ten (10) days after the order disposing of the post-trial motions. A second filing fee will not be collected from a party who previously appealed.").

FOR THE COURT

Columbia, South Carolina

FILED
Jan 28 2022

cc:
Warren W. Wills, III, Esquire
Damien Andreas Sobieraj, Esquire

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP1005392

Kevin Staveley O'Carroll
PLAINTIFF(S)

Fenix Automotive Llc
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

On October 14, 2021, Defendant filed a Motion to Alter or Amend the Judgment of this Court entered on October 7, 2021. Upon consideration, it is hereby Ordered Defendant's Motion is DENIED.

ORDER INFORMATION

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

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 12/05/2022 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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

Charleston Common Pleas

Case Caption: Kevin Staveley O'Carroll VS Fenix Automotive Llc

Case Number: 2019CP1005392

Type: Order/Electronic Form 4

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	Case No.: 2019-CP-10-05392
KEVIN STAVELEY-O'CARROLL,	)	
	)	
Plaintiff,	)	ORDER
-vs-	)	OF
	)	JUDGMENT BY DEFAULT
FENIX AUTOMOTIVE, LLC,	)	
	)	
Defendant.	)	
	)	

Plaintiff, having filed his Motion for Entry of Default and Default Judgment against Defendant Fenix Automotive, LLC ("Fenix"), and it appearing that Fenix was served with Summons and Complaint on October 21, 2019, but has since failed to file any type of responsive pleading to Plaintiff's Complaint, and it further appearing that on January 28, 2020, Plaintiff filed his Motion for Entry of Default and Default Judgment against Fenix;

IT IS HEREBY ORDERED AND ADJUDGED that judgment by default be and is hereby entered against Defendant Fenix Automotive, LLC as to liability on each of Plaintiff's causes of action, and it is further Ordered that the matter be set down for a trial / hearing on the issue of damages, including punitive damages, and attorney's fees.

IT IS SO ORDERED in Charleston, South Carolina, this _____ day of _____ 2020.

_____
Circuit Court Judge

Charleston Common Pleas

Case Caption: Kevin Staveley O'Carroll VS Fenix Automotive Llc

Case Number: 2019CP1005392

Type: Order/Judgment by Default and Form 4

So Ordered

s/Jennifer B. McCoy #2764

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	Case No.: 2019-CP-10-05392
KEVIN STAVELEY-O'CARROLL,	)	
	)	
Plaintiff,	)	ORDER
-vs-	)	OF
	)	JUDGMENT FOR DAMAGES
FENIX AUTOMOTIVE, LLC,	)	
	)	
Defendant.	)	
	)	

Plaintiff Kevin Staveley-O'Carroll ("Plaintiff" or "Staveley-O'Carroll") brought this action against Defendant Fenix Automotive, LLC ("Defendant" or "Fenix") on October 21, 2019 alleging causes of action for breach of contract, negligence, conversion, and unjust enrichment. The record reflects that Plaintiff properly served Defendant with a copy of the Summons and Complaint on November 13, 2019. On January 28, 2020, after Defendant failed to file an answer or otherwise respond to the Complaint, Plaintiff filed and Affidavit of Default and Motion for Default Judgment, which the Court granted its Order dated January 29, 2020. Subsequently, Plaintiff filed his Motion for Damages and requested for a damages hearing.

On August 25, 2021, the parties having been duly and properly notified, the Court held a hearing on the issue of damages via WebEx. Present at the damages hearing via video/audio were Plaintiff appearing with his counsel W. Westbrook Wills III, Esq. and Axel Reinert ("Mr. Reinert"), his expert witness in automotive restoration. Damien A. Sobieraj, Esq. appeared on behalf of Defendant. Plaintiff's expert witness was duly qualified, without objection, to give expert testimony as to issues related to the damages in the matter. Plaintiff and Mr. Reinert's testimony was taken, evidence was received, and the entire record in the case was considered by

the Court.[1] The Court makes the following Findings of Fact and Conclusions of Law as required by SCRCP, Rule 52. Any Finding of Fact which is more appropriately characterized as a Conclusion of Law shall be treated as such, and vice-versa.

FINDINGS OF FACT

Based on Defendant's admissions by default of the allegations of Plaintiff's Complaint, and having considered the testimony and evidence presented at the damages hearing, Plaintiff has established the following facts by a preponderance of the evidence, unless otherwise specified.

1. Plaintiff is an individual residing in Columbia, Missouri.

2. Defendant is a South Carolina limited liability company engaged in the business of automotive restoration.

3. The parties are properly subject to the jurisdiction of the Court, and the Court has subject matter over the matters raised in the pleadings.

4. Defendant was properly served with a copy of Plaintiff's Summons and Complaint, which it failed to answer or otherwise respond, resulting in the entry of default judgment against it.

5. In 2015, Plaintiff entered into a contract with Defendant to restore his classic 1969 Mercedes 280 SL ("the Mercedes"), which he delivered into Defendant's possession and care at Defendant's place of business for that purpose.

6. At the time Plaintiff delivered the Mercedes to Defendant, the vehicle was in poor

[1] As Defendant was in default and default judgment having been entered against it, the Court took testimony and received evidence from and on behalf of Plaintiff only, and limited Defendant's participation in the hearing to cross-examination and objecting to evidence by its counsel. See Howard v. Holiday, Inc. 271 S.C. 238, 246 S.E.2d 880 (1978)(limiting a defendant's participation in a post-default hearing to cross-examination and objection to plaintiff's evidence); see also Limehouse v. Hulsey, 404 S.C. 93, 116, S.E.2d 566, 579 (S.C. 2013)(reaffirming Howard).

condition and had a value of between $20,000 and $25,000, based on the testimony of Mr. Reinert, Mr. Reinart testified that (i) he based his opinion regarding the value of the Mercedes on his observation of the Mercedes only after Defendant had disassembled the Mercedes and had already performed work on the vehicle, (ii) he did not personally observe the condition of the Mercedes when Plaintiff delivered the vehicle to Defendant, (iii) he did not review any photographs showing the condition of the Mercedes prior to Defendant disassembling the Mercedes and beginning work on the vehicle. Furthermore, Mr. Reinert did not identify any industry resources used by him to assist him with his valuation of the Mercedes as delivered to Defendant.

7. Plaintiff and Defendant agreed Defendant would restore the Mercedes to a "daily driver" condition, and that Defendant would provide Plaintiff a detailed estimate of the total cost and time required to perform the restoration project after completely disassembling the Mercedes. Defendant informed Plaintiff in their conversations and emails that the total cost to restore the Mercedes may increase as the project progressed and Defendant determined what original parts could be reused versus rebuilt or replaced.

8. Between September of 2015 and March of 2016, Defendant performed initial work on the Mercedes including completely disassembling it and preparing the body for anticipated metalwork and submitted invoices to Plaintiff for such work totaling $5,825.00, which Plaintiff paid in full.

9. 22 months later, in December of 2017, Defendant provided Plaintiff a detailed estimate for the remainder of the restoration of the Mercedes, which it represented would cost approximately $60,000, and would take approximately six months.

10. To keep the total cost of the remainder of the restoration process as close to the $60,000

estimate as possible, Plaintiff and Defendant specifically agreed that, wherever possible, Defendant would make use of the Mercedes's existing parts and components.

11. At Defendant's request, Plaintiff provided it a $20,000 deposit, which Defendant specifically represented it would maintain, in trust, in a separate account, and against which it would bill for restoration work on the Mercedes going forward. Defendant also represented to Plaintiff that any unused portion of the $20,000 would be returned to Plaintiff upon his request.

12. The evidence and testimony before the Court demonstrates, and the Court finds, that after Plaintiff provided the $20,000 deposit, Defendant failed to complete the restoration of the Mercedes, as agreed, and it remains to this day in an unrestored and completely disassembled state, in Defendant's possession.

13. Moreover, the evidence, testimony, and Defendant's admissions establish that after disassembling the Mercedes, Defendant stored a great many of its parts and components outdoors on the ground or in plastic bins, exposed to the elements and weather, where they have remained since April 2019.

14. From the photographs submitted in evidence and personal observation, Mr. Reinert identified many of the parts and components of the Mercedes, including the vehicle's motor, windshield, suspension, drivetrain, exterior finishes and chrome, and an array of interior components, which he testified were in a severe degradation condition or ruined as a direct result of Defendant leaving them outdoors in the weather over a a few years, but Mr. Reinart also conceded he did not have firsthand knowledge of the condition of these parts when the Plaintiff delivered the Mercedes to Defendant Mr. Reinert further testified that, if many of those parts and components were in good condition when the Mercedes was delivered to Defendant, then these parts could have been reused in the restoration of the Mercedes. However, due to their present

condition, Mr. Reinert opined many of those parts and components may no longer be usable for the restoration project, or may now require very extensive refurbishment.

15. Mr. Reinert testified that, based on Plaintiff and Defendant's agreement, the total actual cost of the restoration of the Mercedes at the time of the parties' original agreement would reasonably have been between $60,000 and $70,000 dollars. However, Mr. Reinert believed that because of the degradation to many of the parts of the Mercedes due to Defendant failure to properly protect them from damage, the current cost to restore the vehicle is likely to be double that figure.

16. Plaintiff alleged, Mr. Reinert testified, and the Court finds, that Defendant knew or should have known that storing the subject parts and components of Plaintiff's Mercedes outdoors, exposed to the elements over a period of years could result in their degradation or ruination. Mr. Reinert testified that by doing so, Defendant deviated from the standards of care, professionalism, and best practices for businesses in the automotive restoration industry.

17. Based on the uncontroverted testimony of Mr. Reinert, the Court finds the Mercedes would have had a value of between $42,000 and $120,000 had Defendant restored it as agreed in its contract with Plaintiff. Instead, in its present condition and state, the Mercedes currently has a value of $10,000.

18. In September of 2019, as Defendant had still failed to complete the restoration of the Mercedes, Plaintiff made a demand on Defendant for the return of his $20,000 deposit, which Defendant also failed to return to him.

CONCLUSIONS OF LAW

Plaintiff filed his action against Defendant alleging causes of action for breach of contract, negligence, conversion, and unjust enrichment for which he has prayed for actual,

consequential, special, and punitive damages as proven at trial, together with attorney's fees and costs of the action. The Defendant failed to answer or otherwise respond to Plaintiff's Complaint, and default judgment was entered against it.

A defendant in default admits liability but not the damages as set forth in the prayer for relief. Solley v. Navy Fed. Credit Union, Inc., 397 S.C. 192, 203 723 S.E.2d 597, 603 (S.C. App. 2012); see also Renney v. Dobbs House, Inc., 275 S.C. 562, 566, 274 S.E.2d 290, 292 (1981). The amount of damages in a default action must be proved by the preponderance of the evidence. Id.; see Jackson v. Midlands Human Res. Ctr., 296 S.C. 526, 529, 374 S.E.2d 505, 507 (Ct. App.1988) ("A judgment for money damages must be warranted by the proof of the party in whose favor it is rendered."). As to punitive or exemplary damages, the Plaintiff has the burden of proving by clear and convincing evidence the Defendant's demonstrated misconduct was willful, wanton, or with reckless disregard for the Plaintiff's rights. See Mishoe v. Qhg of Lake City, Inc., 621 S.E.2d 363, 366, 366 S.C. 195 (S.C. 2005). "A conscious failure to exercise due care constitutes willfulness." Id.

Based on the pleadings, admissions, and the uncontroverted evidence and testimony presented by Plaintiff and his expert witness at the damages hearing, the Court finds and concludes as follows:

Breach of Contract

Plaintiff and Defendant entered into a valid contract for the restoration of Plaintiff's Mercedes, supported by consideration, and creating rights and obligations between the parties, under which Defendant agreed to restore the vehicle to a "daily driver" condition, and Plaintiff agreed to pay Defendant for parts and labor associated with the restoration. Pursuant to the parties' contract, Defendant invoiced Plaintiff for the initial restoration work it performed in the

amounts totaling $5,825.00, which Plaintiff paid in full. Thereafter, Plaintiff provided Defendant a $20,000 deposit towards the remainder of the vehicle restoration, which Defendant was to hold in a separate account, as agreed, however, Defendant did complete the restoration of the Mercedes. Furthermore, after Plaintiff discovered Defendant had not performed its obligations, as promised, and demanded the return of his $20,000 deposit, as agreed, Defendant failed to deliver it. The Court finds Defendant has breached its contract with Plaintiff entitling Plaintiff to contract damages.

Damages in a breach of contract action are to put the non-breaching party in the position he or she would have been in had the breach not occurred and the contract were performed. See Minter v. GOCT, Inc., 322 S.C. 525, 473 S.E.2d 67(Ct. App. 1996)(purpose of damages for breach of contract is to put plaintiff in as good a position as he or she would have been if the contract had been performed). Compensation for lost profits or value is recoverable as damage in a breach of contract action where the estimate of such lost profit or value is not based wholly on speculation and conjecture. Charles v. Texas Co., 199 S.C. 156, 18 S.E.2d 719 (1942); South Carolina Federal Savings Bank v. Thorton-Crosby Development Co., 303 S.C. 74, 399 S.E.2d 8 (Ct. App. 1990); Global Protection Corp. v Halbersberg, 332 S.C. 149, 503 S.E.2d 483 (1998)(absolute certainty of data on which lost profits are estimated not required; must be such reasonable certainty that damages are not based wholly on speculation and conjecture and certain standard or fixed method by which profits or value may be estimated and determined with a fair degree of accuracy is sufficient).

The proper measure of damages for breach of contract is the loss actually suffered by the contractee as the result of the breach. Tomlinson v. Mixon, 626 S.E.2d 43, 50, 367 S.C. 467 (S.C. App. 2006); South Carolina Fin. Corp. v. West Side Fin. Co., 236 S.C. 109, 113 S.E.2d 329

(1960). "In the normal case, the damage will consist of two distinct elements: (1) out-of-pocket costs actually incurred as a result of the contract; and (2) the gain above costs that would have been realized had the contract been performed." Id; Collins Entm't., Inc. v. White, 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005).

Here, therefore, as damages for Defendant's breach of contract, Plaintiff is entitled to the difference between the fair market value of the Mercedes as restored to the agreed upon condition and its present value, minus the difference between the cost of the restoration work and the amount the Plaintiff already paid toward that cost. According to the uncontroverted testimony of Mr. Reinert, the fair market value for the Mercedes as restored to the agreed "daily driver" condition would have been between $42,000 and $120,000, the average of which amounts to $81,000. Mr. Reinert did not identify any industry resources from which he used information to formulate his estimated fair market value of the Mercedes, relying upon general internet searches for sales listings of similar Mercedes. He further testified that based on the parties agreement at the time of its making, the reasonable cost of the labor and parts would have been between $60,000 and $70,000 dollars, the average of which amounts to $65,000. Plaintiff also paid Defendant a total of $25,825 towards the total cost of the restoration. Plaintiff's actual damage resulting from Defendant's breach of contract can, therefore, be expressed as ($81,000 - $2,500) – ($65,000 - $25,825) and totals $39,325.

Under the foregoing measure, Plaintiff is also entitled to the return of the vehicle in its present state. Mr. Reinert testified that shipping of the vehicle in its present disassembled state to a Charleston location will cost a fee of $525 which includes tarping, and two hours of loading and unloading, plus $100 dollars per hour for additional time. Mr. Reinert testified that in his opinion, loading and unloading the Mercedes in its disassembled condition would likely take

several hours. The Court finds Plaintiff is entitled to consequential damages associated with shipping the Mercedes to another location in Charleston in the amount of $1,125.

Plaintiff is entitled to actual and consequential damages as a result of Defendant's breach of contract in the total amount of $40,450, including the cost to return the vehicle, plus the costs and expenses of the action.

Negligence

Plaintiff's contract with Defendant for the restoration of the Mercedes and his delivery of the vehicle to Defendant for that purpose created a bailment. "A bailment is created by the delivery of personal property by one person to another in trust for a specific purpose, pursuant to an express or implied contract to fulfill that trust." Hadfield v. Gilchrist, 538 S.E.2d 268, 343 S.C. 88, 95 (S.C. App. 2000); Home Indent Co. v. Harleysville Mut. Ins. Co., 252 S.C. 452, 460, 166 S.E.2d 819, 824 (1969)("Bailment has been defined as the delivery of a chattel for some express or particular purpose upon a contract, express or implied, that, after the purpose has been fulfilled, then the chattel shall be redelivered to the bailor, or otherwise dealt with according to his directions.").

The bailment contract between Plaintiff and Defendant created a duty in Defendant to exercise due care in safekeeping of Plaintiff's Mercedes, see Harris v. Burnside, 261 S.C. 190, 199 S.E. 2d 65, 67-8 (1973)(citing Fortner v. Carnes, 258 S.C. 455, 189 S.E.2d 24), and in its repair, see id. (citing Edwards v. Charleston Sheet Metal, 253 S.C. 537, 172 S.E.2d 120). Breach of the duty of care arising under a bailment contract constitutes a tort. Id. at 195, 68.

In action involving a bailment alleging the tort of negligence, the bailor is entitled to be compensated for all losses that are the natural consequence and proximate result of the bailee's negligence. Dixon v. Besco Engineering, Inc., 320 S.C. 174, 180, 463 S.E.2d 636 (S.C. App.

1995)(citing 8 Am.Jur.2d Bailments § 346 (1980)). Damages are proximately caused if they are the foreseeable result of the defendant's tortious act. Id. (citing Young v. Tide Craft, Inc., 270 S.C. 453, 242 S.E.2d 671 (1978)). Further, the liability of a bailee under a bailment for mutual benefit, as we have here, arises upon a showing that (1) the goods were delivered to the bailee in good condition, (2) they were lost or returned in a damaged condition, and (3) the loss or damage to the goods was due to the failure of the bailee to exercise ordinary care in the safekeeping of the property. Hadfield v. Gilchrest, 343 S.C. 88 at 99. Importantly, the burden is on the bailee, and not on the bailor, to demonstrate the bailee used ordinary care in storing and safekeeping the property. Id.

Punitive damages are recoverable for negligence, which is so reckless of consequences as to imply or to assume the nature of wantonness, willfulness or recklessness. Solanki v. Wal-Mart Store # 2806, 410 S.C. 229, 237, 763 S.E.2d 615 (S.C. App. 2014)(referencing Bell v. Atl. Coast Line R. Co., 202 S.C. 160, 171, 24 S.E.2d 177, 182 (1943)). "If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care." Berberich v. Jack, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011).

In the present action, pursuant to the parties' agreement, Plaintiff delivered his Mercedes into the Defendant's possession which created a bailment for mutual benefit. As such, Defendant (bailee) owed Plaintiff (bailor) a duty of care both in the safekeeping and in the repair of Plaintiff's vehicle. Based on the admitted allegations in Plaintiff's Complaint and the evidence and testimony of Plaintiff and Mr. Reinert at the damages hearing, the Court finds the Defendant failed to exercise due care in restoring the Plaintiff's vehicle and in safekeeping its parts and components by storing many of them outdoors in such a manner as to allow them to be

directly exposed to the weather over a period of a few years. Such failure to exercise due care by Defendant proximately resulted in the severe degradation or ruination of some parts and components of Plaintiff's Mercedes, which not only reduced its value from the time Plaintiff delivered it to the Defendant, but also may have doubled the cost to restore the vehicle to the "daily driver" condition.

Furthermore, based on the testimony of the Plaintiff and Mr. Reinert and the photographic evidence entered into the record, the Court finds by a standard of clear and convincing evidence, that Defendant knew or should have know that storing the parts and components of Plaintiff's Mercedes on the outdoors on the ground or in bins and exposed to the weather and elements over a period of a few years would result in the very damage that was ultimately occasioned by such failure to exercise even slight care in safeguarding them. Mr. Reinert testified that Defendant's actions constituted an absolute departure from industry standards and best practices, that Defendant or it's agents or employees were conscious of such departure and the damage that would result, and that such acts or omissions amounted to a reckless disregard for Plaintiff's property. The Court finds such damages were foreseeable and avoidable by Defendant.

As stated above, based on the evidence and testimony, at the time Plaintiff delivered the Mercedes to Defendant, the vehicle had a value of between $20,000 and $25,000, the average of which amounts to $22,500. Presently the vehicle is worth $10,000. The damage occasioned to the Mercedes by the negligence of the Defendant has reduced its value by $12,500, and Defendant is liable to Plaintiff in that amount.

While Plaintiff has requested punitive damages, "to ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review..." Gamble v. Stevenson, 305 S.C. 104,

112, 406 S.E.2d 350, 354 (S.C. 1991). The Court when conducting such a review may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) other factors deemed appropriate. *Id.* at 112. After conducting such review, this Court has found no evidence of (i) an excessive duration of conduct, (ii) concealment by Defendant, (iii) the existence of similar past conduct, or (iv) that Defendant has any ability to pay such an award, and this Court declines to award any punitive damages under Plaintiff's negligence cause of action.

Under the theory of negligence, Defendant is liable to Plaintiff for the return of the Mercedes and for compensatory damages in the amount of $13,625, including the cost of transport, , plus the costs and expenses of the action.

Conversion

Plaintiff's claim of conversion relates the $20,000 deposit Plaintiff provided Defendant, and that Defendant failed to return upon Plaintiff's demand, as agreed.

Conversion is the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights." Green v. Waidner, 284 S.C. 35, 324 S.E.2d 331 (S.C. App., 1984); Powell v. A.K. Brown Motor Co., 200 S.C. 75, 78, 20 S.E.2d 636, 637 (1942). Money may be the subject of conversion, when it is capable of being identified, and there may be conversion of determinate sums even though the specific coin and bills are not identified. See Owens v. Andrews Bank & Trust Co., 220 S.E.2d 116, 265 S.C. 490, 497 (S.C. 1975); 89 C.J.S. Trover and Conversion § 23, p. 541 (1955).

The measure of actual damages in an action for conversion of personal property is the value of the property with interest thereon from the date of conversion to the date of trial. Id.; Long v. Gibbs Auto Wrecking Company, 253 S.C. 370, 171 S.E.2d 155 (1969), Mims v. Bennett, 160 S.C. 39, 158 S.E. 124 (1931).

The measure of damages for a willful and intentional conversion, where the property is converted with knowledge of the owner's rights in the property, is the highest market value of the property with interest up to the time of trial, including any additional value due to additions or improvements made by the converter. See Green, 284 S.C. 35, 324 S.E.2d 331; Industrial Welding Supplies, Inc. v. Atlas Vending Co., 276 S.C. 196, 277 S.E.2d 885 (1981); Gregg v. Bank of Columbia, 72 S.C. 458, 52 S.E. 195 (1905); Restatement (Second) of Torts Section 927 (1981); 1 Am.Jur.2d Accession and Confusion Section 29 (1962). Punitive damages are permitted in a conversion claim where the evidence shows the conversion was done recklessly and with conscious indifference to the owner's rights. Long v. Gibbs Auto Wrecking Co., 253 S.C. 370, 171 S.E.2d 155 (1969); Lumpkin v. Allstate Insurance Co., 251 S.C. 19, 159 S.E.2d 852 (1968).

In the present case, based on the admitted allegations of the pleadings and the testimony and evidence presented to the Court, the Plaintiff, after paying for the totality of the restoration work performed on his Mercedes to a certain point, provided Defendant a $20,000 deposit in advance of the remainder of the work. Defendant was to maintain the $20,000, in trust, a separate account to bill against for restoration work going forward, and of which any unused portion would be refundable to Plaintiff on demand. Thereafter, Defendant failed to complete the restoration of Plaintiff's vehicle. When Plaintiff discovered that fact some 20 months later and demanded the return of his deposit money, Defendant did not return it to him, and has still

not returned it. Defendant has knowingly, consciously, and willfully deprived Plaintiff of possession and ownership of a determinant sum of money, and is liable to Plaintiff for conversion of his deposit money in the amount of $20,000, plus interest at the legal rate since Plaintiff demand on September 11, 2019 for its return in the amount of $3,095 totaling $23,095.

Under his conversion action, Plaintiff has again requested punitive damages, "to ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review..." Gamble v. Stevenson, 305 S.C. 104, 112, 406 S.E.2d 350, 354 (S.C. 1991). The Court when conducting such a review may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) other factors deemed appropriate. *Id.* at 112. After conducting such review, this Court has found no evidence of (i) an excessive duration of conduct, (ii) concealment by Defendant, (iii) the existence of similar past conduct, or (iv) that Defendant has any ability to pay such an award, and the Court declines to award any punitive damages under Plaintiff's conversion cause of action.

Under a theory of conversion, Defendant is liable to Plaintiff for actual in the amount of $23,095, plus costs and expenses of the action.

Costs of Action

Based on the record, including the attorney's fee and expenses affidavit filed in the case by his attorney, Plaintiff has been caused to incur costs and expenses associated with bringing and prosecuting the action in the amount of $1,694, which includes the fee of $1,000 charged by his expert witness for his services, as attested to by Mr. Reinert during the damages hearing.

Plaintiff is entitled to recover from Defendant his costs and expenses in the total amount of $1,694.

Attorney's Fees

Plaintiff also requested an award of attorney's fees. "Attorney's fees are not recoverable unless authorized by contract or statute." Jackson v. Speed, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997). Plaintiff and Defendant did not agree to the recovery of attorney's fees in any contract, and Plaintiff has not cited any statute by which this Court may award him attorney's fees. Consequently, the Court denies Plaintiff's request for an award of attorney's fees.

Summary of Judgment

The Court finds Defendant is liable to Plaintiff, as described above, on Plaintiff's causes of action for breach of contract, negligence, and conversion. Because the Court is awarding Plaintiff contract damages on the basis of a valid contract between the parties, the Court has not considered Plaintiff's unjust enrichment claim. See Gantt v. Morgan, 199 S.C. 138, 18 S.E.2d 672 (1942)(Relief under a theory of unjust enrichment is not available if an action is based on the existence of a contract).

Plaintiff is not permitted a double recovery for a single wrong. To prevent that outcome, Plaintiff is required to elect his remedies. See Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (S.C. 1996) (citing Thompson v. Watts, 281 S.C. 504, 316 S.E.2d 393 (1984)(The purpose of election of remedies is to prevent a double recovery for a single wrong.)). However, an election of remedies is not applicable where remedies are addressed to different wrongs, requiring different or additional elements and standards of proof. See Thompson v. Watts, 316 S.E.2d 393, 281 S.C. 504 (S.C. 1984)(citing Tzouvelekas v. Tzouvelekas, 206 S.C. 90, 33 S.E.2d 73, 74

(1945)(Election of remedies is the act of choosing between different remedies allowed by law on the same state of facts.)).

Based on Defendant's liability to Plaintiff on his causes of action for breach of contract, negligence, and conversion, as set out above, and applying the doctrine of election of remedies, the Court finds judgment for the Plaintiff is appropriate in the following amounts:

a) for breach of contract in the amount of $40,450;

b) for negligence in the amount of $21,125, reduced by $40,450 for a total of $0;

c) for conversion in the amount of $23,095;

d) for the return of the Mercedes to Plaintiff; and

e) for Plaintiffs costs and expenses in the amount of $1,694.

IT IS HEREBY ORDERED AND ADJUDGED that judgment against Defendant be and is hereby entered in favor of Plaintiff in the total amount of **$65,239**. Defendant is also hereby ordered to prepare the Mercedes and its parts and components is such a manner that within 30 days of this Order becoming final, they may be available for pick-up and transport to a location in Charleston, South Carolina to be designated by Plaintiff.

IT IS SO ORDERED in Charleston, South Carolina, this _____ day of September 2021.

_____
Hon. Roger M. Young
Circuit Court Judge

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP10-05392

KEVIN STAVELEY-O'CARROLL
PLAINTIFF(S)

FEXNIX AUTOMOTIVE, LLC
DEFENDANT(S)

Submitted by: Damien A. Sobieraj	**Attorney for :** ☐ Plaintiff ☒ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
KEVIN STAVELEY-O'CARROLL	FENIX AUTOMOTIVE, LLC	$65,239.00
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge **Judge Code** **Date**

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

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

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Charleston Common Pleas

Case Caption: Kevin Staveley O'Carroll VS Fenix Automotive Llc

Case Number: 2019CP1005392

Type: Order/Damages

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	Case No.: _____
KEVIN STAVELEY-O'CARROLL,	)	
	)	
Plaintiff,	)	SUMMONS
-vs-	)	
	)	
FENIX AUTOMOTIVE, LLC,	)	(Jury Trial Demanded)
	)	
Defendant.	)	
	)	

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

LAW OFFICE OF
W. WESTBROOK WILLS III

/s/ W.Westbrook Wills III
W. Westbrook Wills III
S.C. Bar # 76681
P.O. Box 822
Folly Beach, SC 29439
(843) 805-6300 (tel)
wwills@wwillslaw.com

Folly Beach, South Carolina
October 21, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	Case No.: _____
KEVIN STAVELEY-O'CARROLL,	)	
	)	
Plaintiff,	)	COMPLAINT
-vs-	)	
	)	
FENIX AUTOMOTIVE, LLC,	)	(Jury Trial Demanded)
	)	
Defendant.	)	
	)	

COMES NOW, Kevin Staveley-O'Carroll, and hereby states his claims for damages and other relief against Defendant Fenix Automotive, LLC, showing this Court as follows:

PARTIES, VENUE, AND JURISDICTION

1. Plaintiff Kevin Staveley-O'Carroll ("Plaintiff or "Staveley-O'Carroll) is a resident of Columbia, Boone County, Missouri.

2. Defendant Fenix Automotive, LLC ("Fenix") is a South Carolina limited liability company organized and operating under the laws of the State of South Carolina, and having a principal place of business located at 2470 Air Park Road, Charleston, Charleston County, South Carolina 29406. Fenix may be served with process through its registered agent for the service of process, Michael D. Fitzgerald at 704 Clearview Drive, Charleston, Charleston County, South Carolina 29412. Fenix is engaged in the business of automobile restoration and customization.

3. The acts or omissions giving rise to the allegations in this Complaint took place in Charleston County, South Carolina.

4. Jurisdiction is proper in this Court. Venue is proper in this Court.

FACTUAL ALLEGATIONS

5. In summer of 2015, Plaintiff came into possession and ownership of a 1969 Mercedes

280SL (the "Mercedes") in South Carolina, which he desired to have restored to its original condition.

6. Plaintiff had the Mercedes delivered to Fenix's previous shop location at 1947 Belgrade Avenue in Charleston for an evaluation and to obtain an estimate for the restoration project.[1]

7. Fenix's owner, Michael Fitzgerald ("Fitzgerald"), affirmatively represented to Plaintiff that Fenix was capable effecting the restorations to the Mercedes, and discussed a plan for the restoration project, including a general overview of the restoration process. Fitzgerald indicated that Fenix could not provide an exact quote for the cost of restoring the Mercedes because it would not know the scope of the work to be performed and the parts to be replaced until it was able to fully disassemble the vehicle.

8. In August of 2015, Plaintiff contracted with Fenix for Fenix to repair and restore the Mercedes.

9. In an effort to reduce the overall cost of the project, Plaintiff and Fenix agreed that, whenever possible, Fenix would endeavor to restore and reuse the existing part of the Mercedes.

10. Between September 1, 2015 and October 15, 2015, Fenix performed the initial steps of the restoration process to the Mercedes, which included, without limitation, its complete disassembly, removal and cataloguing of all parts and hardware, and preparation of the empty shell of the vehicle for media blasting.

11. On October 26, 2015, Fenix invoiced Plaintiff for the restoration work referenced in paragraph 10 in the amount of $3,225.00, which Plaintiff paid in full.

12. Thereafter, on March 14, 2016, Fenix invoiced Plaintiff in the amount of $2,600.00 for further bodywork on the Mercedes, including, without limitation, fabrication and installation of metal rotisserie mounts, removal of body rust, media blasting the entire body of the vehicle, and

integral application of anti-rust compound, which Plaintiff paid in full.

13. On or about December 3, 2017, Fitzgerald sent Plaintiff a detailed assessment of the condition of the Mercedes, and the work and parts necessary to complete each aspect of the restoration, including, without limitation, the body, paint, suspension and breaks, tires and wheels, interior, convertible top, glass, chrome and brightwork, transmission and drive, engine and mechanical, and a plan of action for the remainder of the restoration project. *A copy of Fitzgerald's e-mail estimate to Plaintiff is attached hereto as EXHIBIT "A."*

14. Fitzgerald also indicated in the December 9, 2017 e-mail that it would be necessary for Plaintiff to provide Fenix a deposit for the remainder of the restoration project, against which Fenix would bill for parts and labor as the work progressed.

15. On December 12, 2017, Fenix sent Plaintiff an e-mail and invoice requesting a $20,000 deposit, and in which Fenix represented to Plaintiff, *inter alia,* 1) that it would keep a running daily ledger of costs and e-mail it to Plaintiff every two weeks for review, 2) that it would refund any unused portion of his deposit upon demand, and 3) that it estimated completing the restoration project within six months. *A true and accurate copy of the December 12, 2017 e-mail and deposit request is attached hereto as EXHIBIT "B."*

16. On or about December 12, 2017, Plaintiff provided Fenix a $20,000 deposit, and specifically indicated he wished to go forward with the restoration project on the Mercedes.

17. Plaintiff understood Fenix's representations as becoming part and parcel to the parties' agreement.

18. Despite its estimate of six months for completing the repairs and restoration, in the sixteen months following its receipt of Plaintiff's deposit, Fenix performed no further work whatsoever on the Mercedes.

[1] At the time Plaintiff delivered the Mercedes to Fenix, the vehicle was in running condition.

19. Further, in that time, Fenix failed to provide Plaintiff any bi-weekly progress updates or ledgers of costs, as promised.

20. On April 9, 2019, Fenix provided Plaintiff a written letter of commitment in which it acknowledged the slow progress of the restoration of the Mercedes, and committed to fully completing the project and delivering the vehicle to Plaintiff by September 1, 2019. Further, Fenix made a new commitment to provide Plaintiff with weekly updates of the progress of the restoration each Sunday until its completion. *A true and accurate copy of Fenix's April 9, 2019 letter of commitment is attached hereto as EXHIBIT "C."*

21. Plaintiff understood the representations in Fenix's April 9, 2019 letter of commitment as constituting revised terms of the parties' agreement.

22. Thereafter, Fenix failed to provide Plaintiff any weekly progress updates, as promised.

23. As of the date of filing this action, Fenix has failed to complete any further work on Plaintiff's Mercedes.

24. Upon information and belief, the body and mechanical components of Plaintiff's Mercedes remain, to this day, in an entirely disassembled state, and are stored in various bins at Defendant's place of business.

25. Further, when Fenix failed to complete the repairs and restoration to the Mercedes by September 1, 2019, as agreed, Plaintiff, through his counsel, demanded the return of his $20,000 deposit, which Fenix has since failed and refused to refund.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

26. Plaintiffs re-allege and incorporate the allegations of paragraphs 1-25 of the Complaint as if fully set forth herein.

27. Plaintiff and Fenix reached, entered into, and modified an agreement, memorialized in

one or more writings, for Fenix to repair and restore Plaintiff's Mercedes to an operable, if not original, condition.

28. Plaintiff fully performed under the parties agreement by paying in full Fenix's invoices for parts and labor associated with the repairs and restoration of his vehicle, and after, by providing Fenix a $20,000 deposit for further and remaining restoration work.

29. Fenix breached the parties' contract in the following particulars, including without limitation:

a. by failing to provide Plaintiff weekly updates of the progress of the restoration work;

b. by failing to complete the repairs and restoration to the Mercedes and deliver it to Plaintiff by September 1, 2019, as promised;

c. by failing to complete the repairs and restoration at all;

d. by failing and refusing to refund Plaintiff's $20,000 deposit upon Plaintiff's demand; and

e. by failing to perform the repairs and restoration to the Mercedes in a diligent and workmanlike manner.

30. As a direct and proximate result of Fenix's breach of the parties' contract, Plaintiff has been damaged and is entitled to a judgment against Fenix for actual, consequential, and special damages, in an amount to be determined at trial.

FOR A SECOND CAUSE OF ACTION
(Negligence)

31. Plaintiffs re-allege and incorporate the allegations of paragraphs 1-30 of the Complaint as if fully set forth herein.

32. Fenix owed Plaintiff a duty of care, while in possession of Plaintiff's Mercedes, to

ensure the vehicle, and in this case, its component parts were properly stored and protected from damage and loss.

33. Fenix breached its duty of care to Plaintiff by storing the component parts of the Mercedes outdoors in such a manner as to allow them to become damaged and degrade through exposure to the elements over the course of several years.

34. As a proximate result of Fenix's negligence, some or all of the component parts of the Mercedes have been destroyed, rendered useless, or will otherwise require replacement or refurbishment.

35. As a proximate result of Fenix's negligence, Plaintiff has been damaged and is entitled to a judgment for actual, consequential, and special damages in an amount to be demonstrated at trial.

FOR A THIRD CAUSE OF ACTION
(Conversion)

36. Plaintiff re-alleges and incorporates the allegations of paragraphs 1-35 of the Complaint as if fully set forth herein.

37. Plaintiff provided Fenix a deposit of $20,000 in advance for repair and restoration work to his Mercedes that Fenix never completed.

38. Pursuant to the parties agreement, Plaintiff has demanded a refund of the $20,000 deposit he provided Fenix. However, Fenix has failed and refused to return Plaintiff's money.

39. Upon information and belief, Fenix has wrongfully and intentionally converted Plaintiff's deposit to its own use.

40. Fenix's withholding of Plaintiff's deposit has been without Plaintiff's permission or agreement.

41. Fenix's conversion of Plaintiff's deposit was intentional, reckless, and with absolute

disregard for Plaintiff's rights.

42. Plaintiff is entitled to a judgment on his conversion cause of action in an amount not less than $20,000 together with attorney's fees and other costs of the action, punitive damages, and interest on the amount at the legal rate.

FOR A FOURTH CAUSE OF ACTION
(Unjust Enrichment)

43. Plaintiff re-alleges and incorporates the allegations of paragraphs 1- 42 of the Complaint as if fully set forth herein.

44. Plaintiff paid Fenix for parts and labor Fenix invoiced for the initial phase of the restoration of Plaintiff's Mercedes, and thereafter provided a $20,000 deposit towards the remaining work.

45. Fenix failed to complete the restoration work on the Mercedes for which Plaintiff paid the deposit.

46. Fenix, nevertheless, retained and/or unlawfully, intentionally, and deceitfully converted, or otherwise diverted money Plaintiff deposited with it, and retained the benefit of such deposit for itself.

47. Under the circumstances, it would be unjust for Fenix to retain Plaintiff's deposit.

48. Plaintiff is entitled to a judgment in the amount of the deposit, plus pre-judgment interest at the legal rate.

WHEREFORE, having fully set forth his Complaint, Plaintiff prays for the following relief:

a. actual, consequential, and special damages against in an amount to be proven at trial;

b. pre-judgment interest as provided by law;

c. punitive damages;

d. attorney's fees and costs of the action;

e. judgment in favor of Plaintiff for unjust enrichment;

f. a trial by jury; and

g. for any and all such other relief as this Court deems just and proper.

Respectfully submitted,

THE LAW OFFICE OF
W. WESTBROOK WILLS III

/s/ W. Estbrook Wills III
W. Westbrook Wills III
S.C. Bar No.: 76681
P.O. Box 822
Folly Beach, SC 29439
(843)-805-6300
wwills@wwillslaw.com
ATTORNEY FOR PLAINTIFF

This 21st day of October 2019
FOLLY BEACH, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	Case No.: 2019-CP-10-05392
KEVIN STAVELEY-O'CARROLL,	)	
	)	
Plaintiff,	)	MEMORANDUM OF LAW
-vs-	)	IN SUPPORT OF DAMAGES
	)	
FENIX AUTOMOTIVE, LLC,	)	
	)	
Defendant.	)	
	)	

COMES NOW, Plaintiff Kevin Staveley-O'Carroll ("Plaintiff" or "Staveley-O'Carroll") and hereby submits his Memorandum of Law in Support of Damages showing this Court as follows:

INTRODUCTION

In 2015, Plaintiff entered into a contract with Fenix Automotive, LLC ("Defendant") to restore a classic 1969 Mercedes 280 SL ("the Mercedes"), which he had inherited from his mother. Plaintiff delivered the Mercedes into Defendant's possession and care and paid Defendant a $20,000 deposit to cover the initial phases of the restoration.[1] After completely disassembling the Mercedes down to its bare shell, Defendant failed to either completed the restoration work or to reassemble the vehicle. Moreover, during the four years Defendant was in possession of Plaintiff's Mercedes, it negligently stored the parts it removed in piles and bins outdoors, exposed to the elements, resulting in their total loss. In October of 2019, Plaintiff filed his action against Defendant alleging causes of action for breach of contract, negligence, conversion, and unjust enrichment against Defendant. After being properly served with Summons and Complaint,

[1] At the time Plaintiff delivered the Mercedes to Defendant for restoration, the Mercedes was not in running order, but was otherwise in fair condition.

Defendant failed to answer or otherwise respond to Plaintiff's Complaint. Thereafter, on January 28, 2020, Plaintiff moved for entry of default and for default judgment against Defendant, which this Court granted by its Order of Default Judgment (dated January 28, 2020, filed January 21, 2020).

The issue of Plaintiff's damages is the matter now before the Court. The Plaintiff intends to present evidence and testimony, including expert testimony, in support of his claim for damages in function of the above-stated causes of action alleged in his Complaint.

DISCUSION

I. Proof of Damages Against a Defendant in Default.

A defendant in default admits liability but not the damages as set forth in the prayer for relief. Solley v. Navy Fed. Credit Union, Inc., 397 S.C. 192, 203 723 S.E.2d 597, 603 (S.C. App. 2012); see also Renney v. Dobbs House, Inc., 275 S.C. 562, 566, 274 S.E.2d 290, 292 (1981). The amount of damages in a default action must be proved by the preponderance of the evidence. Id.; see Jackson v. Midlands Human Res. Ctr., 296 S.C. 526, 529, 374 S.E.2d 505, 507 (Ct. App.1988) ("A judgment for money damages must be warranted by the proof of the party in whose favor it is rendered.").

"At the damages hearing, the defendant may only participate by cross-examining witnesses and objecting to evidence." Solley v. Navy Fed. Credit Union, Inc., 397 S.C. 192, 203-4, 723 S.E.2d 597, 603 (S.C. App. 2012)(citing Howard v. Holiday, Inc. 271 S.C. 238, 242, 246 S.E.2d 880, 882 (1978); see also Limehouse v. Hulsey, 404 S.C. 93, 116, S.E.2d 566, 579 (S.C. 2013)(reaffirming Howard limiting a defendant's participation in a post-default hearing to cross-examination and objection to plaintiff's evidence.).

II. Measure of Damages

Plaintiff alleged causes of action against the Defendant for breach of contract, negligence, unjust enrichment, and conversion. Plaintiff provides the following discussion of damages related to breach of contract, negligence (bailment), and conversion.

a. Breach of Contract

Damages in a breach of contract action are to put the nonbreaching party in the position he or she would have been in had the breach not occurred and the contract were performed. See Minter v. GOCT, Inc., 322 S.C. 525, 473 S.E.2d 67(Ct. App. 1996)(purpose of damages for breach of contract is to put plaintiff in as good a position as he or she would have been if the contract had been performed). Compensation for lost profits or value is recoverable as damage in a breach of contract action where the estimate of such lost profit or value is not based wholly on speculation and conjecture. Charles v. Texas Co., 199 S.C. 156, 18 S.E.2d 719 (1942); South Carolina Federal Savings Bank v. Thorton-Crosby Development Co., 303 S.C. 74, 399 S.E.2d 8 (Ct. App. 1990); Global Protection Corp. v Halbersberg, 332 S.C. 149, 503 S.E.2d 483 (1998)(absolute certainly of data on which lost profits are estimated not required; must be such reasonable certainty that damages are not based wholly on speculation and conjecture and certain standard or fixed method by which profits or value may be estimated and determined with a fair degree of accuracy is sufficient).

The proper measure of damages for breach of contract is the loss actually suffered by the contractee as the result of the breach. Tomlinson v. Mixon, 626 S.E.2d 43, 50, 367 S.C. 467 (S.C. App. 2006); South Carolina Fin. Corp. v. West Side Fin. Co., 236 S.C. 109, 113 S.E.2d 329 (1960). "In the normal case, the damage will consist of two distinct elements: (1) out-of-pocket costs

actually incurred as a result of the contract; and (2) the gain above costs that would have been realized had the contract been performed." Id; Collins Entm't, Inc. v. White, 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005).

In the present case, Plaintiff submits that, upon sufficient proof, he would be entitled to the difference between the fair market value of the Mercedes in the condition it would have been if the contract had been performed and the vehicle were restored to the agreed upon condition and its present value, minus the difference between how much the restoration work would have actually cost and the amount Plaintiff already paid toward that cost (the values to which he and an expert will testify at the damages hearing).

b. Negligence

Plaintiff's contract with Defendant created a bailment. "A bailment is created by the delivery of personal property by one person to another in trust for a specific purpose, pursuant to an express or implied contract to fulfill that trust." Hadfield v. Gilchrist, 538 S.E.2d 268, 343 S.C. 88, 95 (S.C. App. 2000); Home Indent Co. v. Harleysville Mut. Ins. Co., 252 S.C. 452, 460, 166 S.E.2d 819, 824 (1969)("Bailment has been defined as the delivery of a chattel for some express or particular purpose upon a contract, express or implied, that, after the purpose has been fulfilled, then the chattel shall be redelivered to the bailor, or otherwise dealt with according to his directions.").

The bailment contract between Plaintiff and Defendant created a duty in Defendant to exercise due care in safekeeping of Plaintiff's Mercedes, see Harris v. Burnside, 261 S.C. 190, 199 S.E. 2d 65, 67-8 (1973)(citing Fortner v. Carnes, 258 S.C. 455, 189 S.E.2d 24), and in its repair, see id. (citing Edwards v. Charleston Sheet Metal, 253 S.C. 537, 172 S.E.2d 120). The breach of the duty of care arising under a bailment contract constitutes a tort. Id. at 195, 68. Such breach

by the bailee may constitute a conversion. Conversion is the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, **to the alteration of their condition** or the exclusion of the owner's rights." Powell v. A.K. Brown Motor Co., 200 S.C. 75, 78, 20 S.E.2d 636, 637 (1942(emphasis supplied). Where the breach of the bailee clearly amounts to a conversion, and the conversion was in reckless and wanton disregard of the rights of the Plaintiff, exemplary damages are allowed. Burnside, 261 S.C. 190, 196, 199 S.E.2d 65, 68.

Damages for negligence are those which appear to be the natural and probable consequence of the act or acts constituting the negligence. See Bailey v. Segar, 346 S.C. 359, 550 S.E.2d 910 (Ct. App. 2001), *cert. dis.* 354 S.C. 57, 579 S.E.2d 605 (S.C. 2003). Here, Plaintiff and Plaintiff's expert witness will testify as to the lost value of the Mercedes to Plaintiff as a result of Defendant's failure to exercise due care in safekeeping the parts and components of the vehicle while in its possession.

c. Conversion

Plaintiff's claim of conversion relates the $20,000 deposit Plaintiff provided Defendant, that Defendant failed to return upon Plaintiff's demand, as agreed.

Conversion is the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights." Green v. Waidner, 284 S.C. 35, 324 S.E.2d 331 (S.C. App., 1984); Powell v. A.K. Brown Motor Co., 200 S.C. 75, 78, 20 S.E.2d 636, 637 (1942).

The measure of actual damages in an action for conversion of personal property is the value of the property with interest thereon from the date of conversion to the date of trial. Id.; Long v.

Gibbs Auto Wrecking Company, 253 S.C. 370, 171 S.E.2d 155 (1969), Mims v. Bennett, 160 S.C. 39, 158 S.E. 124 (1931).

The measure of damages for a willful and intentional conversion, where the property is converted with knowledge of the owner's rights in the property, is the highest market value of the property with interest up to the time of trial, including any additional value due to additions or improvements made by the converter. See Green, 284 S.C. 35, 324 S.E.2d 331; Industrial Welding Supplies, Inc. v. Atlas Vending Co., 276 S.C. 196, 277 S.E.2d 885 (1981); Gregg v. Bank of Columbia, 72 S.C. 458, 52 S.E. 195 (1905); Restatement (Second) of Torts Section 927 (1981); 1 Am.Jur.2d Accession and Confusion Section 29 (1962).

Money may be the subject of conversion, when it is capable of being identified, and there may be conversion of determinate sums even though the specific coin and bills are not identified. See Owens v. Andrews Bank & Trust Co., 220 S.E.2d 116, 265 S.C. 490, 497 (S.C. 1975); 89 C.J.S. Trover and Conversion § 23, p. 541 (1955)

Only if the owner seeks punitive damages must the evidence show that the conversion was done recklessly and with conscious indifference to the owner's rights. Long v. Gibbs Auto Wrecking Co., 253 S.C. 370, 171 S.E.2d 155 (1969); Lumpkin v. Allstate Insurance Co., 251 S.C. 19, 159 S.E.2d 852 (1968).

Plaintiff will provide evidence and testimony as to the willful and intentional nature of Defendant's conversion of his funds, as alleged in his complaint, and admitted by Defendant by virtue of its default.

[Signature on following page]

Respectfully submitted,

THE LAW OFFICE OF
W. WESTBROOK WILLS III

/s/ W. Westbrook Wills III
W. Westbrook Wills III
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P.O. Box 822
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ATTORNEY FOR PLAINTIFF

This 19th day of August 2021
FOLLY BEACH, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	Case No.: 2019-CP-10-05392
KEVIN STAVELEY-O'CARROLL,	)	
	)	
Plaintiff,	)	CERTIFICATE OF SERVICE
-vs-	)	
	)	
FENIX AUTOMOTIVE, LLC,	)	
	)	
Defendant.	)	
	)	

I certify that I have this day served a copy of the foregoing Memorandum of Law in Support of Damages on counsel for Defendant Fenix Automotive, LLC by e-mail, e-file service, and by U.S. Mail, addressed as follows:

Damien A. Sobieraj, Esq.
Cooper River Legal Services, LLC
P.O. Box 2439
Mt Pleasant, SC 29465

/s/ W. Westbrook Wills III
W. Westbrook Wills III

Dated: August 19, 2021

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON KEVIN STAVELEY-O'CARROLL, Plaintiff vs. FENIX AUTOMOTIVE, LLC, Defendant.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO.: 2019CP10-05392 **MOTION TO ALTER OR AMEND JUDGMENT**

(CP11-008)

TO: THE PLAINTIFF ABOVE-NAMED AND W. WESTBROOK WILLS III, ATTORNEY FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the undersigned will move before the Honorable Roger M. Young, Sr., Circuit Court Judge, within ten (10) days or as soon thereafter as counsel may be heard, for an Order, pursuant to Rule 59 SCRCP altering or amending the judgment. The grounds for this motion are as follows:

1. On October 7, 2021, this Court signed an Order for Judgment of Damages (the "Order") proposed by Defendant's counsel in which Defendant's counsel inadvertently included an incorrect amount of $2,500 for the current value of the vehicle in the formula for the Breach of Contract damages on page 8 of the Order.

2. The correct amount for the current value of the car is $10,000 as stated on page 5 of the Order in Paragraph 17 of the Finding of Facts.

3. Consequently, counsel's error caused a miscalculation in the damages set forth on pages 8 and 9 of the Order for the Breach of Contract cause of action and, therefore, the total damages awarded on page 16 of the Order in the Summary of Judgment by an additional $7,500.

Defendant and its counsel respectfully request that this Court amend its Order with the attached Amended Order for Judgment of Damages containing the changes necessary to correct the aforementioned errors and reduce by $7,500 the damages awarded for the Breach of Contract cause of action and, therefore, the total damages awarded.

COOPER RIVER LEGAL SERVICES, LLC

s/Damien A. Sobieraj
Damien A. Sobieraj, Esquire
S.C. Bar ID No. 71760
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Email: damien@cooperriverlegalservices.com
Attorney for Defendant

Dated: October 14, 2021

CERTIFICATE OF SERVICE

I hereby certify that the foregoing MOTION TO ALTER OR AMEND JUDGMENT was by email on October 15, 2021, to the following:

W. Westbrook Wills III, Attorney for Plaintiff at wwills@wwillslaw.com

COOPER RIVER LEGAL SERVICES, LLC

s/Damien A. Sobieraj

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Attorney for Defendant

Dated: October 15, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	Case No.: 2019-CP-10-05392
KEVIN STAVELEY-O'CARROLL,	)	
	)	
Plaintiff,	)	AMENDED ORDER
-vs-	)	OF
	)	JUDGMENT FOR DAMAGES
FENIX AUTOMOTIVE, LLC,	)	
	)	
Defendant.	)	
	)	

Plaintiff Kevin Staveley-O'Carroll ("Plaintiff" or "Staveley-O'Carroll") brought this action against Defendant Fenix Automotive, LLC ("Defendant" or "Fenix") on October 21, 2019 alleging causes of action for breach of contract, negligence, conversion, and unjust enrichment. The record reflects that Plaintiff properly served Defendant with a copy of the Summons and Complaint on November 13, 2019. On January 28, 2020, after Defendant failed to file an answer or otherwise respond to the Complaint, Plaintiff filed and Affidavit of Default and Motion for Default Judgment, which the Court granted its Order dated January 29, 2020. Subsequently, Plaintiff filed his Motion for Damages and requested for a damages hearing.

On August 25, 2021, the parties having been duly and properly notified, the Court held a hearing on the issue of damages via WebEx. Present at the damages hearing via video/audio were Plaintiff appearing with his counsel W. Westbrook Wills III, Esq. and Axel Reinert ("Mr. Reinert"), his expert witness in automotive restoration. Damien A. Sobieraj, Esq. appeared on behalf of Defendant. Plaintiff's expert witness was duly qualified, without objection, to give expert testimony as to issues related to the damages in the matter. Plaintiff and Mr. Reinert's testimony was taken, evidence was received, and the entire record in the case was considered by

the Court.[1] The Court makes the following Findings of Fact and Conclusions of Law as required by SCRCP, Rule 52. Any Finding of Fact which is more appropriately characterized as a Conclusion of Law shall be treated as such, and vice-versa.

FINDINGS OF FACT

Based on Defendant's admissions by default of the allegations of Plaintiff's Complaint, and having considered the testimony and evidence presented at the damages hearing, Plaintiff has established the following facts by a preponderance of the evidence, unless otherwise specified.

1. Plaintiff is an individual residing in Columbia, Missouri.

2. Defendant is a South Carolina limited liability company engaged in the business of automotive restoration.

3. The parties are properly subject to the jurisdiction of the Court, and the Court has subject matter over the matters raised in the pleadings.

4. Defendant was properly served with a copy of Plaintiff's Summons and Complaint, which it failed to answer or otherwise respond, resulting in the entry of default judgment against it.

5. In 2015, Plaintiff entered into a contract with Defendant to restore his classic 1969 Mercedes 280 SL ("the Mercedes"), which he delivered into Defendant's possession and care at Defendant's place of business for that purpose.

6. At the time Plaintiff delivered the Mercedes to Defendant, the vehicle was in poor

[1] As Defendant was in default and default judgment having been entered against it, the Court took testimony and received evidence from and on behalf of Plaintiff only, and limited Defendant's participation in the hearing to cross-examination and objecting to evidence by its counsel. See Howard v. Holiday, Inc. 271 S.C. 238, 246 S.E.2d 880 (1978)(limiting a defendant's participation in a post-default hearing to cross-examination and objection to plaintiff's evidence); see also Limehouse v. Hulsey, 404 S.C. 93, 116, S.E.2d 566, 579 (S.C. 2013)(reaffirming Howard).

condition and had a value of between $20,000 and $25,000, based on the testimony of Mr. Reinert, Mr. Reinart testified that (i) he based his opinion regarding the value of the Mercedes on his observation of the Mercedes only after Defendant had disassembled the Mercedes and had already performed work on the vehicle, (ii) he did not personally observe the condition of the Mercedes when Plaintiff delivered the vehicle to Defendant, (iii) he did not review any photographs showing the condition of the Mercedes prior to Defendant disassembling the Mercedes and beginning work on the vehicle. Furthermore, Mr. Reinert did not identify any industry resources used by him to assist him with his valuation of the Mercedes as delivered to Defendant.

7. Plaintiff and Defendant agreed Defendant would restore the Mercedes to a "daily driver" condition, and that Defendant would provide Plaintiff a detailed estimate of the total cost and time required to perform the restoration project after completely disassembling the Mercedes. Defendant informed Plaintiff in their conversations and emails that the total cost to restore the Mercedes may increase as the project progressed and Defendant determined what original parts could be reused versus rebuilt or replaced.

8. Between September of 2015 and March of 2016, Defendant performed initial work on the Mercedes including completely disassembling it and preparing the body for anticipated metalwork and submitted invoices to Plaintiff for such work totaling $5,825.00, which Plaintiff paid in full.

9. 22 months later, in December of 2017, Defendant provided Plaintiff a detailed estimate for the remainder of the restoration of the Mercedes, which it represented would cost approximately $60,000, and would take approximately six months.

10. To keep the total cost of the remainder of the restoration process as close to the $60,000

estimate as possible, Plaintiff and Defendant specifically agreed that, wherever possible, Defendant would make use of the Mercedes's existing parts and components.

11. At Defendant's request, Plaintiff provided it a $20,000 deposit, which Defendant specifically represented it would maintain, in trust, in a separate account, and against which it would bill for restoration work on the Mercedes going forward. Defendant also represented to Plaintiff that any unused portion of the $20,000 would be returned to Plaintiff upon his request.

12. The evidence and testimony before the Court demonstrates, and the Court finds, that after Plaintiff provided the $20,000 deposit, Defendant failed to complete the restoration of the Mercedes, as agreed, and it remains to this day in an unrestored and completely disassembled state, in Defendant's possession.

13. Moreover, the evidence, testimony, and Defendant's admissions establish that after disassembling the Mercedes, Defendant stored a great many of its parts and components outdoors on the ground or in plastic bins, exposed to the elements and weather, where they have remained since April 2019.

14. From the photographs submitted in evidence and personal observation, Mr. Reinert identified many of the parts and components of the Mercedes, including the vehicle's motor, windshield, suspension, drivetrain, exterior finishes and chrome, and an array of interior components, which he testified were in a severe degradation condition or ruined as a direct result of Defendant leaving them outdoors in the weather over a a few years, but Mr. Reinart also conceded he did not have firsthand knowledge of the condition of these parts when the Plaintiff delivered the Mercedes to Defendant Mr. Reinert further testified that, if many of those parts and components were in good condition when the Mercedes was delivered to Defendant, then these parts could have been reused in the restoration of the Mercedes. However, due to their present

condition, Mr. Reinert opined many of those parts and components may no longer be usable for the restoration project, or may now require very extensive refurbishment.

15. Mr. Reinert testified that, based on Plaintiff and Defendant's agreement, the total actual cost of the restoration of the Mercedes at the time of the parties' original agreement would reasonably have been between $60,000 and $70,000 dollars. However, Mr. Reinert believed that because of the degradation to many of the parts of the Mercedes due to Defendant failure to properly protect them from damage, the current cost to restore the vehicle is likely to be double that figure.

16. Plaintiff alleged, Mr. Reinert testified, and the Court finds, that Defendant knew or should have known that storing the subject parts and components of Plaintiff's Mercedes outdoors, exposed to the elements over a period of years could result in their degradation or ruination. Mr. Reinert testified that by doing so, Defendant deviated from the standards of care, professionalism, and best practices for businesses in the automotive restoration industry.

17. Based on the uncontroverted testimony of Mr. Reinert, the Court finds the Mercedes would have had a value of between $42,000 and $120,000 had Defendant restored it as agreed in its contract with Plaintiff. Instead, in its present condition and state, the Mercedes currently has a value of $10,000.

18. In September of 2019, as Defendant had still failed to complete the restoration of the Mercedes, Plaintiff made a demand on Defendant for the return of his $20,000 deposit, which Defendant also failed to return to him.

CONCLUSIONS OF LAW

Plaintiff filed his action against Defendant alleging causes of action for breach of contract, negligence, conversion, and unjust enrichment for which he has prayed for actual,

consequential, special, and punitive damages as proven at trial, together with attorney's fees and costs of the action. The Defendant failed to answer or otherwise respond to Plaintiff's Complaint, and default judgment was entered against it.

A defendant in default admits liability but not the damages as set forth in the prayer for relief. Solley v. Navy Fed. Credit Union, Inc., 397 S.C. 192, 203 723 S.E.2d 597, 603 (S.C. App. 2012); see also Renney v. Dobbs House, Inc., 275 S.C. 562, 566, 274 S.E.2d 290, 292 (1981). The amount of damages in a default action must be proved by the preponderance of the evidence. Id.; see Jackson v. Midlands Human Res. Ctr., 296 S.C. 526, 529, 374 S.E.2d 505, 507 (Ct. App.1988) ("A judgment for money damages must be warranted by the proof of the party in whose favor it is rendered."). As to punitive or exemplary damages, the Plaintiff has the burden of proving by clear and convincing evidence the Defendant's demonstrated misconduct was willful, wanton, or with reckless disregard for the Plaintiff's rights. See Mishoe v. Qhg of Lake City, Inc., 621 S.E.2d 363, 366, 366 S.C. 195 (S.C. 2005). "A conscious failure to exercise due care constitutes willfulness." Id.

Based on the pleadings, admissions, and the uncontroverted evidence and testimony presented by Plaintiff and his expert witness at the damages hearing, the Court finds and concludes as follows:

Breach of Contract

Plaintiff and Defendant entered into a valid contract for the restoration of Plaintiff's Mercedes, supported by consideration, and creating rights and obligations between the parties, under which Defendant agreed to restore the vehicle to a "daily driver" condition, and Plaintiff agreed to pay Defendant for parts and labor associated with the restoration. Pursuant to the parties' contract, Defendant invoiced Plaintiff for the initial restoration work it performed in the

amounts totaling $5,825.00, which Plaintiff paid in full. Thereafter, Plaintiff provided Defendant a $20,000 deposit towards the remainder of the vehicle restoration, which Defendant was to hold in a separate account, as agreed, however, Defendant did complete the restoration of the Mercedes. Furthermore, after Plaintiff discovered Defendant had not performed its obligations, as promised, and demanded the return of his $20,000 deposit, as agreed, Defendant failed to deliver it. The Court finds Defendant has breached its contract with Plaintiff entitling Plaintiff to contract damages.

Damages in a breach of contract action are to put the non-breaching party in the position he or she would have been in had the breach not occurred and the contract were performed. See Minter v. GOCT, Inc., 322 S.C. 525, 473 S.E.2d 67(Ct. App. 1996)(purpose of damages for breach of contract is to put plaintiff in as good a position as he or she would have been if the contract had been performed). Compensation for lost profits or value is recoverable as damage in a breach of contract action where the estimate of such lost profit or value is not based wholly on speculation and conjecture. Charles v. Texas Co., 199 S.C. 156, 18 S.E.2d 719 (1942); South Carolina Federal Savings Bank v. Thorton-Crosby Development Co., 303 S.C. 74, 399 S.E.2d 8 (Ct. App. 1990); Global Protection Corp. v Halbersberg, 332 S.C. 149, 503 S.E.2d 483 (1998)(absolute certainty of data on which lost profits are estimated not required; must be such reasonable certainty that damages are not based wholly on speculation and conjecture and certain standard or fixed method by which profits or value may be estimated and determined with a fair degree of accuracy is sufficient).

The proper measure of damages for breach of contract is the loss actually suffered by the contractee as the result of the breach. Tomlinson v. Mixon, 626 S.E.2d 43, 50, 367 S.C. 467 (S.C. App. 2006); South Carolina Fin. Corp. v. West Side Fin. Co., 236 S.C. 109, 113 S.E.2d 329

(1960). "In the normal case, the damage will consist of two distinct elements: (1) out-of-pocket costs actually incurred as a result of the contract; and (2) the gain above costs that would have been realized had the contract been performed." Id; Collins Entm't., Inc. v. White, 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005).

Here, therefore, as damages for Defendant's breach of contract, Plaintiff is entitled to the difference between the fair market value of the Mercedes as restored to the agreed upon condition and its present value, minus the difference between the cost of the restoration work and the amount the Plaintiff already paid toward that cost. According to the uncontroverted testimony of Mr. Reinert, the fair market value for the Mercedes as restored to the agreed "daily driver" condition would have been between $42,000 and $120,000, the average of which amounts to $81,000. Mr. Reinert did not identify any industry resources from which he used information to formulate his estimated fair market value of the Mercedes, relying upon general internet searches for sales listings of similar Mercedes. He further testified that based on the parties agreement at the time of its making, the reasonable cost of the labor and parts would have been between $60,000 and $70,000 dollars, the average of which amounts to $65,000. Plaintiff also paid Defendant a total of $25,825 towards the total cost of the restoration. Plaintiff's actual damage resulting from Defendant's breach of contract can, therefore, be expressed as ($81,000 - **$10,000**) – ($65,000 - $25,825) and totals **$31,825**.

Under the foregoing measure, Plaintiff is also entitled to the return of the vehicle in its present state. Mr. Reinert testified that shipping of the vehicle in its present disassembled state to a Charleston location will cost a fee of $525 which includes tarping, and two hours of loading and unloading, plus $100 dollars per hour for additional time. Mr. Reinert testified that in his opinion, loading and unloading the Mercedes in its disassembled condition would likely take

several hours. The Court finds Plaintiff is entitled to consequential damages associated with shipping the Mercedes to another location in Charleston in the amount of $1,125.

Plaintiff is entitled to actual and consequential damages as a result of Defendant's breach of contract in the total amount of **$32,950**, including the cost to return the vehicle, plus the costs and expenses of the action.

Negligence

Plaintiff's contract with Defendant for the restoration of the Mercedes and his delivery of the vehicle to Defendant for that purpose created a bailment. "A bailment is created by the delivery of personal property by one person to another in trust for a specific purpose, pursuant to an express or implied contract to fulfill that trust." Hadfield v. Gilchrist, 538 S.E.2d 268, 343 S.C. 88, 95 (S.C. App. 2000); Home Indent Co. v. Harleysville Mut. Ins. Co., 252 S.C. 452, 460, 166 S.E.2d 819, 824 (1969)("Bailment has been defined as the delivery of a chattel for some express or particular purpose upon a contract, express or implied, that, after the purpose has been fulfilled, then the chattel shall be redelivered to the bailor, or otherwise dealt with according to his directions.").

The bailment contract between Plaintiff and Defendant created a duty in Defendant to exercise due care in safekeeping of Plaintiff's Mercedes, see Harris v. Burnside, 261 S.C. 190, 199 S.E. 2d 65, 67-8 (1973)(citing Fortner v. Carnes, 258 S.C. 455, 189 S.E.2d 24), and in its repair, see id. (citing Edwards v. Charleston Sheet Metal, 253 S.C. 537, 172 S.E.2d 120). Breach of the duty of care arising under a bailment contract constitutes a tort. Id. at 195, 68.

In action involving a bailment alleging the tort of negligence, the bailor is entitled to be compensated for all losses that are the natural consequence and proximate result of the bailee's negligence. Dixon v. Besco Engineering, Inc., 320 S.C. 174, 180, 463 S.E.2d 636 (S.C. App.

1995)(citing 8 Am.Jur.2d Bailments § 346 (1980)). Damages are proximately caused if they are the foreseeable result of the defendant's tortious act. Id. (citing Young v. Tide Craft, Inc., 270 S.C. 453, 242 S.E.2d 671 (1978)). Further, the liability of a bailee under a bailment for mutual benefit, as we have here, arises upon a showing that (1) the goods were delivered to the bailee in good condition, (2) they were lost or returned in a damaged condition, and (3) the loss or damage to the goods was due to the failure of the bailee to exercise ordinary care in the safekeeping of the property. Hadfield v. Gilchrest, 343 S.C. 88 at 99. Importantly, the burden is on the bailee, and not on the bailor, to demonstrate the bailee used ordinary care in storing and safekeeping the property. Id.

Punitive damages are recoverable for negligence, which is so reckless of consequences as to imply or to assume the nature of wantonness, willfulness or recklessness. Solanki v. Wal-Mart Store # 2806, 410 S.C. 229, 237, 763 S.E.2d 615 (S.C. App. 2014)(referencing Bell v. Atl. Coast Line R. Co., 202 S.C. 160, 171, 24 S.E.2d 177, 182 (1943)). "If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care." Berberich v. Jack, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011).

In the present action, pursuant to the parties' agreement, Plaintiff delivered his Mercedes into the Defendant's possession which created a bailment for mutual benefit. As such, Defendant (bailee) owed Plaintiff (bailor) a duty of care both in the safekeeping and in the repair of Plaintiff's vehicle. Based on the admitted allegations in Plaintiff's Complaint and the evidence and testimony of Plaintiff and Mr. Reinert at the damages hearing, the Court finds the Defendant failed to exercise due care in restoring the Plaintiff's vehicle and in safekeeping its parts and components by storing many of them outdoors in such a manner as to allow them to be

directly exposed to the weather over a period of a few years. Such failure to exercise due care by Defendant proximately resulted in the severe degradation or ruination of some parts and components of Plaintiff's Mercedes, which not only reduced its value from the time Plaintiff delivered it to the Defendant, but also may have doubled the cost to restore the vehicle to the "daily driver" condition.

Furthermore, based on the testimony of the Plaintiff and Mr. Reinert and the photographic evidence entered into the record, the Court finds by a standard of clear and convincing evidence, that Defendant knew or should have know that storing the parts and components of Plaintiff's Mercedes on the outdoors on the ground or in bins and exposed to the weather and elements over a period of a few years would result in the very damage that was ultimately occasioned by such failure to exercise even slight care in safeguarding them. Mr. Reinert testified that Defendant's actions constituted an absolute departure from industry standards and best practices, that Defendant or it's agents or employees were conscious of such departure and the damage that would result, and that such acts or omissions amounted to a reckless disregard for Plaintiff's property. The Court finds such damages were foreseeable and avoidable by Defendant.

As stated above, based on the evidence and testimony, at the time Plaintiff delivered the Mercedes to Defendant, the vehicle had a value of between $20,000 and $25,000, the average of which amounts to $22,500. Presently the vehicle is worth $10,000. The damage occasioned to the Mercedes by the negligence of the Defendant has reduced its value by $12,500, and Defendant is liable to Plaintiff in that amount.

While Plaintiff has requested punitive damages, "to ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review…" Gamble v. Stevenson, 305 S.C. 104,

112, 406 S.E.2d 350, 354 (S.C. 1991). The Court when conducting such a review may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) other factors deemed appropriate. *Id.* at 112. After conducting such review, this Court has found no evidence of (i) an excessive duration of conduct, (ii) concealment by Defendant, (iii) the existence of similar past conduct, or (iv) that Defendant has any ability to pay such an award, and this Court declines to award any punitive damages under Plaintiff's negligence cause of action.

Under the theory of negligence, Defendant is liable to Plaintiff for the return of the Mercedes and for compensatory damages in the amount of $13,625, including the cost of transport, , plus the costs and expenses of the action.

Conversion

Plaintiff's claim of conversion relates the $20,000 deposit Plaintiff provided Defendant, and that Defendant failed to return upon Plaintiff's demand, as agreed.

Conversion is the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights." Green v. Waidner, 284 S.C. 35, 324 S.E.2d 331 (S.C. App., 1984); Powell v. A.K. Brown Motor Co., 200 S.C. 75, 78, 20 S.E.2d 636, 637 (1942). Money may be the subject of conversion, when it is capable of being identified, and there may be conversion of determinate sums even though the specific coin and bills are not identified. See Owens v. Andrews Bank & Trust Co., 220 S.E.2d 116, 265 S.C. 490, 497 (S.C. 1975); 89 C.J.S. Trover and Conversion § 23, p. 541 (1955).

The measure of actual damages in an action for conversion of personal property is the value of the property with interest thereon from the date of conversion to the date of trial. Id.; Long v. Gibbs Auto Wrecking Company, 253 S.C. 370, 171 S.E.2d 155 (1969), Mims v. Bennett, 160 S.C. 39, 158 S.E. 124 (1931).

The measure of damages for a willful and intentional conversion, where the property is converted with knowledge of the owner's rights in the property, is the highest market value of the property with interest up to the time of trial, including any additional value due to additions or improvements made by the converter. See Green, 284 S.C. 35, 324 S.E.2d 331; Industrial Welding Supplies, Inc. v. Atlas Vending Co., 276 S.C. 196, 277 S.E.2d 885 (1981); Gregg v. Bank of Columbia, 72 S.C. 458, 52 S.E. 195 (1905); Restatement (Second) of Torts Section 927 (1981); 1 Am.Jur.2d Accession and Confusion Section 29 (1962). Punitive damages are permitted in a conversion claim where the evidence shows the conversion was done recklessly and with conscious indifference to the owner's rights. Long v. Gibbs Auto Wrecking Co., 253 S.C. 370, 171 S.E.2d 155 (1969); Lumpkin v. Allstate Insurance Co., 251 S.C. 19, 159 S.E.2d 852 (1968).

In the present case, based on the admitted allegations of the pleadings and the testimony and evidence presented to the Court, the Plaintiff, after paying for the totality of the restoration work performed on his Mercedes to a certain point, provided Defendant a $20,000 deposit in advance of the remainder of the work. Defendant was to maintain the $20,000, in trust, a separate account to bill against for restoration work going forward, and of which any unused portion would be refundable to Plaintiff on demand. Thereafter, Defendant failed to complete the restoration of Plaintiff's vehicle. When Plaintiff discovered that fact some 20 months later and demanded the return of his deposit money, Defendant did not return it to him, and has still

not returned it. Defendant has knowingly, consciously, and willfully deprived Plaintiff of possession and ownership of a determinant sum of money, and is liable to Plaintiff for conversion of his deposit money in the amount of $20,000, plus interest at the legal rate since Plaintiff demand on September 11, 2019 for its return in the amount of $3,095 totaling $23,095.

Under his conversion action, Plaintiff has again requested punitive damages, "to ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review…" Gamble v. Stevenson, 305 S.C. 104, 112, 406 S.E.2d 350, 354 (S.C. 1991). The Court when conducting such a review may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) other factors deemed appropriate. *Id.* at 112. After conducting such review, this Court has found no evidence of (i) an excessive duration of conduct, (ii) concealment by Defendant, (iii) the existence of similar past conduct, or (iv) that Defendant has any ability to pay such an award, and the Court declines to award any punitive damages under Plaintiff's conversion cause of action.

Under a theory of conversion, Defendant is liable to Plaintiff for actual in the amount of $23,095, plus costs and expenses of the action.

Costs of Action

Based on the record, including the attorney's fee and expenses affidavit filed in the case by his attorney, Plaintiff has been caused to incur costs and expenses associated with bringing and prosecuting the action in the amount of $1,694, which includes the fee of $1,000 charged by his expert witness for his services, as attested to by Mr. Reinert during the damages hearing.

Plaintiff is entitled to recover from Defendant his costs and expenses in the total amount of $1,694.

Attorney's Fees

Plaintiff also requested an award of attorney's fees. "Attorney's fees are not recoverable unless authorized by contract or statute." Jackson v. Speed, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997). Plaintiff and Defendant did not agree to the recovery of attorney's fees in any contract, and Plaintiff has not cited any statute by which this Court may award him attorney's fees. Consequently, the Court denies Plaintiff's request for an award of attorney's fees.

Summary of Judgment

The Court finds Defendant is liable to Plaintiff, as described above, on Plaintiff's causes of action for breach of contract, negligence, and conversion. Because the Court is awarding Plaintiff contract damages on the basis of a valid contract between the parties, the Court has not considered Plaintiff's unjust enrichment claim. See Gantt v. Morgan, 199 S.C. 138, 18 S.E.2d 672 (1942)(Relief under a theory of unjust enrichment is not available if an action is based on the existence of a contract).

Plaintiff is not permitted a double recovery for a single wrong. To prevent that outcome, Plaintiff is required to elect his remedies. See Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (S.C. 1996) (citing Thompson v. Watts, 281 S.C. 504, 316 S.E.2d 393 (1984)(The purpose of election of remedies is to prevent a double recovery for a single wrong.)). However, an election of remedies is not applicable where remedies are addressed to different wrongs, requiring different or additional elements and standards of proof. See Thompson v. Watts, 316 S.E.2d 393, 281 S.C. 504 (S.C. 1984)(citing Tzouvelekas v. Tzouvelekas, 206 S.C. 90, 33 S.E.2d 73, 74

(1945)(Election of remedies is the act of choosing between different remedies allowed by law on the same state of facts.)).

Based on Defendant's liability to Plaintiff on his causes of action for breach of contract, negligence, and conversion, as set out above, and applying the doctrine of election of remedies, the Court finds judgment for the Plaintiff is appropriate in the following amounts:

a) for breach of contract in the amount of **$32,950**;

b) for negligence in the amount of $21,125, reduced by **$32,950** for a total of $0;

c) for conversion in the amount of $23,095;

d) for the return of the Mercedes to Plaintiff; and

e) for Plaintiffs costs and expenses in the amount of $1,694.

IT IS HEREBY ORDERED AND ADJUDGED that judgment against Defendant be and is hereby entered in favor of Plaintiff in the total amount of **$57,739**. Defendant is also hereby ordered to prepare the Mercedes and its parts and components is such a manner that within 30 days of this Order becoming final, they may be available for pick-up and transport to a location in Charleston, South Carolina to be designated by Plaintiff.

IT IS SO ORDERED in Charleston, South Carolina, this _____ day of October 2021.

_____
Hon. Roger M. Young
Circuit Court Judge

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP10-05392

KEVIN STAVELEY-O'CARROLL
PLAINTIFF(S)

FEXNIX AUTOMOTIVE, LLC
DEFENDANT(S)

Submitted by: Damien A. Sobieraj	**Attorney for :** ☐ Plaintiff ☒ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
KEVIN STAVELEY-O'CARROLL	FENIX AUTOMOTIVE, LLC	$57,739.00
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge **Judge Code** **Date**

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

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

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

****

FORM 4C INSTRUCTIONS—JUDGMENT IN A CIVIL CASE

(Instructions for Information Only-Not to be filed with Form 4C)

1. Form 4C-Judgment in a Civil Case has been modified to add order information and enrollment instructions for the clerk of court. The purpose of Form 4 has not changed with the exception that judgment information is provided when applicable.

2. Please note that the Form 4C must be attached to all orders that include information to enroll in the judgment index. The clerk will not be responsible for reading the order to determine enrollment information.

   The attorney or prevailing party will prepare and attach the Form 4C when submitting the proposed order that includes judgment enrollment information for the judgment index. The judge will review and sign Form 4C when he or she signs an order that includes judgment enrollment information for the judgment index.

3. Form 4C is not required to be submitted to the Court with orders that do not include information to enroll in the judgment index. If the clerk receives such an order without Form 4C attached, the clerk should enter and process the order pursuant to Rule 58 and Rule 77(d), SC Rules of Civil Procedure (i.e., the clerk should serve notice of entry of the judgment by mail or provide the attorneys with copies of the signed order by other means).

4. The "Information for the Judgment Index" section should be completed when the judgment affects title to real or personal property or if any amount should be enrolled. In the "Judgment in Favor of" column, enter the name of the party to whom the judgment is awarded. In the "Judgment Against" column, enter the name of the person to whom the judgment is against. The judgment amount to be enrolled should be noted in the "Judgment Amount" column. As necessary, describe any property referenced in the order if it is to be enrolled in the judgment index. If there is no judgment information to enroll, indicate "N/A" in one of the boxes in this section of the form.

5. To enter information to accommodate multiple parties, additional Form 4Cs may be used as necessary. Additional space may be inserted on the form as necessary.

6. The section "For the Clerk of Court Office Use Only" should be completed by the clerk as it has been with the previous version of Form 4.

7. If the matter is on appeal to the Circuit Court, then the parties on the form should be changed from Plaintiff and Defendant to Appellant and Respondent.

8. If an arbitrator prepares an order after arbitration, the arbitrator should strike through "Circuit Court Judge" and indicate "Arbitrator" in the signature block.

9. If a Special Circuit Court Judge, Master in Equity, or Special Referee prepares an order after hearing a Circuit Court matter, then he or she should strike through the title "Circuit Court Judge" below the signature line and indicate the appropriate title.

10. When an Order of Foreclosure is filed, neither the parties or debt owed should be listed in the Information for the Judgment Index Section, unless the foreclosure order specifically requires entry of the full judgment amount before the foreclosure sale, pursuant to Section 29-3-650 of the SC Code.

11. If the deficiency judgment is waived in a Foreclosure action, indicate N/A in the "Judgment Amount To Be Enrolled" box.

12. Foreclosure actions should be ended by the Clerk of Court upon receipt of the Order of Foreclosure. Subsequent information, including deficiency judgments, can be added to the action after the case is ended. The Master in Equity should end the action in the MIE system upon the receipt of the Order of Foreclosure.

13. When judgment enrollment information is included in the Information for the Judgment Index Section (for example, when there is a deficiency judgment), only the parties who the judgment is for and against should be included in the Section. Subordinate parties and lienholders should not be included in the box if there is not a judgment amount specifically for or against them.

14. Form 4C is not required to be attached to Transcripts of Judgment and Confession of Judgment.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	Case No.: 2019-CP-10-05392
KEVIN STAVELEY-O'CARROLL,	)	
	)	
Plaintiff,	)	
-vs-	)	PLAINTIFF'S NOTICE OF MOTION AND MOTION TO ALTER, AMEND, AND RECONSIDER
	)	
FENIX AUTOMOTIVE, LLC,	)	
	)	
Defendant.	)	
	)	

TO: DAMIEN A. SOBIERAJ, ESQ, ATTORNEY FOR DEFENDANT:

PLEASE TAKE NOTICE, that pursuant to SCRCP, Rule 59(e), Kevin Staveley-O'Carroll ("Plaintiff"), will move within 10 days, or as soon as may be heard, for the Court to alter, amend, or reconsider its October 6, 2021 Order of Judgment by Default against Fenix Automotive, LLC ("Defendant") in the above-captioned case (the "Order") on the following grounds:

1. In making its award of damages as set forth in the Order, the Court based some or all of its calculations on incorrect monetary figures supplied by Defendant in his proposed order of judgment, which are substantially inconsistent with the uncontested testimony of Plaintiff's expert during the damages hearing;
2. that while the Court properly found and ruled that, by a standard of clear and convincing evidence, Defendant's negligent conduct in restoring vehicle and safeguarding its parts and components during the process amounted to a conscious and reckless disregard for Plaintiff's rights and property, it nevertheless declined to award punitive damages on the basis that the Court did not find evidence of some or all of the factors set out in Gamble v. Stevenson, 305 S.C. 104, 112, 406 S.E.2d 350, 354 (S.C. 1991). Plaintiff respectfully

submits that, in so finding, the Court has misconstrued the Gamble factors as necessary for awarding punitive damages as opposed to factors, to be applied post punitive damage award, to determine whether those damages were excessive in amount, and therefore violative of due process. Plaintiff submits, rather, that under South Carolina caselaw, where the Court (or trier of fact) has found by a standard of clear and convincing evidence that Defendant's actions or conduct causing the Plaintiff's loss were done with willful, wanton, or reckless disregard for Plaintiff's rights or property, Plaintiff is entitled to an award of punitive damages as a matter of law and public policy. See Broom v. Southeastern Highway Contracting Co., Inc., 352 S.E.2d 302, 291 S.C. 93 (S.C. App. 1986)(abrogated on other grounds)(upon proof of willful or conscious disregard for plaintiff's rights, award of punitive damages does not rest in the jury's discretion, but is recoverable as a matter of right); Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 333 S.C. 71, 508 S.E.2d 565 1998)(citing Sample v. Gulf Ref. Co., 183 S.C. 399, 410, 191 S.E 209, 214 (1937)(jury properly charged that it would have a duty to award punitive damages if it found the plaintiff's rights had been consciously, willfully, and recklessly violated); Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 725 S.E.2d 112 (S.C. App. 2012)(citing Broom and Sample for the propositions as stated above). While Plaintiff is entitled to an award of punitive damages as a matter of right and public policy, the amount of the punitive damage award is within the discretion of the trier of fact, and subject to the Gamble factors to ensure such award is not excessive.

3. that while the Court also found Defendant liable for conversion of Plaintiff's funds, and that Defendant committed such conversion "knowingly, consciously, and willfully," it nevertheless declined to award Plaintiff punitive damage on the same basis as it did with

regard to Plaintiff's negligence claim (The Court's consideration of the Gamble factors). Plaintiff respectfully submits the Court misconstrued the application of the Gamble factors in the same manner as set out in Ground 2, above. Plaintiff would respectfully request the Court reconsider its denial of punitive damages with regard to Plaintiff's conversion claim for the same reasons he requests reconsideration of the issue with respect to his negligence claim in Ground 2, above.

This motion is based on the pleadings, testimony of the Plaintiff and Plaintiff's expert witness, proposed orders filed by the parties in the case, the transcript of the damages hearing, Plaintiff's memorandum of law supporting this motion, to be submitted prior to the hearing of this motion, the applicable caselaw and Rules of Civil Procedure, and other such matters as may be properly presented to the Court.

Plaintiff requests a hearing on this motion.

Respectfully submitted,

THE LAW OFFICE OF
W. WESTBROOK WILLS III

/s/ W. Westbrook Wills III
W. Westbrook Wills III
S.C. Bar No.: 76681
P.O. Box 822
Folly Beach, SC 29439
(843)-805-6300
wwills@wwillslaw.com
ATTORNEY FOR PLAINTIFF

This 15th day of October 2021
FOLLY BEACH, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	Case No.: 2019-CP-10-05392
KEVIN STAVELEY-O'CARROLL,	)	
	)	
Plaintiff,	)	
-vs-	)	CERTIFICATE OF SERVICE
	)	
FENIX AUTOMOTIVE, LLC,	)	
	)	
Defendant.	)	
	)	

I certify that I have this day served a copy of the foregoing *Plaintiff's Notice of Motion and Motion to Alter, Amend, and Reconsider* on counsel for Defendant Fenix Automotive, LLC by e-mail, e-file service, and by U.S. Mail, addressed as follows:

Damien A. Sobieraj, Esq.
Cooper River Legal Services, LLC
P.O. Box 2439
Mt Pleasant, SC 29465

/s/ W. Westbrook Wills III
W. Westbrook Wills III

Dated: October 15, 2021

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Roger M. Young Sr., Circuit Court Judge

Case No. 2019-CP-10-05392

Kevin Staveley-O'Carroll,

Appellant,

v.

Fenix Automotive, LLC,

Respondent.

NOTICE OF APPEAL

Kevin Staveley-O'Carroll hereby give notice that he appeals the Order of the Hon. Roger M. Young Sr., dated and filed October 7, 2021 (see Exhibit "A"), inclusive of the Order denying Plaintiff's Rule 59, SCRCP Motion to Alter, Amend, or Reconsider, dated November 1, 2021, filed on November 2, 2021 (see Exhibit "B").

Respectfully Submitted,

LAW OFFICE OF
W. WESTBROOK WILLS III

/s/ W. Westbrook Wills III
P.O. Box 822
Folly Beach, SC 29439
Tel. (843) 805-6300
wwills@wwillslaw.com
ATTORNEY FOR APPELLANT

Other counsel of Record:

Damien A. Sobieraj, Esq.
Cooper River Legal Services, LLC
P.O. Box 2439
Mt. Pleasant, SC 29465
Tel. (843)881-2244
damien@cooperriverlegalservices.com
ATTORNEY FOR RESPONDENT

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Roger M. Young Sr., Circuit Court Judge

Case No. 2019-CP-10-05392

Kevin Staveley-O'Carroll,

Appellant,

v.

Fenix Automotive, LLC,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this day, November 17, 2021, he served the foregoing Notice of Appeal electronically through the E-File system, by electronic mail, and by U.S. Mail addressed as follows:

Damien A. Sobieraj, Esq.
Cooper River Legal Services, LLC
P.O. Box 2439
Mt. Pleasant, SC 29465

/s/ W. Westbrook Wills III
W. Westbrook Wills III

EXHIBIT
A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	Case No.: 2019-CP-10-05392
KEVIN STAVELEY-O'CARROLL,	)	
	)	
Plaintiff,	)	ORDER
-vs-	)	OF
	)	JUDGMENT FOR DAMAGES
FENIX AUTOMOTIVE, LLC,	)	
	)	
Defendant.	)	
	)	

Plaintiff Kevin Staveley-O'Carroll ("Plaintiff" or "Staveley-O'Carroll") brought this action against Defendant Fenix Automotive, LLC ("Defendant" or "Fenix") on October 21, 2019 alleging causes of action for breach of contract, negligence, conversion, and unjust enrichment. The record reflects that Plaintiff properly served Defendant with a copy of the Summons and Complaint on November 13, 2019. On January 28, 2020, after Defendant failed to file an answer or otherwise respond to the Complaint, Plaintiff filed and Affidavit of Default and Motion for Default Judgment, which the Court granted its Order dated January 29, 2020. Subsequently, Plaintiff filed his Motion for Damages and requested for a damages hearing.

On August 25, 2021, the parties having been duly and properly notified, the Court held a hearing on the issue of damages via WebEx. Present at the damages hearing via video/audio were Plaintiff appearing with his counsel W. Westbrook Wills III, Esq. and Axel Reinert ("Mr. Reinert"), his expert witness in automotive restoration. Damien A. Sobieraj, Esq. appeared on behalf of Defendant. Plaintiff's expert witness was duly qualified, without objection, to give expert testimony as to issues related to the damages in the matter. Plaintiff and Mr. Reinert's testimony was taken, evidence was received, and the entire record in the case was considered by

the Court.[1] The Court makes the following Findings of Fact and Conclusions of Law as required by SCRCP, Rule 52. Any Finding of Fact which is more appropriately characterized as a Conclusion of Law shall be treated as such, and vice-versa.

FINDINGS OF FACT

Based on Defendant's admissions by default of the allegations of Plaintiff's Complaint, and having considered the testimony and evidence presented at the damages hearing, Plaintiff has established the following facts by a preponderance of the evidence, unless otherwise specified.

1. Plaintiff is an individual residing in Columbia, Missouri.

2. Defendant is a South Carolina limited liability company engaged in the business of automotive restoration.

3. The parties are properly subject to the jurisdiction of the Court, and the Court has subject matter over the matters raised in the pleadings.

4. Defendant was properly served with a copy of Plaintiff's Summons and Complaint, which it failed to answer or otherwise respond, resulting in the entry of default judgment against it.

5. In 2015, Plaintiff entered into a contract with Defendant to restore his classic 1969 Mercedes 280 SL ("the Mercedes"), which he delivered into Defendant's possession and care at Defendant's place of business for that purpose.

6. At the time Plaintiff delivered the Mercedes to Defendant, the vehicle was in poor

[1] As Defendant was in default and default judgment having been entered against it, the Court took testimony and received evidence from and on behalf of Plaintiff only, and limited Defendant's participation in the hearing to cross-examination and objecting to evidence by its counsel. See Howard v. Holiday, Inc. 271 S.C. 238, 246 S.E.2d 880 (1978)(limiting a defendant's participation in a post-default hearing to cross-examination and objection to plaintiff's evidence); see also Limehouse v. Hulsey, 404 S.C. 93, 116, S.E.2d 566, 579 (S.C. 2013)(reaffirming Howard).

condition and had a value of between $20,000 and $25,000, based on the testimony of Mr. Reinert, Mr. Reinart testified that (i) he based his opinion regarding the value of the Mercedes on his observation of the Mercedes only after Defendant had disassembled the Mercedes and had already performed work on the vehicle, (ii) he did not personally observe the condition of the Mercedes when Plaintiff delivered the vehicle to Defendant, (iii) he did not review any photographs showing the condition of the Mercedes prior to Defendant disassembling the Mercedes and beginning work on the vehicle. Furthermore, Mr. Reinert did not identify any industry resources used by him to assist him with his valuation of the Mercedes as delivered to Defendant.

7. Plaintiff and Defendant agreed Defendant would restore the Mercedes to a "daily driver" condition, and that Defendant would provide Plaintiff a detailed estimate of the total cost and time required to perform the restoration project after completely disassembling the Mercedes. Defendant informed Plaintiff in their conversations and emails that the total cost to restore the Mercedes may increase as the project progressed and Defendant determined what original parts could be reused versus rebuilt or replaced.

8. Between September of 2015 and March of 2016, Defendant performed initial work on the Mercedes including completely disassembling it and preparing the body for anticipated metalwork and submitted invoices to Plaintiff for such work totaling $5,825.00, which Plaintiff paid in full.

9. 22 months later, in December of 2017, Defendant provided Plaintiff a detailed estimate for the remainder of the restoration of the Mercedes, which it represented would cost approximately $60,000, and would take approximately six months.

10. To keep the total cost of the remainder of the restoration process as close to the $60,000

estimate as possible, Plaintiff and Defendant specifically agreed that, wherever possible, Defendant would make use of the Mercedes's existing parts and components.

11. At Defendant's request, Plaintiff provided it a $20,000 deposit, which Defendant specifically represented it would maintain, in trust, in a separate account, and against which it would bill for restoration work on the Mercedes going forward. Defendant also represented to Plaintiff that any unused portion of the $20,000 would be returned to Plaintiff upon his request.

12. The evidence and testimony before the Court demonstrates, and the Court finds, that after Plaintiff provided the $20,000 deposit, Defendant failed to complete the restoration of the Mercedes, as agreed, and it remains to this day in an unrestored and completely disassembled state, in Defendant's possession.

13. Moreover, the evidence, testimony, and Defendant's admissions establish that after disassembling the Mercedes, Defendant stored a great many of its parts and components outdoors on the ground or in plastic bins, exposed to the elements and weather, where they have remained since April 2019.

14. From the photographs submitted in evidence and personal observation, Mr. Reinert identified many of the parts and components of the Mercedes, including the vehicle's motor, windshield, suspension, drivetrain, exterior finishes and chrome, and an array of interior components, which he testified were in a severe degradation condition or ruined as a direct result of Defendant leaving them outdoors in the weather over a a few years, but Mr. Reinart also conceded he did not have firsthand knowledge of the condition of these parts when the Plaintiff delivered the Mercedes to Defendant Mr. Reinert further testified that, if many of those parts and components were in good condition when the Mercedes was delivered to Defendant, then these parts could have been reused in the restoration of the Mercedes. However, due to their present

condition, Mr. Reinert opined many of those parts and components may no longer be usable for the restoration project, or may now require very extensive refurbishment.

15. Mr. Reinert testified that, based on Plaintiff and Defendant's agreement, the total actual cost of the restoration of the Mercedes at the time of the parties' original agreement would reasonably have been between $60,000 and $70,000 dollars. However, Mr. Reinert believed that because of the degradation to many of the parts of the Mercedes due to Defendant failure to properly protect them from damage, the current cost to restore the vehicle is likely to be double that figure.

16. Plaintiff alleged, Mr. Reinert testified, and the Court finds, that Defendant knew or should have known that storing the subject parts and components of Plaintiff's Mercedes outdoors, exposed to the elements over a period of years could result in their degradation or ruination. Mr. Reinert testified that by doing so, Defendant deviated from the standards of care, professionalism, and best practices for businesses in the automotive restoration industry.

17. Based on the uncontroverted testimony of Mr. Reinert, the Court finds the Mercedes would have had a value of between $42,000 and $120,000 had Defendant restored it as agreed in its contract with Plaintiff. Instead, in its present condition and state, the Mercedes currently has a value of $10,000.

18. In September of 2019, as Defendant had still failed to complete the restoration of the Mercedes, Plaintiff made a demand on Defendant for the return of his $20,000 deposit, which Defendant also failed to return to him.

CONCLUSIONS OF LAW

Plaintiff filed his action against Defendant alleging causes of action for breach of contract, negligence, conversion, and unjust enrichment for which he has prayed for actual,

consequential, special, and punitive damages as proven at trial, together with attorney's fees and costs of the action. The Defendant failed to answer or otherwise respond to Plaintiff's Complaint, and default judgment was entered against it.

A defendant in default admits liability but not the damages as set forth in the prayer for relief. Solley v. Navy Fed. Credit Union, Inc., 397 S.C. 192, 203 723 S.E.2d 597, 603 (S.C. App. 2012); see also Renney v. Dobbs House, Inc., 275 S.C. 562, 566, 274 S.E.2d 290, 292 (1981). The amount of damages in a default action must be proved by the preponderance of the evidence. Id.; see Jackson v. Midlands Human Res. Ctr., 296 S.C. 526, 529, 374 S.E.2d 505, 507 (Ct. App.1988) ("A judgment for money damages must be warranted by the proof of the party in whose favor it is rendered."). As to punitive or exemplary damages, the Plaintiff has the burden of proving by clear and convincing evidence the Defendant's demonstrated misconduct was willful, wanton, or with reckless disregard for the Plaintiff's rights. See Mishoe v. Qhg of Lake City, Inc., 621 S.E.2d 363, 366, 366 S.C. 195 (S.C. 2005). "A conscious failure to exercise due care constitutes willfulness." Id.

Based on the pleadings, admissions, and the uncontroverted evidence and testimony presented by Plaintiff and his expert witness at the damages hearing, the Court finds and concludes as follows:

Breach of Contract

Plaintiff and Defendant entered into a valid contract for the restoration of Plaintiff's Mercedes, supported by consideration, and creating rights and obligations between the parties, under which Defendant agreed to restore the vehicle to a "daily driver" condition, and Plaintiff agreed to pay Defendant for parts and labor associated with the restoration. Pursuant to the parties' contract, Defendant invoiced Plaintiff for the initial restoration work it performed in the

amounts totaling $5,825.00, which Plaintiff paid in full. Thereafter, Plaintiff provided Defendant a $20,000 deposit towards the remainder of the vehicle restoration, which Defendant was to hold in a separate account, as agreed, however, Defendant did complete the restoration of the Mercedes. Furthermore, after Plaintiff discovered Defendant had not performed its obligations, as promised, and demanded the return of his $20,000 deposit, as agreed, Defendant failed to deliver it. The Court finds Defendant has breached its contract with Plaintiff entitling Plaintiff to contract damages.

Damages in a breach of contract action are to put the non-breaching party in the position he or she would have been in had the breach not occurred and the contract were performed. See Minter v. GOCT, Inc., 322 S.C. 525, 473 S.E.2d 67(Ct. App. 1996)(purpose of damages for breach of contract is to put plaintiff in as good a position as he or she would have been if the contract had been performed). Compensation for lost profits or value is recoverable as damage in a breach of contract action where the estimate of such lost profit or value is not based wholly on speculation and conjecture. Charles v. Texas Co., 199 S.C. 156, 18 S.E.2d 719 (1942); South Carolina Federal Savings Bank v. Thorton-Crosby Development Co., 303 S.C. 74, 399 S.E.2d 8 (Ct. App. 1990); Global Protection Corp. v Halbersberg, 332 S.C. 149, 503 S.E.2d 483 (1998)(absolute certainty of data on which lost profits are estimated not required; must be such reasonable certainty that damages are not based wholly on speculation and conjecture and certain standard or fixed method by which profits or value may be estimated and determined with a fair degree of accuracy is sufficient).

The proper measure of damages for breach of contract is the loss actually suffered by the contractee as the result of the breach. Tomlinson v. Mixon, 626 S.E.2d 43, 50, 367 S.C. 467 (S.C. App. 2006); South Carolina Fin. Corp. v. West Side Fin. Co., 236 S.C. 109, 113 S.E.2d 329

(1960). "In the normal case, the damage will consist of two distinct elements: (1) out-of-pocket costs actually incurred as a result of the contract; and (2) the gain above costs that would have been realized had the contract been performed." Id; Collins Entm't., Inc. v. White, 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005).

Here, therefore, as damages for Defendant's breach of contract, Plaintiff is entitled to the difference between the fair market value of the Mercedes as restored to the agreed upon condition and its present value, minus the difference between the cost of the restoration work and the amount the Plaintiff already paid toward that cost. According to the uncontroverted testimony of Mr. Reinert, the fair market value for the Mercedes as restored to the agreed "daily driver" condition would have been between $42,000 and $120,000, the average of which amounts to $81,000. Mr. Reinert did not identify any industry resources from which he used information to formulate his estimated fair market value of the Mercedes, relying upon general internet searches for sales listings of similar Mercedes. He further testified that based on the parties agreement at the time of its making, the reasonable cost of the labor and parts would have been between $60,000 and $70,000 dollars, the average of which amounts to $65,000. Plaintiff also paid Defendant a total of $25,825 towards the total cost of the restoration. Plaintiff's actual damage resulting from Defendant's breach of contract can, therefore, be expressed as ($81,000 - $2,500) – ($65,000 - $25,825) and totals $39,325.

Under the foregoing measure, Plaintiff is also entitled to the return of the vehicle in its present state. Mr. Reinert testified that shipping of the vehicle in its present disassembled state to a Charleston location will cost a fee of $525 which includes tarping, and two hours of loading and unloading, plus $100 dollars per hour for additional time. Mr. Reinert testified that in his opinion, loading and unloading the Mercedes in its disassembled condition would likely take

several hours. The Court finds Plaintiff is entitled to consequential damages associated with shipping the Mercedes to another location in Charleston in the amount of $1,125.

Plaintiff is entitled to actual and consequential damages as a result of Defendant's breach of contract in the total amount of $40,450, including the cost to return the vehicle, plus the costs and expenses of the action.

Negligence

Plaintiff's contract with Defendant for the restoration of the Mercedes and his delivery of the vehicle to Defendant for that purpose created a bailment. "A bailment is created by the delivery of personal property by one person to another in trust for a specific purpose, pursuant to an express or implied contract to fulfill that trust." Hadfield v. Gilchrist, 538 S.E.2d 268, 343 S.C. 88, 95 (S.C. App. 2000); Home Indent Co. v. Harleysville Mut. Ins. Co., 252 S.C. 452, 460, 166 S.E.2d 819, 824 (1969)("Bailment has been defined as the delivery of a chattel for some express or particular purpose upon a contract, express or implied, that, after the purpose has been fulfilled, then the chattel shall be redelivered to the bailor, or otherwise dealt with according to his directions.").

The bailment contract between Plaintiff and Defendant created a duty in Defendant to exercise due care in safekeeping of Plaintiff's Mercedes, see Harris v. Burnside, 261 S.C. 190, 199 S.E. 2d 65, 67-8 (1973)(citing Fortner v. Carnes, 258 S.C. 455, 189 S.E.2d 24), and in its repair, see id. (citing Edwards v. Charleston Sheet Metal, 253 S.C. 537, 172 S.E.2d 120). Breach of the duty of care arising under a bailment contract constitutes a tort. Id. at 195, 68.

In action involving a bailment alleging the tort of negligence, the bailor is entitled to be compensated for all losses that are the natural consequence and proximate result of the bailee's negligence. Dixon v. Besco Engineering, Inc., 320 S.C. 174, 180, 463 S.E.2d 636 (S.C. App.

1995)(citing 8 Am.Jur.2d Bailments § 346 (1980)). Damages are proximately caused if they are the foreseeable result of the defendant's tortious act. Id. (citing Young v. Tide Craft, Inc., 270 S.C. 453, 242 S.E.2d 671 (1978)). Further, the liability of a bailee under a bailment for mutual benefit, as we have here, arises upon a showing that (1) the goods were delivered to the bailee in good condition, (2) they were lost or returned in a damaged condition, and (3) the loss or damage to the goods was due to the failure of the bailee to exercise ordinary care in the safekeeping of the property. Hadfield v. Gilchrest, 343 S.C. 88 at 99. Importantly, the burden is on the bailee, and not on the bailor, to demonstrate the bailee used ordinary care in storing and safekeeping the property. Id.

Punitive damages are recoverable for negligence, which is so reckless of consequences as to imply or to assume the nature of wantonness, willfulness or recklessness. Solanki v. Wal-Mart Store # 2806, 410 S.C. 229, 237, 763 S.E.2d 615 (S.C. App. 2014)(referencing Bell v. Atl. Coast Line R. Co., 202 S.C. 160, 171, 24 S.E.2d 177, 182 (1943)). "If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care." Berberich v. Jack, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011).

In the present action, pursuant to the parties' agreement, Plaintiff delivered his Mercedes into the Defendant's possession which created a bailment for mutual benefit. As such, Defendant (bailee) owed Plaintiff (bailor) a duty of care both in the safekeeping and in the repair of Plaintiff's vehicle. Based on the admitted allegations in Plaintiff's Complaint and the evidence and testimony of Plaintiff and Mr. Reinert at the damages hearing, the Court finds the Defendant failed to exercise due care in restoring the Plaintiff's vehicle and in safekeeping its parts and components by storing many of them outdoors in such a manner as to allow them to be

directly exposed to the weather over a period of a few years. Such failure to exercise due care by Defendant proximately resulted in the severe degradation or ruination of some parts and components of Plaintiff's Mercedes, which not only reduced its value from the time Plaintiff delivered it to the Defendant, but also may have doubled the cost to restore the vehicle to the "daily driver" condition.

Furthermore, based on the testimony of the Plaintiff and Mr. Reinert and the photographic evidence entered into the record, the Court finds by a standard of clear and convincing evidence, that Defendant knew or should have know that storing the parts and components of Plaintiff's Mercedes on the outdoors on the ground or in bins and exposed to the weather and elements over a period of a few years would result in the very damage that was ultimately occasioned by such failure to exercise even slight care in safeguarding them. Mr. Reinert testified that Defendant's actions constituted an absolute departure from industry standards and best practices, that Defendant or it's agents or employees were conscious of such departure and the damage that would result, and that such acts or omissions amounted to a reckless disregard for Plaintiff's property. The Court finds such damages were foreseeable and avoidable by Defendant.

As stated above, based on the evidence and testimony, at the time Plaintiff delivered the Mercedes to Defendant, the vehicle had a value of between $20,000 and $25,000, the average of which amounts to $22,500. Presently the vehicle is worth $10,000. The damage occasioned to the Mercedes by the negligence of the Defendant has reduced its value by $12,500, and Defendant is liable to Plaintiff in that amount.

While Plaintiff has requested punitive damages, "to ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review..." Gamble v. Stevenson, 305 S.C. 104,

112, 406 S.E.2d 350, 354 (S.C. 1991). The Court when conducting such a review may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) other factors deemed appropriate. *Id.* at 112. After conducting such review, this Court has found no evidence of (i) an excessive duration of conduct, (ii) concealment by Defendant, (iii) the existence of similar past conduct, or (iv) that Defendant has any ability to pay such an award, and this Court declines to award any punitive damages under Plaintiff's negligence cause of action.

Under the theory of negligence, Defendant is liable to Plaintiff for the return of the Mercedes and for compensatory damages in the amount of $13,625, including the cost of transport, , plus the costs and expenses of the action.

Conversion

Plaintiff's claim of conversion relates the $20,000 deposit Plaintiff provided Defendant, and that Defendant failed to return upon Plaintiff's demand, as agreed.

Conversion is the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights." Green v. Waidner, 284 S.C. 35, 324 S.E.2d 331 (S.C. App., 1984); Powell v. A.K. Brown Motor Co., 200 S.C. 75, 78, 20 S.E.2d 636, 637 (1942). Money may be the subject of conversion, when it is capable of being identified, and there may be conversion of determinate sums even though the specific coin and bills are not identified. See Owens v. Andrews Bank & Trust Co., 220 S.E.2d 116, 265 S.C. 490, 497 (S.C. 1975); 89 C.J.S. Trover and Conversion § 23, p. 541 (1955).

The measure of actual damages in an action for conversion of personal property is the value of the property with interest thereon from the date of conversion to the date of trial. Id.; Long v. Gibbs Auto Wrecking Company, 253 S.C. 370, 171 S.E.2d 155 (1969), Mims v. Bennett, 160 S.C. 39, 158 S.E. 124 (1931).

The measure of damages for a willful and intentional conversion, where the property is converted with knowledge of the owner's rights in the property, is the highest market value of the property with interest up to the time of trial, including any additional value due to additions or improvements made by the converter. See Green, 284 S.C. 35, 324 S.E.2d 331; Industrial Welding Supplies, Inc. v. Atlas Vending Co., 276 S.C. 196, 277 S.E.2d 885 (1981); Gregg v. Bank of Columbia, 72 S.C. 458, 52 S.E. 195 (1905); Restatement (Second) of Torts Section 927 (1981); 1 Am.Jur.2d Accession and Confusion Section 29 (1962). Punitive damages are permitted in a conversion claim where the evidence shows the conversion was done recklessly and with conscious indifference to the owner's rights. Long v. Gibbs Auto Wrecking Co., 253 S.C. 370, 171 S.E.2d 155 (1969); Lumpkin v. Allstate Insurance Co., 251 S.C. 19, 159 S.E.2d 852 (1968).

In the present case, based on the admitted allegations of the pleadings and the testimony and evidence presented to the Court, the Plaintiff, after paying for the totality of the restoration work performed on his Mercedes to a certain point, provided Defendant a $20,000 deposit in advance of the remainder of the work. Defendant was to maintain the $20,000, in trust, a separate account to bill against for restoration work going forward, and of which any unused portion would be refundable to Plaintiff on demand. Thereafter, Defendant failed to complete the restoration of Plaintiff's vehicle. When Plaintiff discovered that fact some 20 months later and demanded the return of his deposit money, Defendant did not return it to him, and has still

not returned it. Defendant has knowingly, consciously, and willfully deprived Plaintiff of possession and ownership of a determinant sum of money, and is liable to Plaintiff for conversion of his deposit money in the amount of $20,000, plus interest at the legal rate since Plaintiff demand on September 11, 2019 for its return in the amount of $3,095 totaling $23,095.

Under his conversion action, Plaintiff has again requested punitive damages, "to ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review..." Gamble v. Stevenson, 305 S.C. 104, 112, 406 S.E.2d 350, 354 (S.C. 1991). The Court when conducting such a review may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) other factors deemed appropriate. *Id.* at 112. After conducting such review, this Court has found no evidence of (i) an excessive duration of conduct, (ii) concealment by Defendant, (iii) the existence of similar past conduct, or (iv) that Defendant has any ability to pay such an award, and the Court declines to award any punitive damages under Plaintiff's conversion cause of action.

Under a theory of conversion, Defendant is liable to Plaintiff for actual in the amount of $23,095, plus costs and expenses of the action.

Costs of Action

Based on the record, including the attorney's fee and expenses affidavit filed in the case by his attorney, Plaintiff has been caused to incur costs and expenses associated with bringing and prosecuting the action in the amount of $1,694, which includes the fee of $1,000 charged by his expert witness for his services, as attested to by Mr. Reinert during the damages hearing.

Plaintiff is entitled to recover from Defendant his costs and expenses in the total amount of $1,694.

Attorney's Fees

Plaintiff also requested an award of attorney's fees. "Attorney's fees are not recoverable unless authorized by contract or statute." Jackson v. Speed, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997). Plaintiff and Defendant did not agree to the recovery of attorney's fees in any contract, and Plaintiff has not cited any statute by which this Court may award him attorney's fees. Consequently, the Court denies Plaintiff's request for an award of attorney's fees.

Summary of Judgment

The Court finds Defendant is liable to Plaintiff, as described above, on Plaintiff's causes of action for breach of contract, negligence, and conversion. Because the Court is awarding Plaintiff contract damages on the basis of a valid contract between the parties, the Court has not considered Plaintiff's unjust enrichment claim. See Gantt v. Morgan, 199 S.C. 138, 18 S.E.2d 672 (1942)(Relief under a theory of unjust enrichment is not available if an action is based on the existence of a contract).

Plaintiff is not permitted a double recovery for a single wrong. To prevent that outcome, Plaintiff is required to elect his remedies. See Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (S.C. 1996) (citing Thompson v. Watts, 281 S.C. 504, 316 S.E.2d 393 (1984)(The purpose of election of remedies is to prevent a double recovery for a single wrong.)). However, an election of remedies is not applicable where remedies are addressed to different wrongs, requiring different or additional elements and standards of proof. See Thompson v. Watts, 316 S.E.2d 393, 281 S.C. 504 (S.C. 1984)(citing Tzouvelekas v. Tzouvelekas, 206 S.C. 90, 33 S.E.2d 73, 74

(1945)(Election of remedies is the act of choosing between different remedies allowed by law on the same state of facts.)).

Based on Defendant's liability to Plaintiff on his causes of action for breach of contract, negligence, and conversion, as set out above, and applying the doctrine of election of remedies, the Court finds judgment for the Plaintiff is appropriate in the following amounts:

a) for breach of contract in the amount of $40,450;

b) for negligence in the amount of $21,125, reduced by $40,450 for a total of $0;

c) for conversion in the amount of $23,095;

d) for the return of the Mercedes to Plaintiff; and

e) for Plaintiffs costs and expenses in the amount of $1,694.

IT IS HEREBY ORDERED AND ADJUDGED that judgment against Defendant be and is hereby entered in favor of Plaintiff in the total amount of **$65,239**. Defendant is also hereby ordered to prepare the Mercedes and its parts and components is such a manner that within 30 days of this Order becoming final, they may be available for pick-up and transport to a location in Charleston, South Carolina to be designated by Plaintiff.

IT IS SO ORDERED in Charleston, South Carolina, this _____ day of September 2021.

_____
Hon. Roger M. Young
Circuit Court Judge

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP10-05392

KEVIN STAVELEY-O'CARROLL
PLAINTIFF(S)

FEXNIX AUTOMOTIVE, LLC
DEFENDANT(S)

Submitted by: Damien A. Sobieraj	**Attorney for :** ☐ Plaintiff ☒ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
KEVIN STAVELEY-O'CARROLL	FENIX AUTOMOTIVE, LLC	$65,239.00
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge **Judge Code** **Date**

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

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

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Charleston Common Pleas

Case Caption: Kevin Staveley O'Carroll VS Fenix Automotive Llc

Case Number: 2019CP1005392

Type: Order/Damages

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

EXHIBIT
B

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Kevin Staveley-O'Carroll, Plaintiff, v. Fenix Automotive, LLC, Defendant.	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT C/A NO.: 2019-CP-10-05392 **ORDER DENYING MOTION TO ALTER OR AMEND A JUDGEMENT PURSUANT TO RULE 59(e)**

The Plaintiff Kevin Staveley-O'Carroll filed a motion asking this Court to reconsider its Order dated October 6, 2021. Specifically, Plaintiff asks this Court to reconsider the following findings within the Order: 1) in awarding damages, the Court based some or all of its calculations on monetary figures supplied by the Defendant in his proposed order of judgment; the Court declined to award punitive damages based on Plaintiff's negligence claim or conversion claim.

STANDARD OF REVIEW

Motions for reconsideration will not be granted absent "highly unusual circumstances." U.S. ex rel. Becker v. Washington Savanah River Co., 305 F.3d 284, 290 (4th Cir. 2002) (stating that simple disagreements with the court's ruling will not support Rule 59(e) relief).[1] Courts have recognized three circumstances in which a court should grant a Rule 59(e) motion: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." Hutchinston v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). Importantly, a motion for reconsideration is not

1 Rule 59 is substantially the same as the Federal Rule. *See* Elam v. S.C. Dep't of Transp., 361 S.C. 9, 21, 602 S.E. 2d 772, 779 (2004) ("Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical.").

a vehicle to re-litigate previously raised issues or "to raise argument or present evidence that could have been presented prior to the entry of judgment." Dash v. Mayweather, C/A No. 3:10-1036-JFA, 2010 U.S. Dist. LEXIS 95277, *2 (D.S.C. Sept. 13, 2010) (quoting Exxon Shipping Co. v. Baker, 554 U.S. 471, n.5 (2008)). In other words, "[a] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014); Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995). Nor does "[a] party's mere disagreement with the court's ruling . . . warrant a Rule 59(e) motion." In re Pella Corp. Architect & Designer Series Windows Mktg., Sales Practices & Prods. Liab. Litig., 269 F.Supp. 3d 685, 691 (D.S.C. 2017); *see also* Lyons v. Fid. Nat'l Title Ins. Co., 415 S.C. 115, 135, 781 S.E.2d 126, 137 (Ct. App. 2015).

After consideration of the issues raised in Plaintiff's motion, Plaintiff's Motion to Alter or Amend a Judgment is DENIED.

AND IT IS SO ORDERED.

ELECTRONIC SIGNATURE PAGE TO FOLLOW

Charleston Common Pleas

Case Caption: Kevin Staveley O'Carroll VS Fenix Automotive Llc

Case Number: 2019CP1005392

Type: Order/Amend

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No.2019-DR-10-05392

KEVIN STAVELEY-O'CARROLL, Appellant,

v.

FENIX AUTOMOTIVE, LLC, Respondent.

MOTION TO DISMISS

YOU WILL PLEASE TAKE NOTICE that the Respondent FeNix Automotive, LLC, by and through its undersigned attorney, moves this Court to dismiss the appeal and remand this matter to the Charleston County Circuit Court.

The Honorable Robert M. Young, Sr., granted an Order of Judgment for Damages dated and filed October 7, 2021. Respondent filed a Motion to Alter or Amend Judgment filed October 14, 2021 (see attached Exhibit "A"). Appellant filed a Motion to Alter, Amend, and Reconsider filed October 15, 2021. Judge Young denied Appellant's motion pursuant to his Order Denying Motion to Alter or Amend a Judgment Pursuant to Rule 59(e) dated November 1, 2021 and filed November 2, 2021. Respondent's Motion to Alter or Amend Judgment is still pending before the trial judge. Appellant filed a Notice of Appeal on November 17, 2021, appealing Judge Young's Order of Judgment for Damages and his Order Denying Motion to Alter or Amend a Judgment to Pursuant to Rule 59(e).

The Supreme Court in *Otten v. Otten*, 287 S.C. 166, 337 S.E.2d 207 (S.C. 1985) dismissed a Notice of Appeal because post-trial motions in that case were still pending in the family court. Similarly, in this case, Respondent's Motion to Alter or Amend Judgment filed October 14, 2021 is still pending in the Circuit Court, and Appellant's Notice of Appeal should not deprive the Circuit Court from considering this motion. *See Holmes v. E. Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 758 S.E.2d 483, 496 (S.C. 2014). Consequently, Appellant's Notice of Appeal is premature because (i) Judge Young may still yet alter or the amend the judgment pursuant to Respondent's pending motion, (ii) Appellant's Notice of Appeal does not address any amended order that Judge Young may grant pursuant to Respondent's pending motion, and (iii) Appellant may still appeal these orders after disposition of the post-trial motions, and this Court should dismiss Appellant's Notice of Appeal to promote judicial economy and prevent untimely rulings subject to duplicative reviews. *See Hudson v. Hudson*, 290 S.C. 215, 349 S.E.2d 341 (S.C. 1986) (holding that when a timely post-trial motion is pending before the lower court, any notice of appeal will be dismissed without prejudice as premature); *Cf. Holmes v. E. Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 758 S.E.2d 483, 496 (S.C. 2014) (stating that post-trial motions should be timely heard and appealed as necessary in "an efficient and wholesale manner, and not…in a piecemeal fashion").

Respectfully submitted,

COOPER RIVER LEGAL SERVICES, LLC

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ATTORNEY FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No.2019-DR-10-05392

KEVIN STAVELEY-
O'CARROLL, Appellant,

v.

FENIX AUTOMOTIVE, LLC, Respondent.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on December 7, 2021, he served the foregoing Motion to Dismiss electronically to W. Westbrook Wills III, attorney for Appellant, through the E-File system and via email addressed to wwills@wwillslaw.com.

COOPER RIVER LEGAL SERVICES, LLC

s/Damien A. Sobieraj
Damien A. Sobieraj, Esquire
S.C. Bar ID No. 71760
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ATTORNEY FOR RESPONDENT

EXHIBIT "A"

STATE OF SOUTH CAROLINA)) COUNTY OF CHARLESTON))) KEVIN STAVELLY-O'CARROLL) Plaintiff,) vs.)) FENIX AUTOMOTIVE, LLC) Defendant.)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO.: 2019-CP-10-05392 **MOTION AND ORDER INFORMATION FORM AND COVERSHEET**

Plaintiff's Attorney: _____, Bar No. _____ Address: _____ Phone: _____Fax _____ E-mail: _____Other: _____	Defendant's Attorney: DAMIEN A. SOBIERAJ, Bar No. 71760 Address: P.O. BOX 2439, MT PLEASANT, SC 29465 Phone: (843)881-2244 Fax(843)849-0209 E-mail: damien@cooperriverlegalservices.com Other: _____

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☒ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: _____
Estimated Time Needed: _____ Court Reporter Needed: ☐ **YES**/☐ **NO**

SECTION II: Motion/Order Type

☒ Written motion attached
☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

s/Damien A. Sobieraj _____ OCTOBER 14, 2021
Signature of Attorney for ☐ Plaintiff /☒ Defendant Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
  Name of Court Reporter: _____
- ☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON KEVIN STAVELEY-O'CARROLL, Plaintiff vs. FENIX AUTOMOTIVE, LLC, Defendant.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO.: 2019CP10-05392 **MOTION TO ALTER OR AMEND JUDGMENT**

(CP11-008)

TO: THE PLAINTIFF ABOVE-NAMED AND W. WESTBROOK WILLS III, ATTORNEY FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the undersigned will move before the Honorable Roger M. Young, Sr., Circuit Court Judge, within ten (10) days or as soon thereafter as counsel may be heard, for an Order, pursuant to Rule 59 SCRCP altering or amending the judgment. The grounds for this motion are as follows:

1. On October 7, 2021, this Court signed an Order for Judgment of Damages (the "Order") proposed by Defendant's counsel in which Defendant's counsel inadvertently included an incorrect amount of $2,500 for the current value of the vehicle in the formula for the Breach of Contract damages on page 8 of the Order.

2. The correct amount for the current value of the car is $10,000 as stated on page 5 of the Order in Paragraph 17 of the Finding of Facts.

3. Consequently, counsel's error caused a miscalculation in the damages set forth on pages 8 and 9 of the Order for the Breach of Contract cause of action and, therefore, the total damages awarded on page 16 of the Order in the Summary of Judgment by an additional $7,500.

Defendant and its counsel respectfully request that this Court amend its Order with the attached Amended Order for Judgment of Damages containing the changes necessary to correct the aforementioned errors and reduce by $7,500 the damages awarded for the Breach of Contract cause of action and, therefore, the total damages awarded.

COOPER RIVER LEGAL SERVICES, LLC

s/Damien A. Sobieraj

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Email: damien@cooperriverlegalservices.com
Attorney for Defendant

Dated: October 14, 2021

CERTIFICATE OF SERVICE

I hereby certify that the foregoing MOTION TO ALTER OR AMEND JUDGMENT was by email on October 15, 2021, to the following:

W. Westbrook Wills III, Attorney for Plaintiff at wwills@wwillslaw.com

COOPER RIVER LEGAL SERVICES, LLC

s/Damien A. Sobieraj

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Email: damien@cooperriverlegalservices.com
Attorney for Defendant

Dated: October 15, 2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	Case No.: 2019-CP-10-05392
KEVIN STAVELEY-O'CARROLL,	)	
	)	
Plaintiff,	)	AMENDED ORDER
-vs-	)	OF
	)	JUDGMENT FOR DAMAGES
FENIX AUTOMOTIVE, LLC,	)	
	)	
Defendant.	)	
	)	

Plaintiff Kevin Staveley-O'Carroll ("Plaintiff" or "Staveley-O'Carroll") brought this action against Defendant Fenix Automotive, LLC ("Defendant" or "Fenix") on October 21, 2019 alleging causes of action for breach of contract, negligence, conversion, and unjust enrichment. The record reflects that Plaintiff properly served Defendant with a copy of the Summons and Complaint on November 13, 2019. On January 28, 2020, after Defendant failed to file an answer or otherwise respond to the Complaint, Plaintiff filed and Affidavit of Default and Motion for Default Judgment, which the Court granted its Order dated January 29, 2020. Subsequently, Plaintiff filed his Motion for Damages and requested for a damages hearing.

On August 25, 2021, the parties having been duly and properly notified, the Court held a hearing on the issue of damages via WebEx. Present at the damages hearing via video/audio were Plaintiff appearing with his counsel W. Westbrook Wills III, Esq. and Axel Reinert ("Mr. Reinert"), his expert witness in automotive restoration. Damien A. Sobieraj, Esq. appeared on behalf of Defendant. Plaintiff's expert witness was duly qualified, without objection, to give expert testimony as to issues related to the damages in the matter. Plaintiff and Mr. Reinert's testimony was taken, evidence was received, and the entire record in the case was considered by

the Court.[1] The Court makes the following Findings of Fact and Conclusions of Law as required by SCRCP, Rule 52. Any Finding of Fact which is more appropriately characterized as a Conclusion of Law shall be treated as such, and vice-versa.

FINDINGS OF FACT

Based on Defendant's admissions by default of the allegations of Plaintiff's Complaint, and having considered the testimony and evidence presented at the damages hearing, Plaintiff has established the following facts by a preponderance of the evidence, unless otherwise specified.

1. Plaintiff is an individual residing in Columbia, Missouri.

2. Defendant is a South Carolina limited liability company engaged in the business of automotive restoration.

3. The parties are properly subject to the jurisdiction of the Court, and the Court has subject matter over the matters raised in the pleadings.

4. Defendant was properly served with a copy of Plaintiff's Summons and Complaint, which it failed to answer or otherwise respond, resulting in the entry of default judgment against it.

5. In 2015, Plaintiff entered into a contract with Defendant to restore his classic 1969 Mercedes 280 SL ("the Mercedes"), which he delivered into Defendant's possession and care at Defendant's place of business for that purpose.

6. At the time Plaintiff delivered the Mercedes to Defendant, the vehicle was in poor

[1] As Defendant was in default and default judgment having been entered against it, the Court took testimony and received evidence from and on behalf of Plaintiff only, and limited Defendant's participation in the hearing to cross-examination and objecting to evidence by its counsel. See Howard v. Holiday, Inc. 271 S.C. 238, 246 S.E.2d 880 (1978)(limiting a defendant's participation in a post-default hearing to cross-examination and objection to plaintiff's evidence); see also Limehouse v. Hulsey, 404 S.C. 93, 116, S.E.2d 566, 579 (S.C. 2013)(reaffirming Howard).

condition and had a value of between $20,000 and $25,000, based on the testimony of Mr. Reinert, Mr. Reinart testified that (i) he based his opinion regarding the value of the Mercedes on his observation of the Mercedes only after Defendant had disassembled the Mercedes and had already performed work on the vehicle, (ii) he did not personally observe the condition of the Mercedes when Plaintiff delivered the vehicle to Defendant, (iii) he did not review any photographs showing the condition of the Mercedes prior to Defendant disassembling the Mercedes and beginning work on the vehicle. Furthermore, Mr. Reinert did not identify any industry resources used by him to assist him with his valuation of the Mercedes as delivered to Defendant.

7. Plaintiff and Defendant agreed Defendant would restore the Mercedes to a "daily driver" condition, and that Defendant would provide Plaintiff a detailed estimate of the total cost and time required to perform the restoration project after completely disassembling the Mercedes. Defendant informed Plaintiff in their conversations and emails that the total cost to restore the Mercedes may increase as the project progressed and Defendant determined what original parts could be reused versus rebuilt or replaced.

8. Between September of 2015 and March of 2016, Defendant performed initial work on the Mercedes including completely disassembling it and preparing the body for anticipated metalwork and submitted invoices to Plaintiff for such work totaling $5,825.00, which Plaintiff paid in full.

9. 22 months later, in December of 2017, Defendant provided Plaintiff a detailed estimate for the remainder of the restoration of the Mercedes, which it represented would cost approximately $60,000, and would take approximately six months.

10. To keep the total cost of the remainder of the restoration process as close to the $60,000

estimate as possible, Plaintiff and Defendant specifically agreed that, wherever possible, Defendant would make use of the Mercedes's existing parts and components.

11. At Defendant's request, Plaintiff provided it a $20,000 deposit, which Defendant specifically represented it would maintain, in trust, in a separate account, and against which it would bill for restoration work on the Mercedes going forward. Defendant also represented to Plaintiff that any unused portion of the $20,000 would be returned to Plaintiff upon his request.

12. The evidence and testimony before the Court demonstrates, and the Court finds, that after Plaintiff provided the $20,000 deposit, Defendant failed to complete the restoration of the Mercedes, as agreed, and it remains to this day in an unrestored and completely disassembled state, in Defendant's possession.

13. Moreover, the evidence, testimony, and Defendant's admissions establish that after disassembling the Mercedes, Defendant stored a great many of its parts and components outdoors on the ground or in plastic bins, exposed to the elements and weather, where they have remained since April 2019.

14. From the photographs submitted in evidence and personal observation, Mr. Reinert identified many of the parts and components of the Mercedes, including the vehicle's motor, windshield, suspension, drivetrain, exterior finishes and chrome, and an array of interior components, which he testified were in a severe degradation condition or ruined as a direct result of Defendant leaving them outdoors in the weather over a a few years, but Mr. Reinart also conceded he did not have firsthand knowledge of the condition of these parts when the Plaintiff delivered the Mercedes to Defendant Mr. Reinert further testified that, if many of those parts and components were in good condition when the Mercedes was delivered to Defendant, then these parts could have been reused in the restoration of the Mercedes. However, due to their present

condition, Mr. Reinert opined many of those parts and components may no longer be usable for the restoration project, or may now require very extensive refurbishment.

15. Mr. Reinert testified that, based on Plaintiff and Defendant's agreement, the total actual cost of the restoration of the Mercedes at the time of the parties' original agreement would reasonably have been between $60,000 and $70,000 dollars. However, Mr. Reinert believed that because of the degradation to many of the parts of the Mercedes due to Defendant failure to properly protect them from damage, the current cost to restore the vehicle is likely to be double that figure.

16. Plaintiff alleged, Mr. Reinert testified, and the Court finds, that Defendant knew or should have known that storing the subject parts and components of Plaintiff's Mercedes outdoors, exposed to the elements over a period of years could result in their degradation or ruination. Mr. Reinert testified that by doing so, Defendant deviated from the standards of care, professionalism, and best practices for businesses in the automotive restoration industry.

17. Based on the uncontroverted testimony of Mr. Reinert, the Court finds the Mercedes would have had a value of between $42,000 and $120,000 had Defendant restored it as agreed in its contract with Plaintiff. Instead, in its present condition and state, the Mercedes currently has a value of $10,000.

18. In September of 2019, as Defendant had still failed to complete the restoration of the Mercedes, Plaintiff made a demand on Defendant for the return of his $20,000 deposit, which Defendant also failed to return to him.

CONCLUSIONS OF LAW

Plaintiff filed his action against Defendant alleging causes of action for breach of contract, negligence, conversion, and unjust enrichment for which he has prayed for actual,

consequential, special, and punitive damages as proven at trial, together with attorney's fees and costs of the action. The Defendant failed to answer or otherwise respond to Plaintiff's Complaint, and default judgment was entered against it.

A defendant in default admits liability but not the damages as set forth in the prayer for relief. Solley v. Navy Fed. Credit Union, Inc., 397 S.C. 192, 203 723 S.E.2d 597, 603 (S.C. App. 2012); see also Renney v. Dobbs House, Inc., 275 S.C. 562, 566, 274 S.E.2d 290, 292 (1981). The amount of damages in a default action must be proved by the preponderance of the evidence. Id.; see Jackson v. Midlands Human Res. Ctr., 296 S.C. 526, 529, 374 S.E.2d 505, 507 (Ct. App.1988) ("A judgment for money damages must be warranted by the proof of the party in whose favor it is rendered."). As to punitive or exemplary damages, the Plaintiff has the burden of proving by clear and convincing evidence the Defendant's demonstrated misconduct was willful, wanton, or with reckless disregard for the Plaintiff's rights. See Mishoe v. Qhg of Lake City, Inc., 621 S.E.2d 363, 366, 366 S.C. 195 (S.C. 2005). "A conscious failure to exercise due care constitutes willfulness." Id.

Based on the pleadings, admissions, and the uncontroverted evidence and testimony presented by Plaintiff and his expert witness at the damages hearing, the Court finds and concludes as follows:

Breach of Contract

Plaintiff and Defendant entered into a valid contract for the restoration of Plaintiff's Mercedes, supported by consideration, and creating rights and obligations between the parties, under which Defendant agreed to restore the vehicle to a "daily driver" condition, and Plaintiff agreed to pay Defendant for parts and labor associated with the restoration. Pursuant to the parties' contract, Defendant invoiced Plaintiff for the initial restoration work it performed in the

amounts totaling $5,825.00, which Plaintiff paid in full. Thereafter, Plaintiff provided Defendant a $20,000 deposit towards the remainder of the vehicle restoration, which Defendant was to hold in a separate account, as agreed, however, Defendant did complete the restoration of the Mercedes. Furthermore, after Plaintiff discovered Defendant had not performed its obligations, as promised, and demanded the return of his $20,000 deposit, as agreed, Defendant failed to deliver it. The Court finds Defendant has breached its contract with Plaintiff entitling Plaintiff to contract damages.

Damages in a breach of contract action are to put the non-breaching party in the position he or she would have been in had the breach not occurred and the contract were performed. See Minter v. GOCT, Inc., 322 S.C. 525, 473 S.E.2d 67(Ct. App. 1996)(purpose of damages for breach of contract is to put plaintiff in as good a position as he or she would have been if the contract had been performed). Compensation for lost profits or value is recoverable as damage in a breach of contract action where the estimate of such lost profit or value is not based wholly on speculation and conjecture. Charles v. Texas Co., 199 S.C. 156, 18 S.E.2d 719 (1942); South Carolina Federal Savings Bank v. Thorton-Crosby Development Co., 303 S.C. 74, 399 S.E.2d 8 (Ct. App. 1990); Global Protection Corp. v Halbersberg, 332 S.C. 149, 503 S.E.2d 483 (1998)(absolute certainty of data on which lost profits are estimated not required; must be such reasonable certainty that damages are not based wholly on speculation and conjecture and certain standard or fixed method by which profits or value may be estimated and determined with a fair degree of accuracy is sufficient).

The proper measure of damages for breach of contract is the loss actually suffered by the contractee as the result of the breach. Tomlinson v. Mixon, 626 S.E.2d 43, 50, 367 S.C. 467 (S.C. App. 2006); South Carolina Fin. Corp. v. West Side Fin. Co., 236 S.C. 109, 113 S.E.2d 329

(1960). "In the normal case, the damage will consist of two distinct elements: (1) out-of-pocket costs actually incurred as a result of the contract; and (2) the gain above costs that would have been realized had the contract been performed." Id; Collins Entm't., Inc. v. White, 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005).

Here, therefore, as damages for Defendant's breach of contract, Plaintiff is entitled to the difference between the fair market value of the Mercedes as restored to the agreed upon condition and its present value, minus the difference between the cost of the restoration work and the amount the Plaintiff already paid toward that cost. According to the uncontroverted testimony of Mr. Reinert, the fair market value for the Mercedes as restored to the agreed "daily driver" condition would have been between $42,000 and $120,000, the average of which amounts to $81,000. Mr. Reinert did not identify any industry resources from which he used information to formulate his estimated fair market value of the Mercedes, relying upon general internet searches for sales listings of similar Mercedes. He further testified that based on the parties agreement at the time of its making, the reasonable cost of the labor and parts would have been between $60,000 and $70,000 dollars, the average of which amounts to $65,000. Plaintiff also paid Defendant a total of $25,825 towards the total cost of the restoration. Plaintiff's actual damage resulting from Defendant's breach of contract can, therefore, be expressed as ($81,000 - **$10,000**) – ($65,000 - $25,825) and totals **$31,825**.

Under the foregoing measure, Plaintiff is also entitled to the return of the vehicle in its present state. Mr. Reinert testified that shipping of the vehicle in its present disassembled state to a Charleston location will cost a fee of $525 which includes tarping, and two hours of loading and unloading, plus $100 dollars per hour for additional time. Mr. Reinert testified that in his opinion, loading and unloading the Mercedes in its disassembled condition would likely take

several hours. The Court finds Plaintiff is entitled to consequential damages associated with shipping the Mercedes to another location in Charleston in the amount of $1,125.

Plaintiff is entitled to actual and consequential damages as a result of Defendant's breach of contract in the total amount of **$32,950**, including the cost to return the vehicle, plus the costs and expenses of the action.

Negligence

Plaintiff's contract with Defendant for the restoration of the Mercedes and his delivery of the vehicle to Defendant for that purpose created a bailment. "A bailment is created by the delivery of personal property by one person to another in trust for a specific purpose, pursuant to an express or implied contract to fulfill that trust." Hadfield v. Gilchrist, 538 S.E.2d 268, 343 S.C. 88, 95 (S.C. App. 2000); Home Indent Co. v. Harleysville Mut. Ins. Co., 252 S.C. 452, 460, 166 S.E.2d 819, 824 (1969)("Bailment has been defined as the delivery of a chattel for some express or particular purpose upon a contract, express or implied, that, after the purpose has been fulfilled, then the chattel shall be redelivered to the bailor, or otherwise dealt with according to his directions.").

The bailment contract between Plaintiff and Defendant created a duty in Defendant to exercise due care in safekeeping of Plaintiff's Mercedes, see Harris v. Burnside, 261 S.C. 190, 199 S.E. 2d 65, 67-8 (1973)(citing Fortner v. Carnes, 258 S.C. 455, 189 S.E.2d 24), and in its repair, see id. (citing Edwards v. Charleston Sheet Metal, 253 S.C. 537, 172 S.E.2d 120). Breach of the duty of care arising under a bailment contract constitutes a tort. Id. at 195, 68.

In action involving a bailment alleging the tort of negligence, the bailor is entitled to be compensated for all losses that are the natural consequence and proximate result of the bailee's negligence. Dixon v. Besco Engineering, Inc., 320 S.C. 174, 180, 463 S.E.2d 636 (S.C. App.

1995)(citing 8 Am.Jur.2d Bailments § 346 (1980)). Damages are proximately caused if they are the foreseeable result of the defendant's tortious act. Id. (citing Young v. Tide Craft, Inc., 270 S.C. 453, 242 S.E.2d 671 (1978)). Further, the liability of a bailee under a bailment for mutual benefit, as we have here, arises upon a showing that (1) the goods were delivered to the bailee in good condition, (2) they were lost or returned in a damaged condition, and (3) the loss or damage to the goods was due to the failure of the bailee to exercise ordinary care in the safekeeping of the property. Hadfield v. Gilchrest, 343 S.C. 88 at 99. Importantly, the burden is on the bailee, and not on the bailor, to demonstrate the bailee used ordinary care in storing and safekeeping the property. Id.

Punitive damages are recoverable for negligence, which is so reckless of consequences as to imply or to assume the nature of wantonness, willfulness or recklessness. Solanki v. Wal-Mart Store # 2806, 410 S.C. 229, 237, 763 S.E.2d 615 (S.C. App. 2014)(referencing Bell v. Atl. Coast Line R. Co., 202 S.C. 160, 171, 24 S.E.2d 177, 182 (1943)). "If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care." Berberich v. Jack, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011).

In the present action, pursuant to the parties' agreement, Plaintiff delivered his Mercedes into the Defendant's possession which created a bailment for mutual benefit. As such, Defendant (bailee) owed Plaintiff (bailor) a duty of care both in the safekeeping and in the repair of Plaintiff's vehicle. Based on the admitted allegations in Plaintiff's Complaint and the evidence and testimony of Plaintiff and Mr. Reinert at the damages hearing, the Court finds the Defendant failed to exercise due care in restoring the Plaintiff's vehicle and in safekeeping its parts and components by storing many of them outdoors in such a manner as to allow them to be

directly exposed to the weather over a period of a few years. Such failure to exercise due care by Defendant proximately resulted in the severe degradation or ruination of some parts and components of Plaintiff's Mercedes, which not only reduced its value from the time Plaintiff delivered it to the Defendant, but also may have doubled the cost to restore the vehicle to the "daily driver" condition.

Furthermore, based on the testimony of the Plaintiff and Mr. Reinert and the photographic evidence entered into the record, the Court finds by a standard of clear and convincing evidence, that Defendant knew or should have know that storing the parts and components of Plaintiff's Mercedes on the outdoors on the ground or in bins and exposed to the weather and elements over a period of a few years would result in the very damage that was ultimately occasioned by such failure to exercise even slight care in safeguarding them. Mr. Reinert testified that Defendant's actions constituted an absolute departure from industry standards and best practices, that Defendant or it's agents or employees were conscious of such departure and the damage that would result, and that such acts or omissions amounted to a reckless disregard for Plaintiff's property. The Court finds such damages were foreseeable and avoidable by Defendant.

As stated above, based on the evidence and testimony, at the time Plaintiff delivered the Mercedes to Defendant, the vehicle had a value of between $20,000 and $25,000, the average of which amounts to $22,500. Presently the vehicle is worth $10,000. The damage occasioned to the Mercedes by the negligence of the Defendant has reduced its value by $12,500, and Defendant is liable to Plaintiff in that amount.

While Plaintiff has requested punitive damages, "to ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review…" Gamble v. Stevenson, 305 S.C. 104,

112, 406 S.E.2d 350, 354 (S.C. 1991). The Court when conducting such a review may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) other factors deemed appropriate. *Id.* at 112. After conducting such review, this Court has found no evidence of (i) an excessive duration of conduct, (ii) concealment by Defendant, (iii) the existence of similar past conduct, or (iv) that Defendant has any ability to pay such an award, and this Court declines to award any punitive damages under Plaintiff's negligence cause of action.

Under the theory of negligence, Defendant is liable to Plaintiff for the return of the Mercedes and for compensatory damages in the amount of $13,625, including the cost of transport, , plus the costs and expenses of the action.

Conversion

Plaintiff's claim of conversion relates the $20,000 deposit Plaintiff provided Defendant, and that Defendant failed to return upon Plaintiff's demand, as agreed.

Conversion is the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights." Green v. Waidner, 284 S.C. 35, 324 S.E.2d 331 (S.C. App., 1984); Powell v. A.K. Brown Motor Co., 200 S.C. 75, 78, 20 S.E.2d 636, 637 (1942). Money may be the subject of conversion, when it is capable of being identified, and there may be conversion of determinate sums even though the specific coin and bills are not identified. See Owens v. Andrews Bank & Trust Co., 220 S.E.2d 116, 265 S.C. 490, 497 (S.C. 1975); 89 C.J.S. Trover and Conversion § 23, p. 541 (1955).

The measure of actual damages in an action for conversion of personal property is the value of the property with interest thereon from the date of conversion to the date of trial. Id.; Long v. Gibbs Auto Wrecking Company, 253 S.C. 370, 171 S.E.2d 155 (1969), Mims v. Bennett, 160 S.C. 39, 158 S.E. 124 (1931).

The measure of damages for a willful and intentional conversion, where the property is converted with knowledge of the owner's rights in the property, is the highest market value of the property with interest up to the time of trial, including any additional value due to additions or improvements made by the converter. See Green, 284 S.C. 35, 324 S.E.2d 331; Industrial Welding Supplies, Inc. v. Atlas Vending Co., 276 S.C. 196, 277 S.E.2d 885 (1981); Gregg v. Bank of Columbia, 72 S.C. 458, 52 S.E. 195 (1905); Restatement (Second) of Torts Section 927 (1981); 1 Am.Jur.2d Accession and Confusion Section 29 (1962). Punitive damages are permitted in a conversion claim where the evidence shows the conversion was done recklessly and with conscious indifference to the owner's rights. Long v. Gibbs Auto Wrecking Co., 253 S.C. 370, 171 S.E.2d 155 (1969); Lumpkin v. Allstate Insurance Co., 251 S.C. 19, 159 S.E.2d 852 (1968).

In the present case, based on the admitted allegations of the pleadings and the testimony and evidence presented to the Court, the Plaintiff, after paying for the totality of the restoration work performed on his Mercedes to a certain point, provided Defendant a $20,000 deposit in advance of the remainder of the work. Defendant was to maintain the $20,000, in trust, a separate account to bill against for restoration work going forward, and of which any unused portion would be refundable to Plaintiff on demand. Thereafter, Defendant failed to complete the restoration of Plaintiff's vehicle. When Plaintiff discovered that fact some 20 months later and demanded the return of his deposit money, Defendant did not return it to him, and has still

not returned it. Defendant has knowingly, consciously, and willfully deprived Plaintiff of possession and ownership of a determinant sum of money, and is liable to Plaintiff for conversion of his deposit money in the amount of $20,000, plus interest at the legal rate since Plaintiff demand on September 11, 2019 for its return in the amount of $3,095 totaling $23,095.

Under his conversion action, Plaintiff has again requested punitive damages, "to ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review…" Gamble v. Stevenson, 305 S.C. 104, 112, 406 S.E.2d 350, 354 (S.C. 1991). The Court when conducting such a review may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) other factors deemed appropriate. *Id.* at 112. After conducting such review, this Court has found no evidence of (i) an excessive duration of conduct, (ii) concealment by Defendant, (iii) the existence of similar past conduct, or (iv) that Defendant has any ability to pay such an award, and the Court declines to award any punitive damages under Plaintiff's conversion cause of action.

Under a theory of conversion, Defendant is liable to Plaintiff for actual in the amount of $23,095, plus costs and expenses of the action.

Costs of Action

Based on the record, including the attorney's fee and expenses affidavit filed in the case by his attorney, Plaintiff has been caused to incur costs and expenses associated with bringing and prosecuting the action in the amount of $1,694, which includes the fee of $1,000 charged by his expert witness for his services, as attested to by Mr. Reinert during the damages hearing.

Plaintiff is entitled to recover from Defendant his costs and expenses in the total amount of $1,694.

Attorney's Fees

Plaintiff also requested an award of attorney's fees. "Attorney's fees are not recoverable unless authorized by contract or statute." Jackson v. Speed, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997). Plaintiff and Defendant did not agree to the recovery of attorney's fees in any contract, and Plaintiff has not cited any statute by which this Court may award him attorney's fees. Consequently, the Court denies Plaintiff's request for an award of attorney's fees.

Summary of Judgment

The Court finds Defendant is liable to Plaintiff, as described above, on Plaintiff's causes of action for breach of contract, negligence, and conversion. Because the Court is awarding Plaintiff contract damages on the basis of a valid contract between the parties, the Court has not considered Plaintiff's unjust enrichment claim. See Gantt v. Morgan, 199 S.C. 138, 18 S.E.2d 672 (1942)(Relief under a theory of unjust enrichment is not available if an action is based on the existence of a contract).

Plaintiff is not permitted a double recovery for a single wrong. To prevent that outcome, Plaintiff is required to elect his remedies. See Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (S.C. 1996) (citing Thompson v. Watts, 281 S.C. 504, 316 S.E.2d 393 (1984)(The purpose of election of remedies is to prevent a double recovery for a single wrong.)). However, an election of remedies is not applicable where remedies are addressed to different wrongs, requiring different or additional elements and standards of proof. See Thompson v. Watts, 316 S.E.2d 393, 281 S.C. 504 (S.C. 1984)(citing Tzouvelekas v. Tzouvelekas, 206 S.C. 90, 33 S.E.2d 73, 74

(1945)(Election of remedies is the act of choosing between different remedies allowed by law on the same state of facts.)).

Based on Defendant's liability to Plaintiff on his causes of action for breach of contract, negligence, and conversion, as set out above, and applying the doctrine of election of remedies, the Court finds judgment for the Plaintiff is appropriate in the following amounts:

a) for breach of contract in the amount of **$32,950**;

b) for negligence in the amount of $21,125, reduced by **$32,950** for a total of $0;

c) for conversion in the amount of $23,095;

d) for the return of the Mercedes to Plaintiff; and

e) for Plaintiffs costs and expenses in the amount of $1,694.

IT IS HEREBY ORDERED AND ADJUDGED that judgment against Defendant be and is hereby entered in favor of Plaintiff in the total amount of **$57,739**. Defendant is also hereby ordered to prepare the Mercedes and its parts and components is such a manner that within 30 days of this Order becoming final, they may be available for pick-up and transport to a location in Charleston, South Carolina to be designated by Plaintiff.

IT IS SO ORDERED in Charleston, South Carolina, this _____ day of October 2021.

_____
Hon. Roger M. Young
Circuit Court Judge

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP10-05392

KEVIN STAVELEY-O'CARROLL
PLAINTIFF(S)

FEXNIX AUTOMOTIVE, LLC
DEFENDANT(S)

Submitted by: Damien A. Sobieraj	**Attorney for :** ☐ Plaintiff ☒ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
KEVIN STAVELEY-O'CARROLL	FENIX AUTOMOTIVE, LLC	$57,739.00
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge **Judge Code** **Date**

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

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

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

****

FORM 4C INSTRUCTIONS—JUDGMENT IN A CIVIL CASE

(Instructions for Information Only-Not to be filed with Form 4C)

1. Form 4C-Judgment in a Civil Case has been modified to add order information and enrollment instructions for the clerk of court. The purpose of Form 4 has not changed with the exception that judgment information is provided when applicable.

2. Please note that the Form 4C must be attached to all orders that include information to enroll in the judgment index. The clerk will not be responsible for reading the order to determine enrollment information.

   The attorney or prevailing party will prepare and attach the Form 4C when submitting the proposed order that includes judgment enrollment information for the judgment index. The judge will review and sign Form 4C when he or she signs an order that includes judgment enrollment information for the judgment index.

3. Form 4C is not required to be submitted to the Court with orders that do not include information to enroll in the judgment index. If the clerk receives such an order without Form 4C attached, the clerk should enter and process the order pursuant to Rule 58 and Rule 77(d), SC Rules of Civil Procedure (i.e., the clerk should serve notice of entry of the judgment by mail or provide the attorneys with copies of the signed order by other means).

4. The "Information for the Judgment Index" section should be completed when the judgment affects title to real or personal property or if any amount should be enrolled. In the "Judgment in Favor of" column, enter the name of the party to whom the judgment is awarded. In the "Judgment Against" column, enter the name of the person to whom the judgment is against. The judgment amount to be enrolled should be noted in the "Judgment Amount" column. As necessary, describe any property referenced in the order if it is to be enrolled in the judgment index. If there is no judgment information to enroll, indicate "N/A" in one of the boxes in this section of the form.

5. To enter information to accommodate multiple parties, additional Form 4Cs may be used as necessary. Additional space may be inserted on the form as necessary.

6. The section "For the Clerk of Court Office Use Only" should be completed by the clerk as it has been with the previous version of Form 4.

7. If the matter is on appeal to the Circuit Court, then the parties on the form should be changed from Plaintiff and Defendant to Appellant and Respondent.

8. If an arbitrator prepares an order after arbitration, the arbitrator should strike through "Circuit Court Judge" and indicate "Arbitrator" in the signature block.

9. If a Special Circuit Court Judge, Master in Equity, or Special Referee prepares an order after hearing a Circuit Court matter, then he or she should strike through the title "Circuit Court Judge" below the signature line and indicate the appropriate title.

10. When an Order of Foreclosure is filed, neither the parties or debt owed should be listed in the Information for the Judgment Index Section, unless the foreclosure order specifically requires entry of the full judgment amount before the foreclosure sale, pursuant to Section 29-3-650 of the SC Code.

11. If the deficiency judgment is waived in a Foreclosure action, indicate N/A in the "Judgment Amount To Be Enrolled" box.

12. Foreclosure actions should be ended by the Clerk of Court upon receipt of the Order of Foreclosure. Subsequent information, including deficiency judgments, can be added to the action after the case is ended. The Master in Equity should end the action in the MIE system upon the receipt of the Order of Foreclosure.

13. When judgment enrollment information is included in the Information for the Judgment Index Section (for example, when there is a deficiency judgment), only the parties who the judgment is for and against should be included in the Section. Subordinate parties and lienholders should not be included in the box if there is not a judgment amount specifically for or against them.

14. Form 4C is not required to be attached to Transcripts of Judgment and Confession of Judgment.

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Roger M. Young Sr., Circuit Court Judge

Case No. 2019-CP-10-05392

Kevin Staveley-O'Carroll,

Appellant,

v.

Fenix Automotive, LLC,

Respondent.

NOTICE OF APPEAL

Kevin Staveley-O'Carroll hereby give notice that he appeals the Order of the Hon. Roger M. Young Sr., dated and filed October 7, 2021 (see Exhibit "A"), inclusive of the Order denying Plaintiff's Rule 59, SCRCP Motion to Alter, Amend, or Reconsider, dated November 1, 2021, filed on November 2, 2021 (see Exhibit "B").

Appellant/Plaintiff files the present notice of appeals within ten (10) days of Judge Young's disposition of Defendant/Respondent Fenix Automotive, LLC's Motion to Alter or Amend Judgment, dated and filed on October 14, 2021 (see Exhibit "C"), pursuant to the Court of Appeals' Order dismissing Appellants appeal without prejudice, filed January 28, 2022 (see Exhibit "D").

[Signature on following page]

Respectfully Submitted,

LAW OFFICE OF
W. WESTBROOK WILLS III

/s/ W. Westbrook Wills III
P.O. Box 822
Folly Beach, SC 29439
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wwills@wwillslaw.com
ATTORNEY FOR APPELLANT

Other counsel of Record:

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damien@cooperriverlegalservices.com
ATTORNEY FOR RESPONDENT

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Roger M. Young Sr., Circuit Court Judge

Case No. 2019-CP-10-05392

Kevin Staveley-O'Carroll,

Appellant,

v.

Fenix Automotive, LLC,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this day, December 13, 2022, he served the foregoing Notice of Appeal electronically through the E-File system, by electronic mail, and by U.S. Mail addressed as follows:

Damien A. Sobieraj, Esq.
Cooper River Legal Services, LLC
P.O. Box 2439
Mt. Pleasant, SC 29465

/s/ W. Westbrook Wills III
W. Westbrook Wills III

EXHIBIT
A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	Case No.: 2019-CP-10-05392
KEVIN STAVELEY-O'CARROLL,	)	
	)	
Plaintiff,	)	ORDER
-vs-	)	OF
	)	JUDGMENT FOR DAMAGES
FENIX AUTOMOTIVE, LLC,	)	
	)	
Defendant.	)	
	)	

Plaintiff Kevin Staveley-O'Carroll ("Plaintiff" or "Staveley-O'Carroll") brought this action against Defendant Fenix Automotive, LLC ("Defendant" or "Fenix") on October 21, 2019 alleging causes of action for breach of contract, negligence, conversion, and unjust enrichment. The record reflects that Plaintiff properly served Defendant with a copy of the Summons and Complaint on November 13, 2019. On January 28, 2020, after Defendant failed to file an answer or otherwise respond to the Complaint, Plaintiff filed and Affidavit of Default and Motion for Default Judgment, which the Court granted its Order dated January 29, 2020. Subsequently, Plaintiff filed his Motion for Damages and requested for a damages hearing.

On August 25, 2021, the parties having been duly and properly notified, the Court held a hearing on the issue of damages via WebEx. Present at the damages hearing via video/audio were Plaintiff appearing with his counsel W. Westbrook Wills III, Esq. and Axel Reinert ("Mr. Reinert"), his expert witness in automotive restoration. Damien A. Sobieraj, Esq. appeared on behalf of Defendant. Plaintiff's expert witness was duly qualified, without objection, to give expert testimony as to issues related to the damages in the matter. Plaintiff and Mr. Reinert's testimony was taken, evidence was received, and the entire record in the case was considered by

the Court.[1] The Court makes the following Findings of Fact and Conclusions of Law as required by SCRCP, Rule 52. Any Finding of Fact which is more appropriately characterized as a Conclusion of Law shall be treated as such, and vice-versa.

FINDINGS OF FACT

Based on Defendant's admissions by default of the allegations of Plaintiff's Complaint, and having considered the testimony and evidence presented at the damages hearing, Plaintiff has established the following facts by a preponderance of the evidence, unless otherwise specified.

1. Plaintiff is an individual residing in Columbia, Missouri.

2. Defendant is a South Carolina limited liability company engaged in the business of automotive restoration.

3. The parties are properly subject to the jurisdiction of the Court, and the Court has subject matter over the matters raised in the pleadings.

4. Defendant was properly served with a copy of Plaintiff's Summons and Complaint, which it failed to answer or otherwise respond, resulting in the entry of default judgment against it.

5. In 2015, Plaintiff entered into a contract with Defendant to restore his classic 1969 Mercedes 280 SL ("the Mercedes"), which he delivered into Defendant's possession and care at Defendant's place of business for that purpose.

6. At the time Plaintiff delivered the Mercedes to Defendant, the vehicle was in poor

[1] As Defendant was in default and default judgment having been entered against it, the Court took testimony and received evidence from and on behalf of Plaintiff only, and limited Defendant's participation in the hearing to cross-examination and objecting to evidence by its counsel. See Howard v. Holiday, Inc. 271 S.C. 238, 246 S.E.2d 880 (1978)(limiting a defendant's participation in a post-default hearing to cross-examination and objection to plaintiff's evidence); see also Limehouse v. Hulsey, 404 S.C. 93, 116, S.E.2d 566, 579 (S.C. 2013)(reaffirming Howard).

condition and had a value of between $20,000 and $25,000, based on the testimony of Mr. Reinert, Mr. Reinart testified that (i) he based his opinion regarding the value of the Mercedes on his observation of the Mercedes only after Defendant had disassembled the Mercedes and had already performed work on the vehicle, (ii) he did not personally observe the condition of the Mercedes when Plaintiff delivered the vehicle to Defendant, (iii) he did not review any photographs showing the condition of the Mercedes prior to Defendant disassembling the Mercedes and beginning work on the vehicle. Furthermore, Mr. Reinert did not identify any industry resources used by him to assist him with his valuation of the Mercedes as delivered to Defendant.

7. Plaintiff and Defendant agreed Defendant would restore the Mercedes to a "daily driver" condition, and that Defendant would provide Plaintiff a detailed estimate of the total cost and time required to perform the restoration project after completely disassembling the Mercedes. Defendant informed Plaintiff in their conversations and emails that the total cost to restore the Mercedes may increase as the project progressed and Defendant determined what original parts could be reused versus rebuilt or replaced.

8. Between September of 2015 and March of 2016, Defendant performed initial work on the Mercedes including completely disassembling it and preparing the body for anticipated metalwork and submitted invoices to Plaintiff for such work totaling $5,825.00, which Plaintiff paid in full.

9. 22 months later, in December of 2017, Defendant provided Plaintiff a detailed estimate for the remainder of the restoration of the Mercedes, which it represented would cost approximately $60,000, and would take approximately six months.

10. To keep the total cost of the remainder of the restoration process as close to the $60,000

estimate as possible, Plaintiff and Defendant specifically agreed that, wherever possible, Defendant would make use of the Mercedes's existing parts and components.

11. At Defendant's request, Plaintiff provided it a $20,000 deposit, which Defendant specifically represented it would maintain, in trust, in a separate account, and against which it would bill for restoration work on the Mercedes going forward. Defendant also represented to Plaintiff that any unused portion of the $20,000 would be returned to Plaintiff upon his request.

12. The evidence and testimony before the Court demonstrates, and the Court finds, that after Plaintiff provided the $20,000 deposit, Defendant failed to complete the restoration of the Mercedes, as agreed, and it remains to this day in an unrestored and completely disassembled state, in Defendant's possession.

13. Moreover, the evidence, testimony, and Defendant's admissions establish that after disassembling the Mercedes, Defendant stored a great many of its parts and components outdoors on the ground or in plastic bins, exposed to the elements and weather, where they have remained since April 2019.

14. From the photographs submitted in evidence and personal observation, Mr. Reinert identified many of the parts and components of the Mercedes, including the vehicle's motor, windshield, suspension, drivetrain, exterior finishes and chrome, and an array of interior components, which he testified were in a severe degradation condition or ruined as a direct result of Defendant leaving them outdoors in the weather over a a few years, but Mr. Reinart also conceded he did not have firsthand knowledge of the condition of these parts when the Plaintiff delivered the Mercedes to Defendant Mr. Reinert further testified that, if many of those parts and components were in good condition when the Mercedes was delivered to Defendant, then these parts could have been reused in the restoration of the Mercedes. However, due to their present

condition, Mr. Reinert opined many of those parts and components may no longer be usable for the restoration project, or may now require very extensive refurbishment.

15. Mr. Reinert testified that, based on Plaintiff and Defendant's agreement, the total actual cost of the restoration of the Mercedes at the time of the parties' original agreement would reasonably have been between $60,000 and $70,000 dollars. However, Mr. Reinert believed that because of the degradation to many of the parts of the Mercedes due to Defendant failure to properly protect them from damage, the current cost to restore the vehicle is likely to be double that figure.

16. Plaintiff alleged, Mr. Reinert testified, and the Court finds, that Defendant knew or should have known that storing the subject parts and components of Plaintiff's Mercedes outdoors, exposed to the elements over a period of years could result in their degradation or ruination. Mr. Reinert testified that by doing so, Defendant deviated from the standards of care, professionalism, and best practices for businesses in the automotive restoration industry.

17. Based on the uncontroverted testimony of Mr. Reinert, the Court finds the Mercedes would have had a value of between $42,000 and $120,000 had Defendant restored it as agreed in its contract with Plaintiff. Instead, in its present condition and state, the Mercedes currently has a value of $10,000.

18. In September of 2019, as Defendant had still failed to complete the restoration of the Mercedes, Plaintiff made a demand on Defendant for the return of his $20,000 deposit, which Defendant also failed to return to him.

CONCLUSIONS OF LAW

Plaintiff filed his action against Defendant alleging causes of action for breach of contract, negligence, conversion, and unjust enrichment for which he has prayed for actual,

consequential, special, and punitive damages as proven at trial, together with attorney's fees and costs of the action. The Defendant failed to answer or otherwise respond to Plaintiff's Complaint, and default judgment was entered against it.

A defendant in default admits liability but not the damages as set forth in the prayer for relief. Solley v. Navy Fed. Credit Union, Inc., 397 S.C. 192, 203 723 S.E.2d 597, 603 (S.C. App. 2012); see also Renney v. Dobbs House, Inc., 275 S.C. 562, 566, 274 S.E.2d 290, 292 (1981). The amount of damages in a default action must be proved by the preponderance of the evidence. Id.; see Jackson v. Midlands Human Res. Ctr., 296 S.C. 526, 529, 374 S.E.2d 505, 507 (Ct. App.1988) ("A judgment for money damages must be warranted by the proof of the party in whose favor it is rendered."). As to punitive or exemplary damages, the Plaintiff has the burden of proving by clear and convincing evidence the Defendant's demonstrated misconduct was willful, wanton, or with reckless disregard for the Plaintiff's rights. See Mishoe v. Qhg of Lake City, Inc., 621 S.E.2d 363, 366, 366 S.C. 195 (S.C. 2005). "A conscious failure to exercise due care constitutes willfulness." Id.

Based on the pleadings, admissions, and the uncontroverted evidence and testimony presented by Plaintiff and his expert witness at the damages hearing, the Court finds and concludes as follows:

Breach of Contract

Plaintiff and Defendant entered into a valid contract for the restoration of Plaintiff's Mercedes, supported by consideration, and creating rights and obligations between the parties, under which Defendant agreed to restore the vehicle to a "daily driver" condition, and Plaintiff agreed to pay Defendant for parts and labor associated with the restoration. Pursuant to the parties' contract, Defendant invoiced Plaintiff for the initial restoration work it performed in the

amounts totaling $5,825.00, which Plaintiff paid in full. Thereafter, Plaintiff provided Defendant a $20,000 deposit towards the remainder of the vehicle restoration, which Defendant was to hold in a separate account, as agreed, however, Defendant did complete the restoration of the Mercedes. Furthermore, after Plaintiff discovered Defendant had not performed its obligations, as promised, and demanded the return of his $20,000 deposit, as agreed, Defendant failed to deliver it. The Court finds Defendant has breached its contract with Plaintiff entitling Plaintiff to contract damages.

Damages in a breach of contract action are to put the non-breaching party in the position he or she would have been in had the breach not occurred and the contract were performed. See Minter v. GOCT, Inc., 322 S.C. 525, 473 S.E.2d 67(Ct. App. 1996)(purpose of damages for breach of contract is to put plaintiff in as good a position as he or she would have been if the contract had been performed). Compensation for lost profits or value is recoverable as damage in a breach of contract action where the estimate of such lost profit or value is not based wholly on speculation and conjecture. Charles v. Texas Co., 199 S.C. 156, 18 S.E.2d 719 (1942); South Carolina Federal Savings Bank v. Thorton-Crosby Development Co., 303 S.C. 74, 399 S.E.2d 8 (Ct. App. 1990); Global Protection Corp. v Halbersberg, 332 S.C. 149, 503 S.E.2d 483 (1998)(absolute certainty of data on which lost profits are estimated not required; must be such reasonable certainty that damages are not based wholly on speculation and conjecture and certain standard or fixed method by which profits or value may be estimated and determined with a fair degree of accuracy is sufficient).

The proper measure of damages for breach of contract is the loss actually suffered by the contractee as the result of the breach. Tomlinson v. Mixon, 626 S.E.2d 43, 50, 367 S.C. 467 (S.C. App. 2006); South Carolina Fin. Corp. v. West Side Fin. Co., 236 S.C. 109, 113 S.E.2d 329

(1960). "In the normal case, the damage will consist of two distinct elements: (1) out-of-pocket costs actually incurred as a result of the contract; and (2) the gain above costs that would have been realized had the contract been performed." Id; Collins Entm't., Inc. v. White, 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005).

Here, therefore, as damages for Defendant's breach of contract, Plaintiff is entitled to the difference between the fair market value of the Mercedes as restored to the agreed upon condition and its present value, minus the difference between the cost of the restoration work and the amount the Plaintiff already paid toward that cost. According to the uncontroverted testimony of Mr. Reinert, the fair market value for the Mercedes as restored to the agreed "daily driver" condition would have been between $42,000 and $120,000, the average of which amounts to $81,000. Mr. Reinert did not identify any industry resources from which he used information to formulate his estimated fair market value of the Mercedes, relying upon general internet searches for sales listings of similar Mercedes. He further testified that based on the parties agreement at the time of its making, the reasonable cost of the labor and parts would have been between $60,000 and $70,000 dollars, the average of which amounts to $65,000. Plaintiff also paid Defendant a total of $25,825 towards the total cost of the restoration. Plaintiff's actual damage resulting from Defendant's breach of contract can, therefore, be expressed as ($81,000 - $2,500) – ($65,000 - $25,825) and totals $39,325.

Under the foregoing measure, Plaintiff is also entitled to the return of the vehicle in its present state. Mr. Reinert testified that shipping of the vehicle in its present disassembled state to a Charleston location will cost a fee of $525 which includes tarping, and two hours of loading and unloading, plus $100 dollars per hour for additional time. Mr. Reinert testified that in his opinion, loading and unloading the Mercedes in its disassembled condition would likely take

several hours. The Court finds Plaintiff is entitled to consequential damages associated with shipping the Mercedes to another location in Charleston in the amount of $1,125.

Plaintiff is entitled to actual and consequential damages as a result of Defendant's breach of contract in the total amount of $40,450, including the cost to return the vehicle, plus the costs and expenses of the action.

Negligence

Plaintiff's contract with Defendant for the restoration of the Mercedes and his delivery of the vehicle to Defendant for that purpose created a bailment. "A bailment is created by the delivery of personal property by one person to another in trust for a specific purpose, pursuant to an express or implied contract to fulfill that trust." Hadfield v. Gilchrist, 538 S.E.2d 268, 343 S.C. 88, 95 (S.C. App. 2000); Home Indent Co. v. Harleysville Mut. Ins. Co., 252 S.C. 452, 460, 166 S.E.2d 819, 824 (1969)("Bailment has been defined as the delivery of a chattel for some express or particular purpose upon a contract, express or implied, that, after the purpose has been fulfilled, then the chattel shall be redelivered to the bailor, or otherwise dealt with according to his directions.").

The bailment contract between Plaintiff and Defendant created a duty in Defendant to exercise due care in safekeeping of Plaintiff's Mercedes, see Harris v. Burnside, 261 S.C. 190, 199 S.E. 2d 65, 67-8 (1973)(citing Fortner v. Carnes, 258 S.C. 455, 189 S.E.2d 24), and in its repair, see id. (citing Edwards v. Charleston Sheet Metal, 253 S.C. 537, 172 S.E.2d 120). Breach of the duty of care arising under a bailment contract constitutes a tort. Id. at 195, 68.

In action involving a bailment alleging the tort of negligence, the bailor is entitled to be compensated for all losses that are the natural consequence and proximate result of the bailee's negligence. Dixon v. Besco Engineering, Inc., 320 S.C. 174, 180, 463 S.E.2d 636 (S.C. App.

1995)(citing 8 Am.Jur.2d Bailments § 346 (1980)). Damages are proximately caused if they are the foreseeable result of the defendant's tortious act. Id. (citing Young v. Tide Craft, Inc., 270 S.C. 453, 242 S.E.2d 671 (1978)). Further, the liability of a bailee under a bailment for mutual benefit, as we have here, arises upon a showing that (1) the goods were delivered to the bailee in good condition, (2) they were lost or returned in a damaged condition, and (3) the loss or damage to the goods was due to the failure of the bailee to exercise ordinary care in the safekeeping of the property. Hadfield v. Gilchrest, 343 S.C. 88 at 99. Importantly, the burden is on the bailee, and not on the bailor, to demonstrate the bailee used ordinary care in storing and safekeeping the property. Id.

Punitive damages are recoverable for negligence, which is so reckless of consequences as to imply or to assume the nature of wantonness, willfulness or recklessness. Solanki v. Wal-Mart Store # 2806, 410 S.C. 229, 237, 763 S.E.2d 615 (S.C. App. 2014)(referencing Bell v. Atl. Coast Line R. Co., 202 S.C. 160, 171, 24 S.E.2d 177, 182 (1943)). "If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care." Berberich v. Jack, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011).

In the present action, pursuant to the parties' agreement, Plaintiff delivered his Mercedes into the Defendant's possession which created a bailment for mutual benefit. As such, Defendant (bailee) owed Plaintiff (bailor) a duty of care both in the safekeeping and in the repair of Plaintiff's vehicle. Based on the admitted allegations in Plaintiff's Complaint and the evidence and testimony of Plaintiff and Mr. Reinert at the damages hearing, the Court finds the Defendant failed to exercise due care in restoring the Plaintiff's vehicle and in safekeeping its parts and components by storing many of them outdoors in such a manner as to allow them to be

directly exposed to the weather over a period of a few years. Such failure to exercise due care by Defendant proximately resulted in the severe degradation or ruination of some parts and components of Plaintiff's Mercedes, which not only reduced its value from the time Plaintiff delivered it to the Defendant, but also may have doubled the cost to restore the vehicle to the "daily driver" condition.

Furthermore, based on the testimony of the Plaintiff and Mr. Reinert and the photographic evidence entered into the record, the Court finds by a standard of clear and convincing evidence, that Defendant knew or should have know that storing the parts and components of Plaintiff's Mercedes on the outdoors on the ground or in bins and exposed to the weather and elements over a period of a few years would result in the very damage that was ultimately occasioned by such failure to exercise even slight care in safeguarding them. Mr. Reinert testified that Defendant's actions constituted an absolute departure from industry standards and best practices, that Defendant or it's agents or employees were conscious of such departure and the damage that would result, and that such acts or omissions amounted to a reckless disregard for Plaintiff's property. The Court finds such damages were foreseeable and avoidable by Defendant.

As stated above, based on the evidence and testimony, at the time Plaintiff delivered the Mercedes to Defendant, the vehicle had a value of between $20,000 and $25,000, the average of which amounts to $22,500. Presently the vehicle is worth $10,000. The damage occasioned to the Mercedes by the negligence of the Defendant has reduced its value by $12,500, and Defendant is liable to Plaintiff in that amount.

While Plaintiff has requested punitive damages, "to ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review…" Gamble v. Stevenson, 305 S.C. 104,

112, 406 S.E.2d 350, 354 (S.C. 1991). The Court when conducting such a review may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) other factors deemed appropriate. *Id.* at 112. After conducting such review, this Court has found no evidence of (i) an excessive duration of conduct, (ii) concealment by Defendant, (iii) the existence of similar past conduct, or (iv) that Defendant has any ability to pay such an award, and this Court declines to award any punitive damages under Plaintiff's negligence cause of action.

Under the theory of negligence, Defendant is liable to Plaintiff for the return of the Mercedes and for compensatory damages in the amount of $13,625, including the cost of transport, , plus the costs and expenses of the action.

Conversion

Plaintiff's claim of conversion relates the $20,000 deposit Plaintiff provided Defendant, and that Defendant failed to return upon Plaintiff's demand, as agreed.

Conversion is the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights." Green v. Waidner, 284 S.C. 35, 324 S.E.2d 331 (S.C. App., 1984); Powell v. A.K. Brown Motor Co., 200 S.C. 75, 78, 20 S.E.2d 636, 637 (1942). Money may be the subject of conversion, when it is capable of being identified, and there may be conversion of determinate sums even though the specific coin and bills are not identified. See Owens v. Andrews Bank & Trust Co., 220 S.E.2d 116, 265 S.C. 490, 497 (S.C. 1975); 89 C.J.S. Trover and Conversion § 23, p. 541 (1955).

The measure of actual damages in an action for conversion of personal property is the value of the property with interest thereon from the date of conversion to the date of trial. Id.; Long v. Gibbs Auto Wrecking Company, 253 S.C. 370, 171 S.E.2d 155 (1969), Mims v. Bennett, 160 S.C. 39, 158 S.E. 124 (1931).

The measure of damages for a willful and intentional conversion, where the property is converted with knowledge of the owner's rights in the property, is the highest market value of the property with interest up to the time of trial, including any additional value due to additions or improvements made by the converter. See Green, 284 S.C. 35, 324 S.E.2d 331; Industrial Welding Supplies, Inc. v. Atlas Vending Co., 276 S.C. 196, 277 S.E.2d 885 (1981); Gregg v. Bank of Columbia, 72 S.C. 458, 52 S.E. 195 (1905); Restatement (Second) of Torts Section 927 (1981); 1 Am.Jur.2d Accession and Confusion Section 29 (1962). Punitive damages are permitted in a conversion claim where the evidence shows the conversion was done recklessly and with conscious indifference to the owner's rights. Long v. Gibbs Auto Wrecking Co., 253 S.C. 370, 171 S.E.2d 155 (1969); Lumpkin v. Allstate Insurance Co., 251 S.C. 19, 159 S.E.2d 852 (1968).

In the present case, based on the admitted allegations of the pleadings and the testimony and evidence presented to the Court, the Plaintiff, after paying for the totality of the restoration work performed on his Mercedes to a certain point, provided Defendant a $20,000 deposit in advance of the remainder of the work. Defendant was to maintain the $20,000, in trust, a separate account to bill against for restoration work going forward, and of which any unused portion would be refundable to Plaintiff on demand. Thereafter, Defendant failed to complete the restoration of Plaintiff's vehicle. When Plaintiff discovered that fact some 20 months later and demanded the return of his deposit money, Defendant did not return it to him, and has still

not returned it. Defendant has knowingly, consciously, and willfully deprived Plaintiff of possession and ownership of a determinant sum of money, and is liable to Plaintiff for conversion of his deposit money in the amount of $20,000, plus interest at the legal rate since Plaintiff demand on September 11, 2019 for its return in the amount of $3,095 totaling $23,095.

Under his conversion action, Plaintiff has again requested punitive damages, "to ensure that a punitive damage award is proper, the trial court shall conduct a post-trial review..." Gamble v. Stevenson, 305 S.C. 104, 112, 406 S.E.2d 350, 354 (S.C. 1991). The Court when conducting such a review may consider the following: (1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) other factors deemed appropriate. *Id.* at 112. After conducting such review, this Court has found no evidence of (i) an excessive duration of conduct, (ii) concealment by Defendant, (iii) the existence of similar past conduct, or (iv) that Defendant has any ability to pay such an award, and the Court declines to award any punitive damages under Plaintiff's conversion cause of action.

Under a theory of conversion, Defendant is liable to Plaintiff for actual in the amount of $23,095, plus costs and expenses of the action.

Costs of Action

Based on the record, including the attorney's fee and expenses affidavit filed in the case by his attorney, Plaintiff has been caused to incur costs and expenses associated with bringing and prosecuting the action in the amount of $1,694, which includes the fee of $1,000 charged by his expert witness for his services, as attested to by Mr. Reinert during the damages hearing.

Plaintiff is entitled to recover from Defendant his costs and expenses in the total amount of $1,694.

Attorney's Fees

Plaintiff also requested an award of attorney's fees. "Attorney's fees are not recoverable unless authorized by contract or statute." Jackson v. Speed, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997). Plaintiff and Defendant did not agree to the recovery of attorney's fees in any contract, and Plaintiff has not cited any statute by which this Court may award him attorney's fees. Consequently, the Court denies Plaintiff's request for an award of attorney's fees.

Summary of Judgment

The Court finds Defendant is liable to Plaintiff, as described above, on Plaintiff's causes of action for breach of contract, negligence, and conversion. Because the Court is awarding Plaintiff contract damages on the basis of a valid contract between the parties, the Court has not considered Plaintiff's unjust enrichment claim. See Gantt v. Morgan, 199 S.C. 138, 18 S.E.2d 672 (1942)(Relief under a theory of unjust enrichment is not available if an action is based on the existence of a contract).

Plaintiff is not permitted a double recovery for a single wrong. To prevent that outcome, Plaintiff is required to elect his remedies. See Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (S.C. 1996) (citing Thompson v. Watts, 281 S.C. 504, 316 S.E.2d 393 (1984)(The purpose of election of remedies is to prevent a double recovery for a single wrong.)). However, an election of remedies is not applicable where remedies are addressed to different wrongs, requiring different or additional elements and standards of proof. See Thompson v. Watts, 316 S.E.2d 393, 281 S.C. 504 (S.C. 1984)(citing Tzouvelekas v. Tzouvelekas, 206 S.C. 90, 33 S.E.2d 73, 74

(1945)(Election of remedies is the act of choosing between different remedies allowed by law on the same state of facts.)).

Based on Defendant's liability to Plaintiff on his causes of action for breach of contract, negligence, and conversion, as set out above, and applying the doctrine of election of remedies, the Court finds judgment for the Plaintiff is appropriate in the following amounts:

a) for breach of contract in the amount of $40,450;

b) for negligence in the amount of $21,125, reduced by $40,450 for a total of $0;

c) for conversion in the amount of $23,095;

d) for the return of the Mercedes to Plaintiff; and

e) for Plaintiffs costs and expenses in the amount of $1,694.

IT IS HEREBY ORDERED AND ADJUDGED that judgment against Defendant be and is hereby entered in favor of Plaintiff in the total amount of **$65,239**. Defendant is also hereby ordered to prepare the Mercedes and its parts and components is such a manner that within 30 days of this Order becoming final, they may be available for pick-up and transport to a location in Charleston, South Carolina to be designated by Plaintiff.

IT IS SO ORDERED in Charleston, South Carolina, this _____ day of September 2021.

_____
Hon. Roger M. Young
Circuit Court Judge

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP10-05392

KEVIN STAVELEY-O'CARROLL
PLAINTIFF(S)

FEXNIX AUTOMOTIVE, LLC
DEFENDANT(S)

Submitted by: Damien A. Sobieraj	**Attorney for :** ☐ Plaintiff ☒ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
KEVIN STAVELEY-O'CARROLL	FENIX AUTOMOTIVE, LLC	$65,239.00
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge **Judge Code** **Date**

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

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

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

EXHIBIT
B

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Kevin Staveley-O'Carroll, Plaintiff, v. Fenix Automotive, LLC, Defendant.	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT C/A NO.: 2019-CP-10-05392 **ORDER DENYING MOTION TO ALTER OR AMEND A JUDGEMENT PURSUANT TO RULE 59(e)**

The Plaintiff Kevin Staveley-O'Carroll filed a motion asking this Court to reconsider its Order dated October 6, 2021. Specifically, Plaintiff asks this Court to reconsider the following findings within the Order: 1) in awarding damages, the Court based some or all of its calculations on monetary figures supplied by the Defendant in his proposed order of judgment; the Court declined to award punitive damages based on Plaintiff's negligence claim or conversion claim.

STANDARD OF REVIEW

Motions for reconsideration will not be granted absent "highly unusual circumstances." U.S. ex rel. Becker v. Washington Savanah River Co., 305 F.3d 284, 290 (4th Cir. 2002) (stating that simple disagreements with the court's ruling will not support Rule 59(e) relief).[1] Courts have recognized three circumstances in which a court should grant a Rule 59(e) motion: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." Hutchinston v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). Importantly, a motion for reconsideration is not

1 Rule 59 is substantially the same as the Federal Rule. *See* Elam v. S.C. Dep't of Transp., 361 S.C. 9, 21, 602 S.E. 2d 772, 779 (2004) ("Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical.").

a vehicle to re-litigate previously raised issues or "to raise argument or present evidence that could have been presented prior to the entry of judgment." Dash v. Mayweather, C/A No. 3:10-1036-JFA, 2010 U.S. Dist. LEXIS 95277, *2 (D.S.C. Sept. 13, 2010) (quoting Exxon Shipping Co. v. Baker, 554 U.S. 471, n.5 (2008)). In other words, "[a] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014); Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995). Nor does "[a] party's mere disagreement with the court's ruling . . . warrant a Rule 59(e) motion." In re Pella Corp. Architect & Designer Series Windows Mktg., Sales Practices & Prods. Liab. Litig., 269 F.Supp. 3d 685, 691 (D.S.C. 2017); *see also* Lyons v. Fid. Nat'l Title Ins. Co., 415 S.C. 115, 135, 781 S.E.2d 126, 137 (Ct. App. 2015).

After consideration of the issues raised in Plaintiff's motion, Plaintiff's Motion to Alter or Amend a Judgment is DENIED.

AND IT IS SO ORDERED.

ELECTRONIC SIGNATURE PAGE TO FOLLOW

Charleston Common Pleas

Case Caption: Kevin Staveley O'Carroll VS Fenix Automotive Llc

Case Number: 2019CP1005392

Type: Order/Amend

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

EXHIBIT
D

The South Carolina Court of Appeals

Kevin Staveley-O'Carroll, Appellant,

v.

Fenix Automotive, LLC, Respondent.

Appellate Case No. 2021-001351

ORDER

Respondent has filed a motion to dismiss and remand to the circuit court for consideration of Respondent's Rule 59(e), SCRCP, motion. Respondent's motion is hereby granted and this appeal is dismissed without prejudice. *See Hudson v. Hudson*, 290 S.C. 215, 349 S.E.2d 341 (1986) ("[I]n the event timely post-trial motions are filed under Rule 59, simultaneously with or subsequent to the filing of a Notice of Appeal, the appellant shall notify the Clerk of . . . Court in writing. Upon receipt of such notice, the appeal shall be dismissed without prejudice. Any party can appeal within ten (10) days after the order disposing of the post-trial motions. A second filing fee will not be collected from a party who previously appealed.").

FOR THE COURT

Columbia, South Carolina

FILED
Jan 28 2022

cc:
Warren W. Wills, III, Esquire
Damien Andreas Sobieraj, Esquire

Charleston Common Pleas

Case Caption: Kevin Staveley O'Carroll VS Fenix Automotive Llc

Case Number: 2019CP1005392

Type: Order/Damages

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134