

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Master In Equity

The Honorable Joseph M. Strickland

Appellate Case No. 2022-001160

Mathes Auto Sales, Inc., Respondent,

v.

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

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

BRIEF OF RESPONDENT

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S.C. SUPREME COURT

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COUNTER-STATEMENT OF THE CASE

This action was initiated by the filing of a summons and complaint on November 4, 2016. Therein, the Respondent alleged that its account with NextGear Capital, Inc. ("NextGear") had been inappropriately charged the sum of \$35,368.00 for a 2014 Infiniti QX60 ("Infiniti"), purchased in its name but without its consent by Otis Morris, Jr. ("Morris") from Dixon's Automotive, LLC ("Dixon's Automotive"). The Respondent further alleged that Morris had previously sold the same vehicle to Tarica Worthy ("Worthy") and that she was the rightful owner. The Respondent sought a declaratory judgment that it had no liability to NextGear for any sums advanced to anyone in connection with the fraudulent transaction between Dixon's Automotive and Morris.

On February 1, 2017, the Respondent filed an amended complaint. Therein, the Respondent added Morris, Pro Bowl Motors, Inc. ("Pro Bowl"), Travelers Casualty & Surety Co. of America, Inc. ("Travelers"), Worthy, S.C. State Credit Union ("State Credit Union"), Dixon's Automotive, Auto-Owners Insurance, Inc. ("Auto-Owners"), and Manheim Remarketing, Inc. ("Manheim Remarketing") as additional Defendants.

In addition to declaratory relief, the Respondent sought an award of actual, treble, and punitive damages against Morris, Pro Bowl, Dixon's Automotive, and their respective statutory sureties, Travelers and Auto-Owners, and against Manheim Remarketing. The Respondent alleged causes of action for violation of the Unfair Trade Practices Act, the Act Regulating Manufacturers, Distributors and Dealers ("the Dealers Act"), conversion, and negligence.

Morris, Pro Bowl, State Credit Union, Worthy, and Dixon's Automotive all filed answers denying the material allegations of the amended complaint. Thereafter, the Respondent settled its claims with NextGear and Manheim Remarketing and dismissed its claims against Worthy, State

Credit Union, and Auto-Owners without prejudice. The Respondent also agreed to settle its claims against Travelers shortly before trial.

This matter came before the Honorable Joseph M. Strickland for a bench trial on February 8, 2018, pursuant to an order of reference issued by the Honorable L. Casey Manning on October 30, 2017. The trial began on February 8, 2018, recessed for February 9, 2018, and resumed and concluded on February 12, 2018.

Before taking any testimony, counsel for Dixon's Automotive moved (orally and without prior notice) for summary judgment, suggesting that Dixon's Automotive had done nothing wrong. Over the objection of counsel for the Respondent, the Master agreed to entertain the motion. However, after considering arguments of counsel, the Master determined that the motion was premature and, instead, could be presented under Rule 41(b), SCRCF at the appropriate stage of trial.

The Respondent then presented testimony from Worthy; Daniel Harms, a representative of State Credit Union; excerpts of the deposition of Morris; testimony from Donald W. Deese; excerpts of the depositions of Gerald Scott Dixon ("Dixon") and Michael Tyrone Moore ("Moore") (collectively, "the Dixon partners"); and testimony from Investigator C.B. Duckett of the Columbia Police Department. John Mathes, the owner of the Respondent, testified as the final witness and was cross-examined by counsel for Morris and Pro Bowl. Numerous exhibits were admitted, many of which were premarked and admitted without objection. Counsel for Dixon's Automotive declined to cross-examine any witnesses.

Before the Respondent rested its case, its counsel moved to amend to conform to the evidence pursuant to Rule 15(b), SCRCF to add Dixon and Moore as Defendants on the basis that Dixon and Moore acted, and held themselves out, as partners. The motion was taken under

advisement and counsel for the Respondent and counsel for Dixon's Automotive were directed to brief the issue.

Counsel for Dixon's Automotive then moved for dismissal pursuant to Rule 41(b), SCRPC. (R. p. 328, line 8-25 and Second App. p.1). Counsel for Morris and Pro Bowl joined in the motion for nonsuit by Dixon's Automotive. (Second App. p. 1). After considering the arguments of counsel, the motion was denied.

Neither Morris nor Dixon nor Moore offered a single word of testimony. The Master specifically asked the Petitioners if they wished to defend the case. (R. p. 327, lines 16-18). All chose to remain silent.

On February 16, 2018, the Respondent filed a supplemental motion to amend to conform to the evidence to add Dixon and Moore as parties. In addition to reiterating the grounds argued before resting at trial, the Respondent raised an alternative basis for adding Dixon and Moore: both are "dealers" as defined by S.C. Code Ann. § 56-15-10(h) and "persons" as defined by S.C. Code Ann. § 56-15-10(n), and, therefore, both may be held personally liable under the Regulation of Manufacturers, Distributors, and Dealers Act. On February 23, 2018, the Respondent filed a memorandum in support of its motions.

On June 20, 2018, an order was issued. Judgment was entered in favor of the Respondent against Morris, Pro Bowl, Dixon, Moore, and Dixon's Automotive for the sum of \$70,736.00 in actual damages and the sum of \$212,208.00 in punitive damages. On January 28, 2019, the Master issued an order on post-trial motions and an order granting motion for attorney's fees and costs.

On February 21, 2019, Dixon, Moore, and Dixon's Automotive served notice of appeal. On February 22, 2019, Morris and Pro Bowl served notice of appeal. On February 26, 2019, the Respondent served notice of appeal.

The Court of Appeals affirmed the Master in an opinion filed on June 8, 2022. On June 22, 2022, Dixon, Moore, and Dixon’s Automotive filed a petition for rehearing. On July 20, 2022, the Court of Appeals issued an order, *inter alia*, denying the petition. On the same date the Court of Appeals issued an opinion affirming as modified.

On August 18, 2022, Dixon, Moore, and Dixon Automotive filed a petition for writ of certiorari. On October 27, 2023, the South Carolina Supreme Court issued an order granting the petition as to Petitioner’s Question 2.

STANDARD OF REVIEW

“In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge.” *State v. Johnson*, 439 S.C. 331, 338, 887 S.E.2d 127, 130 (2023) (quoting *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003)). A party “need not use the exact name of a legal doctrine in order to preserve [the issue], but it must be clear that the argument [was] presented on that ground.” *Id.* at 339, 887 S.E.2d 130.

An action brought under the Dealer’s Act is an action at law. *Brown v. Dick Smith Nissan*, 414 S.C. 101, 777 S.E.2d 208 (2015). “In an action at law tried without a jury, an appellate court’s scope of review extends merely to the correction of errors of law.” *Id.* (quoting *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 599–600, 675 S.E.2d 414, 415 (2009)). “The Court will not disturb the trial court’s findings unless they are found to be without evidence that reasonably supports those findings.” *Id.*

An appellate court’s “scope of review for a case heard by a Master-in-Equity who enters a final judgment is the same as that for review of a case heard by a circuit court without a jury.” *Mellen v. Lane*, 377 S.C. 261, 659 S.E.2d 236 (Ct. App. 2008) (quoting *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989)). The appellate court must affirm the Master’s

factual findings unless there is no evidence reasonably supporting them.” *Id.* (citing *Sea Cabins on the Ocean IV Homeowners Ass’n, Inc. v. City of North Myrtle Beach*, 337 S.C. 380, 388, 523 S.E.2d 193, 197 (Ct. App. 1999)).

ARGUMENTS

I. BECAUSE THE PETITIONERS’ ARGUMENTS CONCERNING ALLEGED CONSTITUTIONAL VIOLATIONS WERE NOT RAISED TO AND RULED UPON BY THE TRIAL COURT, THE PETITIONERS FAILED TO PRESERVE THEM FOR APPELLATE REVIEW.

This court granted the Petitioners’ petition for writ of certiorari as to Petitioners’ Question 2, “Did the Court of Appeals err in affirming the trial court’s granting of the Plaintiff’s Motion to Amend the Pleadings which violated the constitutional right to due process by adding Gerald S. Dixon and Michael T. Moore as Defendants in the lawsuit after the Plaintiff had concluded the presentation of its case, thus denying them the opportunity to present any defense and participate in the case[?]”

The record on appeal, compiled and submitted by the Petitioners, shows that the Petitioners did not raise any arguments concerning alleged violations of their rights to due process to the trial court, and the trial court did not rule upon any arguments concerning alleged violations of the Petitioners’ rights to due process.

“Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.” *Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct.App.2006). At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). It is “axiomatic that an issue cannot be raised for the first time on appeal.” *Id.* Imposing such a requirement on the appellant “is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

Constitutional arguments are no exception to the preservation rules, and if not raised to the trial court, the issues are deemed waived on appeal. *Glover v.*

County of Charleston, 361 S.C. 634, 606 S.E.2d 773 (2004) *overruled on other grounds* by *Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76 (2005); *see also Grant v. S.C. Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (1995) (holding that a due process claim raised for the first time on appeal was not preserved); *Merriman v. Minter*, 298 S.C. 110, 378 S.E.2d 441 (1989) (refusing to consider an equal protection challenge to a statute on appeal where it was not raised to the trial court). *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). [emphasis added].

The record is clear that opportunity was afforded to the Petitioners to argue against the Respondent's motion to amend to conform to the proof, and that the Petitioners did, in fact, argue against it. (R. p. 324, line 17 – p. 327, line 1). The Petitioner did not put forth any constitutional argument in the trial court, much less a “specifically articulated” argument that the Petitioners’ rights to due process would be violated by a grant of the Respondent’s motion. These arguments were raised for the first time on appeal. Because “[c]onstitutional arguments are no exception to the preservation rules,” the issue on which this Court granted certiorari has not been preserved for appeal. Therefore, writ of certiorari should be dismissed as improvidently granted.

II. THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE MASTER’S GRANT OF THE PLAINTIFF’S MOTION TO AMEND TO CONFORM TO THE PROOF TO ADD DIXON AND MOORE AS DEFENDANTS BECAUSE THEY SUFFERED NO PREJUDICE AS A RESULT.

Rule 15(b), SCRCP provides in pertinent part:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

By the time the Plaintiff moved to amend to conform to the proof before resting its case, it was clear that the roles of the Dixon partners in this case had been tried by “the express or implied consent of the parties.” (R. p. 320, line 13- p. 328, line 16); Rule 15(b), SCRCP. Dixon’s

Automotive and the Dixon partners were integral to the Respondent's presentation of its case, so much so that 49 of the 120 findings of fact made by the Master in the Order for Judgment are addressed to the actions of Dixon's Automotive or the Dixon partners.

Dixon's Automotive and the Dixon partners were represented throughout the litigation by capable counsel who, at the time of trial, had been in practice for 31 years. (R. p. 328, lines 17-18). Counsel for Dixon's Automotive appeared with the Dixon partners at their respective depositions, and therefore knew that both Dixon and Moore were engaged in the sale of automobiles and repeatedly described themselves as partners who shared profits and losses. (R. p. 135, lines 10 – 22; p. 206, lines 21 – 22; and p. 218, line 13 – p. 219, line 14).

On numerous occasions, counsel for Dixon's Automotive represented that his representation was not confined to Dixon's Automotive. In his oral motion for summary judgment at the commencement of the trial, for example, counsel for Dixon's Automotive repeatedly referred to his *clients* rather than *client*. (R. p. 18, lines 13 – 16; p. 20, lines 13 – 20; p. 21, line 20; and p. 22, lines 9, 16, 20, and 21). The Dixon partners, present in the courtroom, did not object to this characterization. By the same token, both Dixon partners referenced counsel for Dixon's Automotive in their depositions, with Moore explicitly referring to counsel for Dixon's Automotive as "my lawyer." (R. p. 167, lines 7-9). Even after the Plaintiff moved to amend to conform to the proof, opposing counsel continued to refer to Dixon Automotive and the Dixon partners as "my clients," only changing tack once questioned on whether Dixon Automotive had observed corporate formalities. (R. p. 324, line 17 – p. 326, line 9).

Excerpts of the depositions of the Dixon partners were furnished to the Master and all opposing counsel (by page and line number) more than one day prior to offering them in the Plaintiff's case in chief in accordance with Rule 32(a)(5), SCRCF. Opposing counsel knew (or

should have known) exactly what would be introduced, including testimony about Dixon and Moore's partnership. Opposing counsel was offered the opportunity to address the deposition testimony of Moore. (R. p. 187, lines 19-20). Opposing counsel declined the opportunity. Opposing counsel was offered the opportunity to address the deposition testimony of Dixon. (R. p. 238, line 16). Opposing counsel declined to respond. Opposing counsel made no objections to the deposition testimony of either Moore or Dixon pursuant to Rule 32(a)(5), SCRPC. Opposing counsel called no witnesses and declined to cross-examine the Plaintiff's witnesses. Even after the Plaintiff moved to amend to conform to the proof, with Dixon and Moore present in the courtroom and available to deny the Plaintiff's assertions (or, at the very least, clarify their previous testimony if they felt it had been mischaracterized or misunderstood), opposing counsel steadfastly refused to address the Plaintiff's evidence.

Opposing counsel's decision to withhold any evidence in support of his arguments concerning the nature of the Petitioners' business relationship and the nature of his representation was, apparently, a deliberate defense strategy. (R. p. 328, lines 17-18). Opposing counsel appears to have concluded that because the evidence offered by the Respondent at trial amounted, in his estimation, to "no evidence whatsoever of wrongdoing by my clients in this case," he did not need to introduce evidence of his own *or* object to the Respondent's evidence. (R. p. 20, lines 8-9; R. p. 328, lines 8 – 22).

The only evidence before the court, therefore, was the evidence introduced by the Plaintiff. That evidence, paired with all reasonable inferences that may be drawn from that evidence, leads any reasonable person to the same conclusion: that "Dixon and Moore, both of whom described themselves as partners in their depositions[,] were complicit in Morris' serial acts of fraud." (App. Vol. III p. 25).

Rule 15(c), SCRCF provides in pertinent part:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

There can be no doubt that the Respondent's claims against Dixon and Moore arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading. Nor can there be any doubt that Dixon and Moore had notice of the institution of the action and were not prejudiced in maintaining their respective defenses on the merits. Moreover, they knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against them in their individual capacities. Dixon and Moore knew that Morris, an officer and agent of Pro Bowl, had been named as a Defendant along with Pro Bowl. It should not have come as a surprise that the Respondent would seek to establish liability against the individual officers, directors and other persons in active control of the activities of Dixon's Automotive under S.C. Code Ann. § 56-15-10(n) as it had against the individual officers, directors and other persons in active control of the activities of Pro Bowl.

"Amendments to conform to the proof should be liberally allowed when no prejudice to the opposing party will result." *Collins Entertainment, Inc. v. White*, 363 S.C. 546, 562, 611 S.E.2d 262, 270 (2005) (citing *Soil & Material Eng'rs, Inc. v. Folly Assocs.*, 2932 S.C. 498, 501, 361 S.E.2d 779, 781 (Ct. App. 1987)). Because the Dixon partners suffered no prejudice as a result, the master properly granted the Respondent's motion to amend to conform to the proof to add Dixon

and Moore as defendants. Therefore, the Court of Appeals did not err in affirming the decision of the Master.

CONCLUSION

Because the Petitioners failed to preserve the issue of alleged constitutional violations for appellate review, this Court's grant of the Petitioners' petition for writ of certiorari should be withdrawn as improvidently granted. In the event that this Court finds that Petitioners preserved the issues contained in Question 2 for appellate review, this Court should find that the Court of Appeals did not err in affirming the trial court's decision to grant the Respondent's motion to conform to the proof.

Respectfully submitted,

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