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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals Jr., Circuit Court Judge

Case No. 2023-000540

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

v.

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

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

AMENDED INITIAL REPLY BRIEF

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OVERVIEW

Respondent Grand Strand, Inc., knowingly and deceptively placed a previously-wrecked vehicle into the stream of commerce, expecting and intending that its purchaser would pass the harm on to someone else. The Brief of Appellant, Target Motors, LLC (Target) argued it would be unjust to allow Grand Strand to escape liability to its expected victim. Grand Strand's Brief never disputes this. It makes no attempt to argue it is fair, or just, or right to allow it to escape liability to Target.

Target's main brief also established that the type of harm Target suffered was foreseeable to Grand Strand at the time of its tort and would not have happened but for Grand Strand's wrongful acts, thus meeting both prongs of proximate cause. It also established, citing many Supreme Court holdings, that the intervention of a third party does not change the analysis: if the harm was foreseeable, it was foreseeable, regardless of any willful, negligent, criminal, or other acts by third parties. It also established the order erred in holding Grand Strand had no duty "under any theory recognized by South Carolina law," as the UTPA and Dealers Acts clearly create duties; and because not all of Target's claims require there be a "duty" to avoid harm to the victim. Grand Strand's attempt to lay all the liability at the feet of the party that passed along this "hot potato" is no more persuasive than it would be for the party that tossed a lit bomb into a market to argue that all liability be placed at the feet of the last person who tossed it.

Target conceded this might be a novel issue in South Carolina, and pointed to a string of cases from other jurisdictions that have considered liability against those who deceptively introduce a used vehicle into the stream of commerce and in favor of a later purchaser who had

no interaction with the initiator of the problem (and found it would be crazy to prevent the victim from recovering against the initiator).

Grand Strand has no real answer. Perhaps that is why Grand Strand is desperate to avoid the merits.

I. THE COURT SHOULD REACH THE MERITS.

Grand Strand repeatedly beseeches this Court to ignore the merits of Target's appeal. Its requests should be rejected as attempts to create a "trap for the unwary." "[C]ivil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party." In re Nov. 4, 2008 Bluffton Town Council Election, 385 S.C. 632, 637-41, 686 S.E.2d 683, 686-88 (2009) (citing Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004)). They also fail on their own terms, as described below.

A. Target's Statement of Issues on Appeal Is Not Improper.

The test for a statement of issues on appeal, as the Supreme Court has repeatedly explained, is whether the issues are "reasonably clear" in light of the argument in the body of the brief. Greenville Bistro, LLC v. Greenville Cnty., 435 S.C. 146, 170-71, 866 S.E.2d 562, 575 (2021) (quoting Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011)).[1] None of Grand Strand's authorities are to opposite effect. They actually agree with

[1] In Greenville Bistro, 435 S.C. at 170-71, 866 S.E.2d at 575 (italics in original, bolding added) the Court wrote,

> We first address Greenville Bistro's argument that because the County did not specifically identify the jurisdictional question as an issue on appeal in its brief, the issue is unpreserved. See Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."). **We disagree** with Greenville Bistro. See Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) ("When an issue is not specifically set out in the statements of issues, the appellate court may nevertheless consider the issue if it is *reasonably clear* from an appellant's arguments."). The County's brief primarily

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Greenville Bistro.[2] So do many other cases.[3] Here, the points are reasonably clear. Grand

> addresses the merits of its claim for injunctive relief, but **the brief contains argument** against the circuit court's jurisdictional ruling. The brief **sufficiently ensures the Court does not have to "grope in the dark"** to find the County's jurisdictional argument. See Forest Dunes Assocs. v. Club Carib, Inc., 301 S.C. 87, 89, 390 S.E.2d 368, 370 (Ct. App. 1990) ("Every ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue.").

Here, the Court does not need to grope in the dark searching the record for the issue being raised. In contrast, see McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344-45, 479 S.E.2d 67, 76 (Ct. App. 1996) ("nowhere does Cleckley point to specific objections and rulings as required . . . . We are left to 'grope in the dark' concerning the specific allegations of error") (citing Connolly v. People's Life Ins. Co. of S.C., 299 S.C. 348, 384 S.E.2d 738 (1989) for the proposition that "exceptions which required the court to grope in the dark searching the record for the issue being raised" are improper). Unlike in McKissick and Connolly, Target's main brief supplied numerous specific references to the record.

[2] First, Grand Strand quotes dicta from footnote 3 of Town of Sullivan's Island v. Felger, 318 S.C. 340, 350, 457 S.E.2d 626, 631 (Ct. App. 1995), but even that case went on, in the same footnote Grand Strand quotes from, to interpret what it "underst[oo]d" the appellant to be arguing and reached the merits of his argument. The Court there did not attempt the "gotcha!" move Grand Strand attempts here.

Grand Strand next references Jean H. Toal et al., Appellate Practice in South Carolina 429 (3d ed. 2016) as "listing cases" that Grand Strand believes supports its claim. That book first cites Herron, which as noted in text above stands for the proposition that appellate courts reach issues if they are reasonably clear. Herron further quotes Eubank v. Eubank, another of the cases cited in the book, as "finding the statement of issue, when read in conjunction with the argument, sufficiently raised the issue to the court." Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) (citing Eubank, 347 S.C. 367, 555 S.E.2d 413 (Ct. App. 2001)). State v. Black, 319 S.C. 15, 462 S.E.2d 486 (Ct. App. 1995), as the book states, is about whether an issue was argued in the text of the brief, not about any supposed problem with the question presented. Finally, the book cites Felger, which, as noted above, found any problem with the question cured because the arguments were sufficiently clear in the brief. This Court has read Justice Toal's book as Target does and contrary to Grand Strand's view. Gibson v. Ameris Bank, 420 S.C. 536, 542 n.2, 804 S.E.2d 276, 279 n.2 (Ct. App. 2017) (citing the previous edition of the book as "noting our courts have broadly construed the requirements that parties specifically state their issues on appeal where it is 'reasonably clear from appellant's arguments' that the issue is in dispute.")

[3] Such cases abound. Gibson, 420 S.C. at 542, 804 S.E.2d at 279, cited Eubank, 347 S.C. at 373 n.2, 555 S.E.2d at 416 n.2, as "noting wife contended husband had not sufficiently raised an issue as required by Rule 208 (b)(1)(B), SCACR, but considering the issue because a

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Strand's request that the Court ignore the merits misses the point.

Grand Strand's argument about the Question Presented fails for other reasons. Its argument is that an appellate court should not consider issues "not fairly subsumed" within the stated issues on appeal. (Resp't Br. p. 7). It then says the Order actually concerned five issues (id.)—all of which are subsumed in Target's Question Presented. The lower court held that when a car dealer deceptively sells a previously-wrecked vehicle, intending that it be resold, the dealer is automatically immune from liability to all purchasers after the first purchaser because (paraphrasing Grand Strand's view of the proper issues) (1) the initial tortfeasor did not owe any duty to the second purchaser; (2) the initial tortfeasor did not directly cause any damage to the victim; (3) it made no representations to the victim; (4) it did not act unfairly or deceptively directly to the victim with respect to the victim so as to trigger the UTPA; and (5) the victim did not have a claim against the upstream seller under the Dealers Act. [4] There are

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statement within the brief 'when read in conjunction with [h]usband's argument, adequately raised the issue'" and Southern Welding Works, Inc. v. K & S Const. Co., 286 S.C. 158, 160, 332 S.E.2d 102, 104 (Ct. App. 1985) as "finding a party failed to comply with the supreme court rules requiring exceptions to 'contain a complete assignment of error,' but considering the issues because they 'are reasonably clear from K & S's argument and . . . were ruled on by the trial court.'"

Even the Charleston Lumber case on which the Order relies states, "Charleston Lumber does not allege any prejudice as a result of the omission, and there can be no doubt that Charleston Lumber had notice that the Millers had appealed all cases." Charleston Lumber Co. v. Miller Hous. Corp., 318 S.C. 471, 478, 458 S.E.2d 431, 436 (Ct. App. 1995). Here, too, Grand Strand does not allege any prejudice, and there can be no doubt that Grand Strand had notice Target was appealing all the issues Grand Strand claims are at stake and which cover all Target's claims.

[4] The issues Grand Strand contends are proper are:

> (1) Grand Strand did not owe any duty to Target Motors; (2) Grand Strand did not cause any damage to Target Motors; (3) Grand Strand did not make any representations to Target Motors; (4) Grand Strand did not act unfairly or deceptively with respect to Target Motors so as to trigger the UTPA; and (5) Target

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actually more subissues than Grand Strand notes, but they are all fairly subsumed under the lower court's holding that it was the re-seller, not the initial seller, that did these things.

Surely an appellant is not required to have a Question Presented for each subholding, especially where, as here, they are included in the main holding. Where a party, successful below and requested to draft the order, puts in what could be considered 20 or 30 holdings, the Statements of Issues would run on for several pages. That would do no one any good. It would unnecessarily complicate the appellate process.

Alternatively, Target will accept Grand Strand's Statement Of The Issues On Appeal. (Resp't Br. p. 1).[5]

B. Target's Issues Are Neither Abandoned nor Unpreserved.

Respondent's claim that "Based on a review of the Appellant's Brief and the record, the only preserved issue relating to duty is limited to the UTPA" is simply wrong. Grand Strand misconceives the concept of abandonment and demands an extremely and improperly high level of specificity to consider an issue preserved.

Target wrote, "it makes no sense to reject claims for reckless and intentional torts on grounds of a lack of duty." (Appellant Br. p. 2). Grand Strand argues that Target does not "cite

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Motors did not have a claim against Grand Strand under the Dealer's Act.
All are fairly subsumed in the Question Presented.

[5] Grand Strand's "STATEMENT OF THE ISSUES ON APPEAL" is,

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

(Resp't Br. p. 1).

to **South Carolina** case law" for the proposition and therefore "abandoned" the issue. (Resp't Br. p. 11) (emphasis added). Grand Strand's position would mean no novel issue could ever be heard, as by definition, there is no South Carolina law on a "novel" issue. There is no requirement that South Carolina case law be cited to prevent "abandonment;" the requirement concerns citing "any" authority. Second, Target did cite authority, including Felix & Hubbard on South Carolina law (F. Patrick Hubbard & Robert L. Felix, THE SOUTH CAROLINA LAW OF TORTS (5th ed. 2023)); many cases from other jurisdictions; many South Carolina Supreme Court cases finding a duty to the public even in regard to negligence, and a fortiori in regard to aggravated negligence and intentional torts, e.g., S.C. Elec. & Gas Co. v. Utilities Const. Co., 244 S.C. 79, 88, 135 S.E.2d 613, 617 (1964); Myers v. Atl. Coast Line R. Co., 172 S.C. 236, 242, 173 S.E. 812, 814 (1934); Lentz v. Carolina Scenic Coach Lines, 208 S.C. 278, 290, 38 S.E.2d 11, 17 (1946); Gossett v. Burnett, 251 S.C. 548, 164 S.E.2d 578 (1968); and others.[6]

Grand Strand would have Target repeat the above case citations and analysis for each cause of action. That's nonsensical. Especially because the lower court issued a broad ruling: "Grand Strand did not owe a duty to Plaintiff **under any theory recognized by South Carolina law.**" (Order p. 5) (bolding removed from the first eight words). The Order did not even discuss duty in its sections on misrepresentation, fraud, and the UTPA, so it makes no sense to say Target failed to properly address duty in regard to those. The Order's bare mention

[6] Other cases cited in Target's main brief on the point include Ayers v. Atl. Greyhound Corp., 208 S.C. 267, 275, 37 S.E.2d 737, 740 (1946); id. at 277, 37 S.E.2d at 741; Durant v. Stuckey, 221 S.C. 342, 345, 348, 70 S.E.2d 473, 474, 475 (1952); Tobias v. Carolina Power & Light Co., 190 S.C. 181, 184-88, 2 S.E.2d 686, 687-88 (1939). Target's main brief also explained (pp. 19-20 n.9) that this applies a fortiori to recklessness, other forms of aggravated negligence, and intentional torts.

of duty regarding the Dealers Act ("because Grand Strand did not owe a duty") without further discussion is obviously simply a reference to its earlier discussion. At any rate, Target's main brief explicitly addressed duty in regard to both the UTPA and the Dealers Act. (E.g., pp. 1-2, 17-18).

As for questions of preservation, Target's memorandum in opposition to Grand Strand's motion stated, "Grand Strand's duty to disclose also arises from Manheim's Auction Policy." (Id. p. 6). Target's memorandum also argued that Grand Strand owes Target a "Duty Arising From Statutes." (Id. pp. 7-8) (citing authorities). Those statutes, plural, are the Dealers Act and UTPA. (Id.) Target's memorandum also stated,

> Grand Strand's argument is that a seller does not have any **duty** to a buyer later in the chain of ownership. In essence, its position is that if a seller can cheat the first purchaser and get away with it, it does not have any responsibility to any subsequent purchaser.

(Id. pp. 13-14) (emphasis added). It argued that cases "defeat that argument." (Id.) (citing Pfaehler v. Ten Cent Taxi Co., 198 S.C. 476, 18 S.E.2d 331 (1942) and Bishop v. SC Dept. of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998)). This goes to all the causes of action. Grand Strand's argument that "the only preserved issue relating to duty is limited to the UTPA" makes no sense.

Again, Target's memorandum argued,

> The general rule is that whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary course of events, though such consequences are immediately and directly brought about by an intervening cause, if such intervening cause was set in motion by the original wrongdoer.

(Id. p. 13) (quoting Pfaehler) (cleaned). Implicit in the language from Pfaehler Target quoted to the lower court is that there is a duty to the injured victim.

And again, Target's memorandum argued on page 10 (R. p. _) (emphasis added) (citing

Terlinde v. Neely, 271 S.E.2d 768, 275 S.C. 395 (1980)), "The key inquiry regarding the **duty** is foreseeability, not privity. The objective is to protect the innocent purchaser from latent defects." It added, again citing Terlinde, that to "interpose a first buyer as an obstruction to someone equally as deserving, is incomprehensible."

Target's discussion of "duty" is not properly limited to the UTPA claim. It covers all of Target's claims.

C. The Body of Target's Main Brief Specifically Argued the Causes of Action Grand Strand Says It Did Not.

Grand Strand next argues that "the body of the brief does not include any specific argument as to the UTPA, negligent misrepresentation, or fraud causes of action." (Resp't Br. p. 8 n.3). It claims that therefore, there is no basis for reversal as to Sections 2 and 3 of the lower court's order (which addressed those claims). But the body of Target's main brief most definitely contains argument as to all of these. E.g., pp. 17-29 (rebutting the lower court's rationale as to all causes of action); p. 29 (emphasis added) (explicitly stating the rebuttal of the rationale is "to all causes of action"). Target's suggestion that such analyses must be repeated for each cause of auction would require appellate courts to do much more reading, for little if any gain.

See also id. pp. 29-35 (citing and analyzing cases finding the initial deceptive vehicle seller liable to downstream buyers for negligent misrepresentation, violation of consumer protection acts and fraud); id. p. 29 (explicitly noting that the cases on the following pages concern "negligent misrepresentation, violation of consumer protection acts and fraud.") If it were required to separately address each cause of action, when a broad holding includes several

causes of action, Target's main Brief did that.[7] Similarly, the UTPA claim was argued throughout Target's main brief: e.g., pp. 14, 15, 16, 17, 18, 22.

Grand Strand is doubly wrong. It is not required that one explicitly argue each cause of action individually when an error goes to several causes of action; and Target's main brief does contain "specific argument as to the UTPA, negligent misrepresentation, [and] fraud causes of action."

II. GRAND STRAND IS WRONG ON THE MERITS.

A. Facts

Grand Strand alleges several "facts" that need to be corrected. It claims it is undisputed that "When the Truck was sold by Grand Strand to Grainger, it had been fully and completely repaired." (Resp't Br. p. 3). This is not so. A pickup whose frame is removed is never completely repaired. Grand Strand's source is simply an affidavit from its Executive Manager stating that in his opinion, the truck was fully and completely repaired. He is not an expert on auto body repair. He is not even a mechanic. He did not state he had personal knowledge of the repairs or the quality of the repairs. Grand Strand's claim of full and complete repair is a disputed fact. Indeed, on the next page of its brief, Grand Strand admits the truck retains structural damage. It references an "AutoCheck report showing structural damage to the Truck

[7] Target's main brief also contained, among others, arguments re "it would be 'absurd' to 'prohibit UTPA actions by all remote buyers,'" (p. 2); pp. 14-17 (extensively arguing re the UTPA); "negligent misrepresentation, fraudulent misrepresentation and fraud" (p. 30, citing a case); "fraud" (id., citing another case); "fraudulent misrepresentation" (p. 32, citing another case); "negligence, fraud/deceit, and violation of the consumer protection act" (id., citing another case); "fraud" (id. n.16, citing another case);"fraud" (p. 33, citing another case); "fraud and violation of [one state's] consumer-protection statute" (p. 34, citing another case); "fraud . . . [and] violation of [another state's] consumer protection statute" (citing another case) (id.). Obviously, references to other states' "consumer protection" statutes were as analogies to South Carolina's UTPA.

as the result of a wreck," and states that "Grainger notified Manheim about the discovered structural damage." (Resp't Br. p. 4) (emphasis added). It references Grainger and Manheim "sending the Truck back through the auction despite having knowledge of the structural damage" (id. p. 14) (emphasis added); "Grainger and Manheim, each of whom knew about the structural damage" (id. p. 16 n.7) (emphasis added). "[T]he costumer complained to Target Motors after discovering the Truck's structural damage." (Id. p. 5). This is "major" structural damage. (Pl's Ans. to Grainger Int. No. 9); see also Target's memorandum in opposition to Grand Strand's motion, p. 1 (R. p. _) ("The damages were so extensive, they required an original estimate and five supplemental estimates" and required "over $18,000 in repairs.")

The statement on page 4 of Grand Strand's brief that "Grainger commenced an arbitration, and Grainger resolved its claim related to the Truck by accepting a 50% refund on the Truck" needs significant clarification. Grand Strand cites there to "Grainger Ans. to Grand Strand Int. p. 3, R. at ___." But those Answers to Interrogatories make clear on page 4 that the refund was "50% of the loss," not 50% of the value of the truck, and that it was Manheim—not Grand Strand—that paid the loss. Manheim is the Auction. Grand Strand still has not paid a penny for its deception.[8]

Grand Strand states (p. 10) that Target "admitted that it did not have a relationship with Grand Strand, contractual or otherwise," but this too is not so: Target maintained they were joint participants in the auction, and bound by contracts each had with Manheim re fair dealings with

[8] Grand Strand's next sentence, "After resolving Grainger's claims, . . . Manheim and Grainger decided to sell the vehicle through the Manheim auction" (emphasis added) is also erroneous. The compromise between Manheim and Grainger was obviously after Grainger sold the vehicle to Grand Strand. Otherwise, they would not have known what "50% of the loss" was. Of the three sources Grand Strand cites for this proposition, two say nothing about the timing and the third contradicts Grand Strand.

other participants and fair disclosure to other participants (e.g., Opp. pp. 6-7).

Grand Strand states (p. 12), "Grainger, the direct purchaser of the Truck from Grand Strand, has sued Grand Strand in a separate action." Grand Strand does not point out that Grand Strand has moved for summary judgment in that "separate action"—and it is not a separate action. It is a cross-claim in this action. A properly instructed jury can apportion the blame in a single action.

B. Common-Law Claims

Seen in the light most favorable to the non-moving party, Grand Strand negligently, willfully, intentionally, knowingly and recklessly acted in a way that caused harm, of a foreseeable type, to Target. The common law allows Target to recover.[9]

Grand Strand tries to avoid this result with a series of technical arguments that do not make sense. Notably, Grand Strand does not argue that requiring it to pay its victim, Target, would be unfair or unjust. Nor could it credibly do so. Nor does it even mention the Oliver or Baggerly cases on which the Order its lawyers drafted relies, and which Target's main brief showed require reversal of the Order. (See Order pp. 7-8) (citing J.T. Baggerly v. CSX Transp., Inc., 370 S.C. 362, 369, 635 S.E.2d 97, 101 (2006); Oliver v. South Carolina Dep't of Highways & Pub. Transp., 309 S.C. 313, 422 S.E.2d 128 (1992); Appellant Br. pp. 4-5, 23, 26-27, 29 (discussing Oliver); pp. 22-24, 29 (discussing Baggerly).

Target's main brief argued it was foreseeable that deceptively selling this vehicle would result in someone being stuck with a frame-damaged vehicle for which it paid a non-wreck price. Grand Strand's brief does not dispute this. Target argued that selling the vehicle at an

[9] At a minimum, the common law should allow Target to recover, and this is a novel issue to be decided in accord with this Court's sense of justice and right, as discussed below in subsection D.

auction where all vehicles are sold for resale would foreseeably result in the victim being someone other than the party Grand Strand sold it to. Grand Strand's brief does not dispute this.

Target argued that the test for third-party intervention is whether the harm the victim incurred is of a type that could have been foreseen at the time of the initial tortfeasor's act, and cited many South Carolina Supreme Court cases holding exactly that. Grand Strand does not dispute this. Target argued that the harm Target suffered was a type that was reasonably foreseeable at the time of Grand Strand's improper acts. Grand Strand does not dispute this, either. Instead, Grand Strand attempts to evade and obfuscate. Its brief quotes Stone v. Bethea, 251 S.C. 157, 161-62, S.E.2d 171, 173 (1968) for the proposition that a wrongdoer is not liable for unforeseeable harm (pages 12 and 14)[10] caused by an "entirely independent" cause (p. 14), but here, the harm was easily foreseeable, and the supposed "intervening" act of Grainger tossing the hot potato was not "entirely independent" of Grand Strand's tossing the potato in the first place.

Indeed, Grand Strand's vague argument appears to be a claim that the precise means by which the harm was passed on to Target was not predictable. But as explained at length in Target's main brief, the Supreme Court has repeatedly held that that is not the test.[11] The test is whether the harm is of a type reasonably to be expected, not the way the type of harm

[10] Grand Strand writes, "Foreseeability of some injury from an act or omission is a prerequisite to its being a proximate cause of the injury for which recovery is sought" (Resp't Br. p. 12) and therefore "One is not charged with foreseeing that which is unpredictable" (id. p. 14).

[11] (Appellant Br., Section IV.A.2 pp. __) (citing, e.g., Hughes v. Children's Clinic, P. A., 269 S.C. 389, 397, 237 S.E.2d 753, 756-57 (1977); Graham v. Whitaker, 282 S.C. 393, 398, 321 S.E.2d 40, 43 (1984)).

resulted.[12] Grand Strand makes no attempt to contest, rebut, or distinguish the Supreme Court's holdings.[13] Instead, Grand Strand obfuscates, raising issues that do not apply in hopes of confusing the court.

Nor does Grand Strand ever argue that the harm to Target would have occurred even if not for Grand Strand's acts—which is the definition of "but for" causation.[14] Instead, it argues that since Grainger's acts were also a but-for cause, Grand Strand's acts cannot also be a but-for cause. It twice asks a rhetorical question that conflates "a" but-for cause with "the" but-for

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[12] (Id.) (citing, e.g., Matthews v. Porter, 239 S.C. 620, 626, 124 S.E.2d 321, 324 (1962); Tobias v. Carolina Power & Light Co., 190 S.C. 181, 186, 187, 2 S.E.2d 686, 688 (1939); Pfaehler v. Ten Cent Taxi Co., 198 S.C. 476, 486, 18 S.E.2d 331, 335 (1942)).

[13] This Court has previously recognized that the Supreme Court has repeatedly so held.

> Our Supreme Court many times has stated the applicable rule: "[T]o establish liability it is not necessary that the person charged with negligence should have contemplated **the particular event** which occurred. . . . He may be held liable for anything which appears to have been a natural and probable consequence of his negligence. If the actor's conduct is a substantial factor in the harm to another, the fact that he neither foresaw nor should have foreseen the extent of harm or **the manner in which it occurred** does not negative his liability."

Crowley v. Spivey, 285 S.C. 397, 408-09, 329 S.E.2d 774, 781 (Ct. App. 1985) (emphasis added) (alteration in original) (quoting Childers v. Gas Lines, Inc., 248 S.C. 316, 325, 149 S.E.2d 761, 765 (1966), and citing five additional Supreme Court opinions).

See also Lowrimore v. Fast Fare Stores, Inc., 299 S.C. 418, 422-3, 385 S.E.2d 218, 220 (Ct. App. 1989) (similar); Littrell guardian of Littrell v. Landmark Builders of S.C., LLC, No. 2:19-CV-0637-DCN, 2021 WL 795579, at *6 (D.S.C. Mar. 2, 2021) (explaining South Carolina law),

> Put as simply as the court can manage, where an intervening act renders the injury an unforeseeable consequence of the original act, the intervening act breaks the causal chain. But where the consequences of the original act are foreseeable, even in light of intervening negligence, the original tortfeasor remains liable for his or her negligence.

[14] "The test asks, 'but for the existence of X, would Y have occurred?'" https://www.law.cornell.edu/wex/but-for_test.

cause (p. 13).[15] Grand Strand simply ignores the Supreme Court cases cited in Target's main brief explicitly stating that the existence of one but-for cause does not exclude other acts as but-for causes.[16]

Thus, proximate cause is definitely shown, or is at least a jury issue, and Grand Strand will have to look elsewhere to justify its summary judgment.

As for duty, this Court has defined the duty of care (at least for purposes of negligence) as,

> The duty of care is that standard of conduct the law requires of an actor in order to protect others against the risk of harm from his actions. It embodies the principle that the plaintiff should not be called to suffer a harm to his person or property which is foreseeable and which can be avoided by the defendant's exercise of reasonable care.

Snow v. City of Columbia, 305 S.C. 544, 554-55, 409 S.E.2d 797, 803 (Ct. App. 1991). Grand Strand's gyrations attempt to distract the Court from this simple principle.

Grand Strand really has only two arguments. First, Grand Strand erroneously claims the proper discussion of duty is limited to the UTPA cause of action, a contention addressed above in Section I.B. Second, Grand Strand asks in a footnote that the Court ignore the cases establishing a general "duty to the public" especially "in the motor vehicle context" (Resp't

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[15] In Section II.B., Grand Strand asks a rhetorical question that conflates "a" proximate cause and "the" proximate cause ("how can Grand Strand be **the** proximate cause of Target Motors' damages when Target Motors admittedly never saw or relied on any representation by Grand Strand?") (p. 13) (emphasis added). It asks basically the same question at the end of its discussion of the UTPA and Dealers Act. ("If Target Motors did not rely on or review any information provided by Grand Strand or any information provided by Grand Strand to Grainger, how could Grand Strand be **the** cause of Target Motors' damages?") (Id. p. 18) (emphasis added). But Grand Strand never argues the harm would have occurred independent of Grand Strand's acts or that the harm was not foreseeable.

[16] See, e.g., Ruh v. Metal Recycling Servs., LLC, 439 S.C. 649, 654, 889 S.E.2d 577, 580 (2023); Matthews v. Porter, 239 S.C. 620, 627-28, 124 S.E.2d 321, 324-25 (1962); and even the Order's own J.T. Baggerly case, 370 S.C. 362, 635 S.E.2d 97 (2006).

Br. p. 9 n.4) (quoting Appellant Br.).

While asking this Court to ignore the South Carolina cases, Grand Strand ignores the cases Target cited from other jurisdictions finding a duty.[17] It also ignores the Terlinde case Target's lower court memorandum opposing summary judgment cited, and which states,

> We have previously allowed the imposition of tort liability to a third party as a result of contractual obligations despite the absence of privity between the tortfeasor and the third party. See Edward's of Brynes Downs v. Charleston Sheet Metal Company, 253 S.C. 537, 172 S.E.2d 120. The key inquiry is foreseeability, not privity. . . . By placing this product into the stream of commerce, the builder owes a duty of care to those who will use his product, so as to render him accountable for negligent workmanship.

Terlinde v. Neely, 275 S.C. 395, 399, 271 S.E.2d 768, 770 (1980) (emphasis added).

Additionally, Target's main brief (pp. 2, 17-18) quoted Rayfield v. S.C. Dep't of Corr., 297 S.C. 95, 103, 374 S.E.2d 910, 914 (Ct. App. 1988), as stating one owes others a duty of

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[17] To the extent Grand Strand addresses any of these cases, it does so only for the proximate cause issue, not the duty issue. (Resp't Br. p. 16 n.7).

Moreover, Grand Strand mentions only two of the nine cases, and complains that those two cases cited Restatement (Second) of Torts Section 533, which it argues has not been adopted by South Carolina. But nor has Section 533 been rejected by South Carolina, and that makes the question a novel issue of law which the Court should decide in accord with the Court's sense of justice and right, as explained on page 38 of Target's main brief. Grand Strand argues that those same two cases concerned "information passed from the original seller through the intermediate seller," but that is exactly what happened here. Grand Strand's complaint seems to be that here, the intermediate seller had learned of the fraud before passing it on—but that goes to proximate cause, not duty, and is of no moment, as in South Carolina, even "wilful or criminal act[s]" do not break proximate cause, much less duty. (As explained in Target's main brief, p. 19 (citing Ayers v. Atl. Greyhound Corp., 208 S.C. 267, 275, 37 S.E.2d 737, 740 (1946)); p. 28 (quoting Wineglass v. McMinn, 235 S.C. 537, 541-42, 112 S.E.2d 652, 654 (1960)) and Culbertson v. Johnson Motor Lines, 226 S.C. 13, 24, 83 S.E.2d 338, 343 (1954)). The same rule re "intervening" causes is true in at least some other jurisdictions, as also pointed out in Target's main brief (p. 32 n.16) (quoting O'Brien v. B.L.C. Ins. Co., 768 S.W.2d 64, 68 (Mo. 1989)).

Grand Strand has no response to the other cases that did not rely on Section 533 and found the upstream deceptive seller liable to downstream victims with whom it had no communication or direct relationship.

care if he shows "(1) that the essential purpose of [a] statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect." It is undisputed that the requirements are met here. There is a duty. Grand Strand counters by quoting Reynolds v. Ryland Grp., Inc., 340 S.C. 331, 531 S.E.2d 917, 921 (2000) (actually, it quotes the dissent) as stating, "[T]he conduct prohibited by the SCUTPA is not merely duplicative of that addressed by the law of torts, contracts, and warranties;" and another case that Grand Strand says "treat[ed] the UTPA as its own tort for the purposes of the South Carolina Tort Claims Act." It may be that where statutes like the UTPA and Dealers Act state their own remedies for violations of the statute, one cannot sue under negligence per se for violations, but that has nothing to do with whether the statutes create a duty. They do, and Grand Strand violated those duties. Thus the Order's statement, "Grand Strand did not owe a duty to Plaintiff **under any theory recognized by South Carolina law**" (Order p. 5) (bolding removed from the first eight words) is erroneous and should be REVERSED.

Thus, duty and proximate cause are both shown under South Carolina law, and under the law of other jurisdictions. They apply to negligence, both simple negligence and aggravated negligence.

All that Grand Strand has left are the claims for negligent misrepresentation and fraud, for which, as Grand Strand notes, there is dicta[18] indicating that the misrepresentation must have been made to the victim, and the victim must have relied on that misrepresentation. But that is all that is—dicta. No South Carolina appellate court has addressed the situation where an upstream seller deceptively sells a product, intending that it be resold, and is sued by a downstream indirect purchaser. As such, this is a novel issue, to be decided in accord with the

[18] Grand Strand does not call it "dicta," but that is what it is.

Court's sense of justice and right, as discussed in subsection D below.

But for now, the main point is that the negligence claim properly survives summary judgment.

C. Statutory Claims

As noted in Target's main brief, the Supreme Court held in Colleton Preparatory Acad., Inc. v. Hoover Universal, Inc. (Colleton Prep.), 379 S.C. 181, 196, 666 S.E.2d 247, 255 (2008) that it would be "absurd" to prohibit UTPA claims by "remote buyers" like Target. Grand Strand tries to get around this via referencing "causal connection" and "as a result" language in Colleton Prep.,[19] but immediately after the sentence Grand Strand quotes, Colleton Prep. made clear it was not imposing a causal connection requirement any stricter than proximate cause. "To recover under the Act, a plaintiff must prove a violation of the Act, proximate cause, and damages." Id. at 194, 666 S.E.2d at 254. As explained above, proximate cause has two parts, "but for" and "foreseeable." These are jury questions.

Grand Strand refers to only three other cases in its Section II.D. Two are South Carolina cases. It quotes Health Promotion Specialists, LLC, 403 S.C. at 638, 743 S.E.2d at 816, for its use of the "as a result" language, and State ex rel. Wilson v. Ortho-McNeil-Janssen Pharms., Inc., 414 S.C. 33, 57-58, 777 S.E.2d 176, 189 (2015) as stating the UTPA "requires a causal connection." These points are resolved by Colleton Prep.'s explanation that "as a result" and "causal connection" mean nothing more than "proximate cause." Additionally, the fuller quotation from Wilson is, "the claimant must demonstrate a causal connection between the injury-in-fact and the complained of unfair or deceptive acts or practices," which Target

[19] The "as a result" language comes from the statute, which is to be interpreted broadly to fulfill its goal of reducing unfair or deceptive acts affecting commerce in South Carolina. See authorities cited in Section III of Target's main brief.

definitely did.

But Grand Strand goes further. It attempts to incorporate a common-law element of proof into a UTPA action. It cites a federal order, Doe 1 v. Varsity Brands, LLC, No. CV 6:22-2957-HMH, 2023 WL 4088483, at *13 (D.S.C. June 20, 2023), that was apparently unaware of Colleton Prep. Moreover, Doe's sole source for the holding Grand Strand quotes is a North Carolina federal case applying North Carolina law, that states, "[A] private plaintiff cannot recover in an action for a deceptive trade practice if the plaintiff is unable to prove that the deceptive practice worked." Doe, at *13 (quoting Hageman v. Twin City Chrysler-Plymouth, Inc., 681 F. Supp. 303, 308-09 (M.D.N.C. 1988)) (alteration in original (emphasis added). Here, it is proven that the deceptive practice worked. Even under the North Carolina case that Grand Strand's federal case relies on, Target has made out a claim.

This Court is obviously more entitled than is any federal court to decide what aspects, if any, of North Carolina law should be incorporated into South Carolina law. If this Court is to incorporate North Carolina holdings, it should look to the leading case, Marshall v. Miller, 276 S.E.2d 397 (N.C. 1981). Marshall explained that the UTPA "was needed because common law remedies had proved often ineffective" due to their required elements of proof. Id. at 400. It specifically included "misrepresentation" and "fraud" among these common-law actions whose "essential element[s]" were intended to be eliminated for UTPA actions. Id. "As it is a hybrid statute, . . . an entirely statutory cause of action, analogies to other rules of common law . . . should not control." Id. at 402 (emphasis added).

If this Court is to incorporate North Carolina UTPA holdings into South Carolina law, it should follow the North Carolina Supreme Court and hold that common-law requirements for analogous actions are not incorporated in the South Carolina UTPA. See Colleton (holding

the common-law requirement of privity is not incorporated into an analogous claim under the UTPA). If there were any doubt, the undisputed principle that remedial statutes are broadly construed to provide relief to plaintiffs, argued in Target's main brief, Section III, citing, e.g., Allen v. Union Oil & Mfg. Co., 59 S.C. 571, 577, 38 S.E. 274, 276 (1901) would compel a decision for Target.

Because the North Carolina and South Carolina Supreme Courts have held that common-law elements of causes of action are not incorporated into the UTPA; because any doubt would be resolved by the principle of broad construction of remedial statutes; and because Target's harm was an easily foreseeable but-for consequence of Grand Strand's deceptive acts, the Order below should be reversed. (More precisely, because a jury could reasonably conclude the harm was a reasonably foreseeable but-for consequence, Target has the right to a jury determination).

As Grand Strand concedes, the analysis under the Dealers Act is "identical." Both claims should go to the jury.

D. At Best for Grand Strand, These Are Novel Issues Which Should Be Decided in Target's Favor.

Our appellate courts have not yet ruled on whether an upstream repair shop that deceptively places a wrecked vehicle into the stream of commerce is liable to the victim who ends up paying for the deception. Target believes our case law, together with the holdings from other jurisdictions discussed in its main brief, suffice, but recognizes this may be a novel issue, and Grand Strand implies as much (Resp't Br. p. 8).

Importantly, Grand Strand does not dispute that novel issues should be decided in accord with this Court's sense of justice and right, as argued in Target's main brief. Nor does it dispute that it knew the pickup truck had been wrecked, that it should not have hidden the

structural damage, that it intended the victim of its acts to be a party with whom it had no transaction or communication, nor that "it would be unconscionable to allow one to intentionally place a rebuilt wrecked vehicle in the stream of commerce while deceptively hiding its flaws" and then claim the victim cannot sue it.

Instead, it writes (Resp't Br. p. 8) (emphasis added), "Target Motors seeks to recover for a nondisclosure with respect to a transaction to which it was not a party. As a general rule, courts are reluctant to create new duties or to expand tort liability." The Supreme Court disagrees. "[T]his Court has not been reluctant [to expand tort liability with respect to a transaction with which the plaintiff was not a party]." JKT Co. v. Hardwick, 274 S.C. 413, 417, 265 S.E.2d 510, 512 (1980) (footnote omitted). "The erosion of the concept of privity has been a legal phenomenon for more than a decade, and this Court has not been reluctant to contribute to its demise."[20] "Today, we seek to still all whispers of its continued existence." Id. at 418, 265 S.E.2d at 513.

The Supreme Court has repeatedly so held. "[W]hen the Court is confronted with a new scenario not properly disposed of by our present set of rules, it once more responds by expanding our rules to provide the innocent buyer with protection." Damico v. Lennar Carolinas, LLC, 437 S.C. 596, 621, 879 S.E.2d 746, 760 (2022) (unanimous), reh'g denied (2022), cert. denied, 143 S. Ct. 2581 (2023) (cleaned) (discussing cases in which tort liability was extended to indirect purchasers). It has a "policy of providing a remedy where a duty outside the contract is breached." Colleton Prep., 379 S.C. at 191, 666 S.E.2d at 252 (emphasis

[20] None of the three cases Grand Strand cites on this issue state that courts are "reluctant" to do so. Nor are any of the three remotely on point—two involve defendants who did not create and had no knowledge of the allegedly tortious condition, and the third involved sheriff's deputies who were sued for going to a man's home, at 5:30 pm, looking for a suspect who was not there, when another deputy had been told two days prior that the suspect was not there.

added).

The Supreme Court, in fact, has repeatedly found novel issues "with respect to a transaction to which [the plaintiff] was not a party."[21] Within the sub-topic of indirect purchasers, novel issues, i.e., new scenarios not properly disposed of by existing case law, arise when a different cause of action or an unanticipated set of facts is presented for appellate review. Springfield v. Williams Plumbing Supply Co., 249 S.C. 130, 153 S.E.2d 184 (1967) addressed the novel issue of an implied warranty. "It is clear" that whether one may sue under a theory of "implied warranty . . . in the absence of privity, is one of novel impression in this jurisdiction." Id. 135-36, 153 S.E.2d at 186 (emphasis added). It held the matter must go to the jury. Id. at 139, 153 S.E.2d at 188. In Vaden v. Coll. Heights Subdivision, 261 S.C. 509, 511-12, 201 S.E.2d 113, 113-14 (1973) (emphasis added), the Court addressed the question of negligence for an indirect seller. Whether "the developer-subdivider, is liable to the appellants, who had purchased their homes and lots in the subdivision from a builder-vendor, a grantee of the subdivider, for the negligent failure to adequately provide for the drainage of surface water" is "a question of clearly novel impression in this jurisdiction." It too held the matter must go to the jury. Id. at 512, 201 S.E.2d at 114.

Apparently neither party in Vaden re-appealed after remand, because "a closely analogous question" arose again in Brown v. Sandwood Dev. Corp., 273 S.C. 31, 33, 253

[21] Additionally, Target's main brief quoted F. Patrick Hubbard & Robert L. Felix, THE SOUTH CAROLINA LAW OF TORTS (5th ed. 2023) for the proposition that the trend is to "give[] greater weight to the wrongfulness of fraud" and to extend liability to those the wrongdoer "has reason to expect" will suffer harm. (Appellant Br. p. 39). This is an authoritative text, cited more than 100 times by South Carolina appellate and federal courts. Grand Strand's three cases are all more than 25 years old, so even if Grand Strand's cases stated what Grand Strand cites them for, they would not counter Hubbard & Felix's learned conclusion that the trend is towards expanding liability of those, like Grand Strand, who had reason to expect there would be an indirect victim.

S.E.2d 514, 515 (1979). "The question of whether the instant action may be maintained against the appellant on the theory of negligence is one of novel impression," where "only six of the sixteen plaintiffs purchased directly from the appellant, the developer-subdivider." Id. (emphasis added). Again the Court held the matter must go to the jury. Id. at 34, 253 S.E.2d at 515.[22]

As noted, our appellate courts have not ruled on whether an upstream car dealer that deceptively places a wrecked vehicle into the stream of commerce is liable to the victim who ends up paying for the deception. Target recognizes that dicta in some cases would seem to address the issue as to the fraud and negligent misrepresentation causes of action but that is all it is—dicta. These cases were not considering the situation where a defendant knowingly places a rebuilt wrecked truck into the stream of commerce, and then says, "you can only sue the party who sold it to you."[23] See, e.g., K & A Acquisition Grp., LLC v. Island Pointe, LLC, 383 S.C. 563, 682 S.E.2d 252, 259 n.4 (2009) ("[W]e find the case is distinguishable and the statement constitutes dicta."); I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 411 & n.1, 526 S.E.2d 716, 718-719 & n.1 (2000) (holding "a novel question of law" existed despite an earlier Supreme Court holding whose language would have resolved the case, as that past case "did not address" the specific issue in the new case).

[22] See also Baldwin v. Sanders, 266 S.C. 394, 397, 223 S.E.2d 602, 603 (1976) (finding novel question requiring jury trial where wife, who did not contract with doctor, could sue doctor for husband's failed vasectomy, as it was the wife, not the husband, who became pregnant).

[23] "It is difficult to conceive of a commodity that is any more likely to involve knowledge by a seller that there is an especial likelihood that a misrepresentation will reach third persons and will influence their conduct, than in the case of a motor vehicle." Clark v. McDaniel, 546 N.W.2d 590, 593-94 (Iowa 1996).

So too here. The Court should address the novel issue, and decide it "based on its assessment of which answer and reasoning best comport with the law and public policies of this state and the Court's sense of law, justice, and right." Mims Amusement Co. v. S.C. L. Enf't Div., 366 S.C. 141, 145, 621 S.E.2d 344, 346 (2005); State v. Sweat, 379 S.C. 367, 373-74, 665 S.E.2d 645, 649 (Ct. App. 2008).

One obvious possibility is to send the case back for trial, and decide the issue only if it comes back up after remand, as in Vaden, but where the factors weigh as heavily in a plaintiff's favor as they do here, the Court should spare everyone the costs and effort of a new appeal, and decide the issue now.

The law and public policies of this state are "strong[ly]" in favor of "punish[ing]" unfair and deceptive trade practices, Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 30, 644 S.E.2d 663, 671 (2007). "South Carolina is in the vanguard in permitting a plaintiff to recover economic loss from a seller with whom he did not deal and who made no express warranties to him." JKT Co., 274 S.C. at 418, 265 S.E.2d at 512. State policy is to "eliminate" unfair trade practices, Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 477, 351 S.E.2d 347, 349 (Ct. App. 1986); to "provid[e] a remedy where a duty outside the contract is breached," Colleton Prep., 379 S.C. at 191, 666 S.E.2d at 252. Thus, our appellate courts respond "by expanding our rules to provide the innocent buyer with protection," Damico, 437 S.C. at 621, 879 S.E.2d at 760.[24]

Justice and right support Target. "There is no justifiable reason why an innocent corporate consumer should be denied recovery when a manufacturer places a defective article

[24] The Supreme Courts of South Carolina and North Carolina, Justice Cardozo, Prosser, and Felix & Hubbard all state the opposite of Grand Strand's reading of the law.

into commerce." JKT Co., 274 S.C. at 418, 265 S.E.2d at 512 (emphasis added). So too here. There is no justifiable reason why an innocent corporate consumer should be denied recovery when a repair shop buys a severely wrecked vehicle it had worked on, then sells it as without damage. "Trenholm placed the house in the stream of commerce and exacted a fair price for it. . . . [I]t has profited by receiving a fair price and, as between it and an innocent purchaser, the innocent purchaser should be protected[.]" Lane v. Trenholm Bldg. Co., 267 S.C. 497, 503, 229 S.E.2d 728, 731 (1976). So too here. Grand Strand placed the vehicle in the stream of commerce and exacted a fair price for it. The innocent purchaser should be protected.

Moreover, a jury should have an opportunity to weigh in on punitive damages for this tortfeasor for the harm it inflicted on Target, which is another reason to keep the claims for fraud, negligent misrepresentation, and negligence in this case.

Target's main brief concluded "it would be unconscionable to allow one to intentionally place a rebuilt wrecked vehicle in the stream of commerce while deceptively hiding its flaws, and then say, 'No one but the initial purchaser may sue me.'" Grand Strand has made no effort to rebut that.[25]

And—although it might seem unlikely—a deceptive seller in Grand Strand's position could claim that its immediate seller cannot sue it either, so that it can keep its ill-gotten gains. One need not look far to find an example. See the motion for summary judgment against Grainger that Grand Strand filed in this case (Horry County Court, 11/28/2023).

[25] To the extent it may be relevant, Target needs to correct that statement from the initial brief filed September 6, 2023. On November 28, 2023, Grand Strand filed for summary judgment against the initial purchaser claiming it is not liable to anyone for selling a previously rebuilt wrecked vehicle. Horry County Public Index 2022CP2600861 (11/28/23), Def. Grand Strand Nissan Inc.'s Mot. for Summ. J. as to Cross Claims Asserted by Grainger Companies, Inc. d/b/a Grainger Honda.

The erosion of the doctrine of privity, which our Supreme Court has joined with gusto, began with "a remote purchaser of [a] defective automobile." Salladin v. Tellis, 247 S.C. 267, 269-70, 146 S.E.2d 875, 877-78 (1966) (citing "[t]he celebrated decision" by Justice Cardozo in MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916F, 696 (1916)). "The MacPherson decision did not go beyond liability to the ultimate purchaser himself. Later cases have extended it." Id. (quoting PROSSER ON TORTS, 3rd Ed., Sec. 96). Target is not asking to extend liability beyond "the ultimate purchaser" of a "defective automobile." It simply asks to be allowed to sue the deceptive dealer that started the very short chain that ended with Target's injury.

CONCLUSION

Grand Strand engaged in fraud. Grand Strand expected and intended the victim to be someone other than its immediate purchaser. Grand Strand claims an expected victim cannot sue it. That cannot be the law. The Court should follow the many decisions of the Supreme Court finding that victims may sue upstream malefactors with whom they had no contact, and the many decisions from other jurisdictions holding it would be wrongful to allow tortfeasors like Grand Strand to escape liability to their victims, and REVERSE the Order below.

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