THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Hon. B. Alex Hyman, Circuit Court Judge

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SC Court of Appeals

Case No. 2020-CP-40-01934
Appellate Case No. 2025-000063

Stivers Brothers Automotive, Inc. .... Respondent,

v.

W. Warner Peacock and Peacock Automotive, LLC.. Appellants.

FINAL BRIEF OF APPELLANTS

Bradford N. Martin, Esq. (SC Bar No. 3658)
Laura W. H. Teer, Esq. (SC Bar No. 16698)
Bradford Neal Martin & Associates, PA
Post Office Box 10410
Greenville, South Carolina 29603
864.552.9990

ATTORNEYS FOR APPELLANTS
W. WARNER PEACOCK AND PEACOCK
AUTOMOTIVE, LLC

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STATEMENT OF ISSUES ON APPEAL

I. IS THE LOWER COURT'S ORDER AMBIGUOUS AND REQUIRING CLARIFICATION?

II. DID THE LOWER COURT ERR IN GRANTING SUMMARY JUDGMENT WHEN THE MEASURE OF DAMAGES IS AN ISSUE THAT SHOULD BE RESERVED FOR THE TRIAL COURT TO CHARGE TO A JURY FOLLOWING THE PRESENTATION OF ALL EVIDENCE AT TRIAL?

III. DID THE LOWER COURT ERR IN LIMITING THE FACTORS, PRIOR TO TRIAL, THAT CAN BE CONSIDERED BY A JURY IN DETERMINING DAMAGES?

IV. DID THE LOWER COURT ERR TO THE EXTENT IT FOUND THE MEASURE OF DAMAGES FOR A BREACH OF CONTRACT IS NOT THE ACTUAL LOSS SUFFERED BY RESPONDENT BUT MUST BE DETERMINED SOLELY BY THE DIFFERENCE BETWEEN THE CONTRACT PRICE AND THE FAIR MARKET VALUE AT THE TIME OF THE BREACH?

V. DID THE LOWER COURT ERR IN FINDING THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AS TO THE MEASURE OF DAMAGES WHEN THE PARTIES CONTRACTUALLY AGREED TO LIMIT DAMAGES AND THE DOCTRINE OF MITIGATION MUST BE APPLIED?

VI. DID THE LOWER COURT ERR TO THE EXTENT THE ORDER FINDS THE DOCTRINE OF MITIGATION IS NOT APPLICABLE IN THE PRESENT CASE?

VII. DID THE LOWER COURT ERR IN ASSUMING FACTS NOT IN EVIDENCE?

VIII. DID THE LOWER COURT ERR IN DENYING APPELLANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT WHEN RESPONDENT FAILED TO PRESENT ANY FACTS SHOWING A GENUINE ISSUE OF MATERIAL FACT?

IX. DID THE LOWER COURT ERR IN FAILING TO APPLY THE DOCTRINE OF MITIGATION TO APPELLANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT WHERE AN APPLICATION WOULD REQUIRE A FINDING IN APPELLANTS' FAVOR?

X. DID THE LOWER COURT ERR TO THE EXTENT IT CONSIDERED COSTS INCURRED BY OTHER ENTITIES IN DENYING APPELLANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT?

STATEMENT OF THE CASE

Respondent (Stivers) commenced this action on April 13, 2020 (R. 22-35) and filed an Amended Complaint on July 2, 2020 (R. 63-77) alleging Appellants (Peacock Automotive and Warner Peacock) breached two Asset Purchase Agreements (APAs) entered into by the parties, seeking specific performance.[1] Appellants filed an Answer and Counterclaim on June 5, 2020 denying any breach of contract and bringing counterclaims.[2] (R. 36-59). On July 17, 2020 an Answer and Counterclaims were filed to the Amended Complaint. (R. 78-101). Respondent filed Replies to the respective Counterclaims on July 1, 2020 (R. 60-62) and July 29, 2020. (R. 102-104).

The case has a long procedural history. Relevant to this appeal, Appellants filed a motion for partial summary judgment on May 12, 2022 on the grounds that Respondent suffered no recoverable damages, as any damages claimed were offset by the doctrine of mitigation, and the only issue remaining was which party would receive the escrow deposit.[3] (R. 127-130). Respondent filed a return on May 27, 2022. (R. 131-134). Appellants filed a memorandum in support of their motion on May 17, 2023. (R. 184-339).

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[1] Respondent alleged causes of action for breach of contract, breach of contract accompanied by a fraudulent act, violation of the Dealers Act, and interference with contractual relations by Warner Peacock. Respondent additionally requested a declaratory judgment that the APAs were valid and requested veil piercing. Its cause of action for violation of the Dealers Act was subsequently dismissed by the circuit court, and the order of the circuit court affirmed by this Court in Unpublished Opinion No. 2024-UP-378 filed November 6, 2024.

[2] Appellants have alleged causes of action against Respondent for breach of contract, breach of contract accompanied by a fraudulent act, fraud in the inducement, and negligent misrepresentation.

[3] Appellants preserved their previous argument that the APAs limited Respondent's recovery to the $100,000 escrow deposit and argued it more fully in their memorandum in opposition to Respondent's motion for summary judgment. (R. 151-153).

Respondent filed a motion for summary judgment "on declaratory judgment claim" and memorandum in support on March 21, 2023. (R. 135) [4] Appellants filed a memorandum in opposition on May 17, 2023. (R. 148-183).

A hearing was held before the Honorable B. Alex Hyman on May 23, 2023 on a number of motions, including Appellants' and Respondent's motions for summary judgment. The lower court issued a form 4 order denying Appellants' motion for partial summary judgment (R. 4-6) and a formal order granting Respondent's motion for summary judgment as to the measure in damages, in part,[5] on July 31, 2023. (R. 7-15).

Appellants filed motions to alter or amend both orders on August 10, 2023. (R. 340-346). The lower court ruled on the other motions before it by form order filed November 1, 2023 and took the two motions for summary judgment under advisement. (R. 16-18). The lower court denied Appellants' motions to alter or amend the motions for summary judgment by form order filed December 20, 2024 (R. 19-21). Appellants served their notice of appeal on January 9, 2025.

STATEMENT OF THE FACTS

Appellant Peacock Automotive, LLC signed two APAs on January 7, 2020 for the purchase of Stivers' (Respondent's) Columbia, South Carolina Chevrolet and Hyundai/Genesis dealerships. (R. 79, ¶ 4). This purchase was between two experienced dealers. The APAs themselves provided that Respondent would give Peacock full access to its books and records and would operate the dealerships in the ordinary course until the closing, using its best efforts to maintain the goodwill value of the dealerships. (R. 79, ¶ 7). Respondent failed to do so. (R. 80, ¶ 10). When Respondent

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[4] This motion differed from the request for declaratory judgment in Respondent's Complaint and Amended Complaint, which asked for a finding that the APAs were valid and enforceable. (R. 8-9; R. 71-72).

[5] Respondent also requested a finding that the Chevrolet APA is ambiguous as to the measure of damages recoverable for its breach but the Hyundai/Genesis APA was unambiguous. These issues were not ruled on by the lower court and Respondent did not file a Rule 59(e) Motion, so they are not preserved. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004).

continued to break its word, Peacock had no alternative but to terminate the APAs on March 27, 2020. (R. 80-81, ¶ 13). Respondent immediately brought suit alleging several causes of action against Peacock Automotive and its President, Warner Peacock, arising from the termination of the APAs.

The sophisticated parties agreed in the APAs, negotiated by their lawyers, that three types of remedies were available depending on the breach: specific performance, the escrow deposit, and injunctive relief. (R. 151-154).[6] The APAs further provided that indirect, special, and punitive damages are not recoverable. (R. 154, *Id.*) Liquidated damages were set in the amount of the escrow deposit. (R. 152). South Carolina law allows parties to prospectively set an amount of damages for breach through the inclusion of a liquidated damages provision. *Erie Ins. Co. v. Winter Constr. Co.*, 393 S.C. 455, 460, 713 S.E.2d 318, 321 (Ct. App. 2011).

The facts in the present case are atypical. A seller has an obligation to make reasonable efforts to mitigate its damages. *See, e.g., Du Bose v. Bultman,* 215 S.C. 468, 56 S.E.2d 95 (1949); *Genovese v. Bergeron,* 327 S.C. 567, 490 S.E.2d 608 (Ct.App.1997); *Chastain v. Owens Carolina, Inc.,* 310 S.C. 417, 426 S.E.2d 834 (Ct.App.1993). In the most common scenario, the seller resells the business to a subsequent buyer at a loss and brings an action for the difference between the sale price and the original contract price. In cases involving assets that do not have a ready market, the seller has no opportunity to mitigate damages and therefore claims the entire original contract price. The third scenario is that of the loss volume seller. This seller claims the

[6] The parties agreed under the provisions of the two APAs that the right to specific performance was the primary remedy available. (R. 152, APA Sections 20(e) and 24(l)). They also recognized, however, that if specific performance did not remedy some breaches that separate provisions in those events would control, including monetary damages. The monetary damages available under the APAs to Stivers, in addition to specific performance, was retention of the escrow deposit for a breach of Section 20(d) or 22 (indemnification by Buyer). (R. 152). Section 24(l)(3) further provided that indirect, special, and punitive damages were not recoverable under Section 22. (R. 154).

contract price even though the assets are subsequently sold for full value as it could have sold two units rather than one had the contract been performed.

This is not a case in which Respondent was left holding a business it could not sell. Nor is Respondent a lost volume seller. This is a case in which Respondent wants to have its cake and eat it too. Respondent had two Columbia dealerships; it sold its Chevrolet dealership in October of 2020 for $500,000 more than the original APA price (R. 223-249) and admitted in discovery that in doing so it fully mitigated its damages as to the Chevrolet franchise. (R. 203-204).

Respondent took the opposite approach to its Hyundai/Genesis dealership, for which there was also a ready market. It is undisputed that the value of automobile franchises increased dramatically in 2020. (R. 207-214). Appellants submitted signed APAs to Respondent on July 23, 2020 and October 26, 2020 offering to purchase the Hyundai/Genesis dealership for the same price but on better terms. (R. 254-256; R. 257-261)[7] Respondent, recognizing it had a rapidly appreciating asset, chose not to sell the dealership to Appellants or anyone else. (R. 131-133). Instead, they kept the dealership and made almost $6 million in net profits through March of 2022, which far exceeded their alleged damages.

By retaining Hyundai/Genesis, Respondent realized net profits that would not otherwise have been received, and which quickly exceeded the APA price. It was undisputed that in the six months between the termination of the APAs and Respondent's sale of the Chevrolet franchise for $500,000 more than the subject APA, it realized $265,398 in net operating profits for the Chevrolet dealership. (R. 213, ¶ 27). Respondent also realized more than $5,893,886 in net profits for the Hyundai/Genesis dealership between April, 2020 and March, 2022. (R. 209-210, ¶ 15).

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[7] Appellants offered to increase the escrow deposit to $500,000, pay the purchase price in cash, and reimburse Stivers' attorneys' fees and costs. (R. 257-259).

The value of Hyundai/Genesis dealership additionally rose dramatically in 2020 and 2021. The Haig Report, a recognized industry publication, noted in August of 2021 that Blue Sky values in the automobile industry had risen an estimated 52% from the end of 2019 and 26% from the end of 2020. (R. 211-212, ¶ 21). Therefore, Respondent did not suffer any loss as a result of retaining the Hyundai/Gensis franchise but experienced a substantial gain instead.

Respondent clearly determined it was more profitable to retain Hyundai/Genesis but asked the lower court to find its damages were to be determined solely as of the date the APAs were terminated without consideration for its actual loss contrary to South Carolina law. *See Road., LLC v. Beaufort Cnty.*, 433 S.C. 164, 175, 857 S.E.2d 371, 376 (Ct. App. 2021) quoting *S.C. Fin. Corp. of Anderson v. W. Side Fin. Co.* , 236 S.C. 109, 122, 113 S.E.2d 329, 335 (1960) ("The measure of damages for breach of contract is the loss actually suffered by the contractee as the result of the breach.").

At the May 23, 2023 hearing, Respondent's counsel quantified its alleged damages for the termination of the Hyundai/Genesis dealership APA at $2.3 million (R. 373, ll. 13-17; R. 374, ll. 18-21). Respondent presented the Affidavit of Mark A. Dayman in support of this argument. (R. 392-393). The claimed damages are undisputedly less than the net profits and increased franchise value Respondent realized by retaining the Hyundai/Genesis dealership. These profits are not treated as a collateral source but mitigate (and eliminate) the damages Respondent claims. *See Crossman Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.*, No. 4:09-cv-1379-RBH, 2013 WL 5437712, at *27 (D.S.C. Sept. 27, 2013).

ARGUMENTS

I. STANDARD OF REVIEW

Summary judgment is appropriate where it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 392 S.E.2d 460 (1990). Summary judgment should only be granted when plain, palpable and undisputed facts exist on which reasonable minds cannot differ. *Trico Surveying, Inc. v. Godley Auction Co.*, 314 S.C. 542, 431 S.E.2d 565 (1993).

In determining whether any triable issues of fact exist, the lower court must view the evidence and all reasonable inferences which may be drawn therefrom in the light most favorable to the party opposing summary judgment. *Brockbank* v. *Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000). "In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Young v. S.C. Dep't of Corr.*, 333 S.C. 714, 717, 511 S.E.2d 413, 415 (Ct. App. 1999). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Baugus* v. *Wessinger*, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). "All ambiguities, conclusions, and inferences arising in and from the evidence must be construed most strongly against the movant." *Id.* Since it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. *Baughman v. Am. Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

Questions of law are reviewed *de novo*. *Fields v. J. Haynes Waters Builders, Inc.,* 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008). "Whether a court order is clear and unambiguous is a question of law for the court." *Campione v. Best,* 435 S.C. 451, 458, 868 S.E.2d 378, 382 (Ct. App. 2021) (citation omitted). A reviewing court is free to decide questions of law with no particular deference to the lower court. *Hunt v. Forestry Comm'n,* 358 S.C. 564, 569, 595 S.E.2d 846, 848-49 (Ct.App.2004).

II. THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENT AS A RULING ON THE MEASURE OF DAMAGES SHOULD BE RESERVED FOR THE TRIAL COURT

A. A Ruling on the Measure of Damages is not Appropriate for a Declaratory Judgment

Respondent moved for "summary judgment on declaratory judgment" that "the appropriate measure of damages associated with Defendants' breach of the APAs is the difference between the contract price and the fair market value of the assets listed in the APAs at the time of the breach." (R. 135; R 136).[8] The lower court erred when the order would not terminate the uncertainty or controversy giving rise to the proceeding, as required by the statute. S.C. Code Ann. § 15-53-70. Further, the question of the measure of damages does not determine the construction or validity of the contract involved in the present case and, therefore, is not appropriate for declaratory relief. See S.C. Code 15-53-30. The question of the proper measure of damages for a breach of contract is not appropriate for a declaratory judgment as this issue does not declare Respondent's rights or status nor does it establish the legal relationship between the parties. *See* S.C. Code § 15-53-20.

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[8] Respondent requested a "declaration that the APAs remain valid and enforceable contracts" in its Amended Complaint. (R. 71-72, ¶ 66). Respondent did not move for summary judgment as to this issue.

B. The Law on Damages is a Matter to be Charged at Trial

The issue of the proper measure of damages is a matter to be charged to a jury. A jury charge is not properly decided on a declaratory judgment motion prior to trial. "The trial court must determine the law to be charged based on the evidence [presented] at trial." *Cook v. State,* 415 S.C. 551, 556, 784 S.E.2d 665, 667 (2015) (quoting *State v. Smith,* 363 S.C. 111, 115, 609 S.E.2d 528, 530 (Ct. App. 2005). It is not appropriate to limit the applicable law to be considered. If there is any evidence to support a jury charge, the trial judge should grant it. *State v. Burriss,* 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). The refusal to grant a charge that states a sound principle of applicable law is an error of law. *State v. Pittman,* 373 S.C. 527, 570, 647 S.E.2d 144, 167 (2007).

III. THE LOWER COURT'S ORDER IS AMBIGUOUS AND REQUIRES INTERPRETATION

The lower court's July 31, 2023 order is ambiguous. The order provides, in part:

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> D.G. Porter, Inc. v. Fridley, 373 N.W.2d. 917 (1985) involved the breach of a contract for the sale of a bar. The Supreme Court of North Dakota noted "the general rule is that the seller's remedy for the buyer's breach of an executory contract to purchase an ongoing business is to recover damages for the difference between the contract price and the fair market value of the business on the date of the breach." 373 N.W.2d at 924. The Fridley Court explicitly addressed the fact that the seller retained possession of the assets after the breach, as the Plaintiff has done in the present matter with its Hyundai/Genesis franchise. "By receiving this remedy, [the seller] will receive the equivalent of what he bargained for under the agreement: in addition to retaining the business he will receive an amount equal to the difference between the contract price of $250,000 and the value of the business on the date of [the buyer's] breach." 373 N.W.3d at 925.
>
> Accordingly, this Court finds that the Plaintiff has established that there is no genuine issue of material fact that the appropriate measure of damages in an action involving the buyer's breach of an executory contract to purchase an ongoing business, regardless of whether the seller retains possession of the assets, is the "market measure" of damages. Therefore, the Plaintiff's measure of damages in this case for the alleged breach of the APAs shall be the

> difference between the contract price of the assets and their fair market value at the time of the breach.
>
> In making this ruling, the Court is aware this alleged breach occurred at the height of the COVID-19 pandemic. At that moment in time, the future of the automobile sales industry nationwide was uncertain. Car sales had declined, customer traffic in dealerships was significantly low due to feared spread of disease, and many consumers were out of work. Subsequently, the federal government's Paycheck Protection Program was put in place, reviving the sales market and causing dealership values to significantly increase. To allow subsequent market fluctuations to influence damages at the time of a breach is unfair in this case particularly, but also would establish an untenable public policy allowing those who might breach a contract to await more favorable market conditions before determining damages. Such is not the longstanding law of this jurisdiction.

(R. 11-12).

Appellants raised mitigation and the limitation of damages by contractual agreement in their pleadings and memorandum in opposition to Respondent's motion for summary judgment. (R. 91; R. 151-161). Read as a whole, the lower court's order is ambiguous as to whether other doctrines potentially impacting a jury's consideration of damages, including mitigation and a liquidated damages, are applicable in the present case. Respondent contends that the lower court orders foreclose Appellants from presenting evidence of mitigation and contractual limitation of damages at trial.

Appellants requested that the lower court clarify that its July 31st order did not eliminate the doctrine of mitigation or the contractual limitation of damages. (R. 340). The lower court failed to clarify and did not hold oral arguments stating only in its December 20, 2024 form order:

> [a]fter careful consideration, Defendant's Motion to Alter or Amend the July 31, 2023 Order Granting Plaintiff's Motion for Summary Judgment and Defendant's Motion to Alter or Amend the July 31, 2023 Order Denying Defendants' Motion for Summary Judgment are respectfully denied.

(R. 19).

"[I]n construing an ambiguous order ..., the determinative factor is to ascertain the intent of the judge who wrote the order." *Eddins v. Eddins*, 304 S.C. 133, 135, 403 S.E.2d 164, 166 (Ct.App.1991) (citing *Weil v. Weil*, 299 S.C. 84, 382 S.E.2d 471 (1989)). Further, "the interpretation or construction of [an order] must be characterized by justice and fairness." *Eddins*, 304 S.C. at 136, 403 S.E.2d at 166 (quoting 46 Am.Jur.2d Judgments § 73 (1969)). "An appellate court must view the trial court's statements as a whole to determine its reasoning." *Anderson v. Buonforte,* 365 S.C. 482, 488, 617 S.E.2d 750, 753 (Ct. App. 2005). "Furthermore, '[a]n order should be construed within the context of the proceeding in which it is rendered.'" *Id.* (alteration in original) (quoting *Dibble v. Sumter Ice & Fuel Co.,* 283 S.C. 278, 282, 322 S.E.2d 674, 677 (Ct. App. 1984)).

The determination of whether a party may immediately appeal an order issued before trial is governed primarily by S.C. Code § 14-3-330. Immediate appeal may be taken from "[a]ny intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas . . . ."). S.C. Code § 14-3-330(1). An order involves the merits when it "finally determine[s] some substantial matter forming the whole or a part of some ... defense...." *Mid-State Distribs., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993) (citation omitted).

To the extent the lower court's order is interpreted to eliminate defenses available to Appellants, it is immediately appealable. Additionally, interlocutory orders affecting a substantial right may be immediately appealed pursuant to § 14-3-330(2). Orders affecting a substantial right ". . . strike out [a] ... defense." *Mid-State.*, 310 S.C. at 335 n. 4, 426 S.E.2d at 780 n. 4.

The lower court's order could be interpreted to state only hornbook law regarding one measure of damages a jury can apply to determine any actual loss suffered by Respondent. This

interpretation was requested and would be characterized by justice and fairness as it would not eliminate common law and contractual defenses available to Appellants. Appellants therefore request a finding by this Court that the order of the lower court does not exclude mitigation or contractual limitations on damages in the present case. In the alternative, Appellants request this Court reverse the finding of the lower court as set forth below.

IV. THE LOWER COURT ERRED IN FINDING THERE WAS NO GENUINE ISSUE OF MATERIAL FACT AND ERRED TO THE EXTENT IT FOUND THE MEASURE OF DAMAGES IS NOT THE ACTUAL LOSS SUFFERED BY RESPONDENT BUT MUST BE DETERMINED BASED SOLELY ON ANY DIFFERENCE BETWEEN THE CONTRACT PRICE AND THE FAIR MARKET VALUE AT THE TIME OF THE BREACH.

A. The Lower Court Erred in Taking the Determination of Damages Away from the Jury

If this Court finds the lower court's order limited damages to the sole determination of the "difference between the contract price and the fair market value of the business on the date of the breach," the lower court erred by making it the sole factor to be considered by a jury to determine the actual loss suffered.

Limitation of the measure of damages to a single factor erroneously limits a jury and may result in an award that does not reflect the loss actually suffered. The "[t]he measure of damages for breach of contract is the loss actually suffered by the contractee as the result of the breach." *Road., LLC v. Beaufort Cnty.*, 433 S.C. 164, 175, 857 S.E.2d 371, 376 (Ct. App. 2021) *quoting S.C. Fin. Corp. of Anderson v. W. Side Fin. Co.* , 236 S.C. 109, 122, 113 S.E.2d 329, 335 (1960). A party proves damages only by showing an actual loss that would not have been incurred but for the defendant's breach of the contract. *Drews Co. v. Ledwith-Wolfe Assocs.*, 296 S.C. 207, 213, 371 S.E.2d 532, 535 (1988).

A jury may consider multiple factors in determining the amount of any damages that should be awarded in a case. Appellants presented a genuine issue of material fact as to whether post-termination values are relevant to establish the fair market value of the dealership. South Carolina Appellate Courts have found evidence of sale prices other than the date of termination to be admissible as to the fair market value of property. *See e.g., Benya v. Gamble*, 282 S.C. 624, 632, 321 S.E.2d 57, 62 (Ct. App. 1984) (allowing evidence of the sale price eighteen months after the contract was breached); *South Carolina State Highway Dept. v. Wilson*, 254 S.C. 360, 175 S.E.2d 391 (1970) (admission of sale price of two properties nine years prior to condemnation not an abuse of discretion).

Appellants presented evidence of the increased value of the Chevrolet dealership when it was subsequently sold months later (R. 225), and the rising value of dealerships in 2020 and 2021. (R. 250-251; R. 252-253). It was error for the lower court to invade the province of the jury by determining that evidence of market conditions following the termination of the APAs was not credible due to Covid-19. The potential impact of Covid-19 on the market is a matter for a jury to decide.

It is solely for a jury to determine the weight and credibility to be given to any evidence of post-termination profits or conditions. *See State v. Battle*, 408 S.C. 109, 119, 757 S.E.2d 737, 742 (2014) ("The task of determining the weight of the evidence lies within the exclusive province of the jury."); *S.C. Cable Television Ass'n. v. S. Bell Tel. & Tel. Co.*, 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992) ("The weight and credibility of evidence presented at the hearing is a [trial] matter within the province of the trier of fact."). The lower court erred in invading the province of the jury to the extent it erroneously limited the factors that could be considered in determining damages.

B. The Lower Court Erred to the Extent its Order Contradicts the Contractual Agreement of The Parties

The lower court also failed to consider that the APAs contained a liquidated damages provision that limited damages to the escrow deposit. The parties agreed that the right to specific performance was the primary remedy available[9] (R. 152), and any amount of damages available, in addition to specific performance, was limited to retention of the escrow deposit as liquidated damages. (R. 152).

Two sophisticated parties with on-going concerns set the amount of the escrow deposit as the liquidated damages if Appellant failed to purchase the dealerships through no fault of Respondent. South Carolina law allows parties to prospectively set an amount of damages for breach through the inclusion of a liquidated damages provision. *Erie Ins. Co. v. Winter Constr. Co.*, 393 S.C. 455, 460, 713 S.E.2d 318, 321 (Ct. App. 2011). The lower court's order prohibits the application of this agreed clause.

Therefore, the lower court erred to the extent it found, as a matter of law, that the difference between the contract price and the fair market value of the business on the date of the breach supersedes any contractual limitations on damages.

C. The Lower Court Erred to the Extent the Order Finds Mitigation is not Applicable

The lower court erred in failing to consider the legal duty of mitigation. "It is the undoubted general rule that it is the duty of the owner of the property, which is injured by the negligence of another, to use reasonable means to minimize the damages." *Newman v. Brown,* 228 S.C. 472, 480, 90 S.E.2d 649, 653 (1955). "The duty to mitigate losses applies to contracts." *Cisson Constr.,*

[9] Respondent initially sued for specific performance in the Complaint and again in the Amended Complaint. (R. 35; R. 76).

Inc. v. Reynolds & Assocs., Inc., 311 S.C. 499, 503, 429 S.E.2d 847, 849 (Ct.App.1993) *citing U.S. Rubber Co. v. White Tire Co.*, 231 S.C. 84, 95, 97 S.E.2d 403, 409 (1956).

The duty to mitigate, or the doctrine of avoidable consequences, prevents a party from recovering damages that it could have reasonably avoided. *McClary v. Massey Ferguson, Inc.,* 291 S.C. 506, 511, 354 S.E.2d 405, 408 (Ct. App. 1987). Respondent sold its Chevrolet dealership for more than the APA price. (R. 225). Respondent admitted this sale fully mitigated its damages as to the Chevrolet APA. (R. 203-204). However, Respondent did not attempt to sell the Hyundai/Genesis dealership. (R. 132). Instead, it realized significant profits and increased value as a result of retaining the dealership. (R. 207-214).

Mitigation works both positively and negatively, meaning that Respondent's damages are reduced by both its successful mitigation efforts and its failure to mitigate. *See LaSalle Talman Bank, F.S.B. v. United States*, 317 F.3d 1363, 1371 (Fed. Cir. 2003) (a determination of damages for breach of contract is subject to "the general principle that the non-breaching party is not entitled, through the award of damages, to achieve a position superior to the one it would reasonably have occupied had the breach not occurred."). "Where the defendant's wrong or breach of contract has not only caused damage, but has also conferred a benefit upon plaintiff. . . which he would not otherwise have reaped, the value of this benefit must be credited to defendant in assessing the damages." *Id.* at 1372 (quoting Charles T. McCormick, *Handbook on the Law of Damages* 146 (1935)).

See also Cmty. Health Choice, Inc. v. United States, 970 F.3d 1364, 1376 (Fed. Cir. 2020) ("Rather, here we look to a second aspect of the mitigation doctrine, which recognizes that there must be a reduction in damages equal to the amount of benefit that resulted from the mitigation efforts that the non-breaching party in fact undertook"); *DPJ Co. P'ship v. F.D.I.C.*, 30 F.3d 247,

250 (1st Cir. 1994) (holding that, with respect to reliance damages for breach of contract "a 'deduction' is appropriate 'for any benefit received [by the claimant] for salvage or otherwise'" (alteration in original) (quoting A. Farnsworth, *Contracts* § 12.16 (2d ed. 1990)); *Tony Thornton Auction Service, Inc. v. Quintis,* 760 S.W.2d 202, 207 (Mo. Ct. App. 1988) (quoting 22 Am. Jur. 2d *Damages* § 385 and citing Restatement (Second) of Contracts § 347) ("anything of value that the plaintiff retains because of the breach, but that was to have been delivered to the defendant had the contract been performed, must be deducted from the plaintiff's gross recovery.").

The lower court has erred to the extent it found mitigation is not applicable in the present case. The doctrine of mitigation is not set aside because the APAs were terminated during the Covid-19 pandemic. Appellants are entitled to have the jury charged at trial with all correct statements of the law regarding damages that are supported by the evidence presented at the trial. It is for the jury to consider the weight to be given to post-termination events taking all relevant factors, including Covid-19 into account.

The authority relied upon by the lower court in its July 31, 2023 order is largely non-controlling and distinguishable. Mitigation was not raised as an issue in *Turner Brd. Sys. Inc. v. McDavid*, 693 S.E.2d 873 (Ga. App. 2010) or *D.G. Porter, Inc. v. Fridley*, 373 N.W.2d 917 (N.D. 1985) cited by the lower court.[10]

[10] The lower court also cites *Peery v. Hansen*, 120 Ariz. 266, 585 P.2d 574 (Ct. App. Ariz. 1978); *Redmond v. Prosper, Inc.*, 364 So.2d 812 (Fla.Dist. Ct. App. 1978); and *Wickman v. Opper*, 188 Cal.App.2d. 129 (Cal. 1961), none of which address mitigation. The lower court also cites *Turner v. Shalberg*, 70 S.W.3d 653 (2002) in which Turner had already sold his business to Geraughty. When Geraughty stopped making payments on the purchase, Turner entered into a contract to resell the business to Shalberg. Geraughty ceased operation of the business shortly before Shalberg defaulted on the sale. The Missouri Court of Appeals found that at the time of Shalberg's default, there was no on-going business to sell and all Turner had was the personal property in the business, which he liquidated. Unlike

McDavid, supra, addressed the alleged breach of a sale by the seller in Georgia. McDavid had contracted for the purchase of the Atlanta Hawks and Thrashers as well as the operating rights to Phillips Arena. Substantial evidence was presented at trial that the contract price was well below the fair market value of the two teams. The damages awarded by the jury, therefore, represented the value McDavid would have realized over the below market value contract price. This is simply not the issue in the present case.

There is no suggestion that McDavid had the opportunity to purchase comparable sports teams and did not do so. In the present case, however, there is ample evidence Respondent could have sold the Hyundai/Genesis dealership. Additionally, McDavid did not retain the assets from which he could continue to benefit after the transaction was cancelled. Respondent, in contrast, has realized a significant increase in the value of its business as well as millions of dollars in profits.

The lower court additionally failed to note that in *Porter*, the North Dakota Supreme Court remanded the case to determine damages, including the issue of the fair market value of the business. The lower court (Hyman) stated the North Dakota court in *Porter* addressed the fact the seller retained possession of the assets after the breach. This finding overlooks that the North Dakota court noted Porter stated he had contracted with a third party for the resale of the business following Fridley's abandonment of the premises. *Id.* at 925. This issue was also remanded to the lower court to consider. Whether Porter mitigated his damages and the impact of any events after the contract was rescinded on the final determination of damages was not addressed. Therefore,

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Respondent, Turner could not offer a business he no longer had to another buyer, nor could he continue to operate the business without the required licenses.

the decision in *Porter* actually supports the consideration of the myriad factors that may comprise a determination of damages, including mitigation.

D. The Lower Court Erred in Assuming Facts not in Evidence

The lower court also assumed facts not in evidence. The order recited that the court was aware of the impact of Covid-19 on car sales and customer traffic to dealerships in March of 2020 and that the Paycheck Protection Program subsequently altered the market to the extent that it would be unfair to consider post-termination sales. (R. 12). However, such evidence was never presented to the lower court.

The lower court cannot simply apply its personal knowledge or take judicial notice of this information. See *Eadie v. H.A. Sack Co.*, 322 S.C. 164, 172, 470 S.E.2d 397, 401 (Ct. App. 1996) ("A fact is not subject to judicial notice unless the fact is either of such common knowledge that it is accepted by the general public without qualification or contention, or its accuracy may be ascertained by reference to readily available sources of indisputable reliability."). The fair market value of Respondent's Hyundai/Genesis dealership and whether it was impacted by Covid-19 is not a fact that is appropriate for judicial notice. *See Bowers v. Bowers*, 349 S.C. 85, 561 S.E.2d 610 (Ct. App. 2002)[11] (rejecting the application of the doctrine of judicial notice to valuations of marital residence).

[11] The case was distinguished on other grounds: *Wooten v. Wooten*, 352 S.C. 242, 580 S.E.2d 765 (Ct. App. 2003).

V. THE LOWER COURT ERRED IN DENYING APPELLANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

A. The Order Denying Appellants' Motion for Partial Summary Judgment Raises Companion Issues to Issues Raised in the Order Granting Respondent's Motion for Summary Judgment and a Decision on this Order will Promote Judicial Economy

The lower court's order denying partial summary judgment to Appellants encompasses the issue of mitigation and the potential suggestion in its order granting summary judgment to Stivers that mitigation and contractual limitations are not applicable in the present case. *See Pitts v. Jackson Nat'l Life Ins. Co.*, 352 S.C. 319, 574 S.E.2d 502 (Ct. App. 2002). South Carolina courts have "made a practice of accepting appeals of denials of interlocutory orders not ordinarily immediately appealable when these appeals are companion to issues that are reviewable." *Olson v. Faculty House of Carolina, Inc.*, 344 S.C. 194, 216, 544 S.E.2d 38, 49 (Ct.App. 2001), *cert.* granted (Oct. 10, 2001).

Pitts is instructive. Pitts argued the lower court erred in granting Jackson National's motion to dismiss the claims for breach of fiduciary duty and constructive fraud. Pitts also contended the circuit court erred in denying his motion for summary judgment on the unjust enrichment claim. He asserted Jackson National "will be unjustly enriched if it is allowed to retain [funds it received from Ultimate policyholders who qualified for the Preferred Ultimate policy] and, therefore, a constructive trust should be imposed on all monies wrongfully obtained by Jackson National through concealment and non-disclosure." *Pitts*, 352 S.C. at 337-38. This Court found the interlocutory denial of the motion for summary judgment on the unjust enrichment claim constituted a basis for the grant of summary judgment to Jackson National, making it appropriate to review that motion as well. In the present case the lower court's order potentially limiting the doctrines a jury can consider regarding damages (and contractual limitations) are

closely tied to Appellants' argument that Respondent's damages are completely offset by either successful mitigation or the failure to mitigate.

Resolution of Appellants' motion for partial summary judgment would also promote judicial economy. *See Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005)(finding resolution of partial denial of motion to dismiss was proper when it was coupled with appeal from partial grant of motion to dismiss because resolution of both was "in an effort to avoid another appeal in the future and potentially narrow the issues for trial (i.e. judicial economy)"); *Morris v. Anderson County*, 349 S.C. 607, 610, 564 S.E.2d 649, 651 (2002) (stating an appellate court "may, as a matter of discretion, consider an unappealable order along with an appealable issue where such a ruling will avoid unnecessary litigation"). In the present case the grant of Appellants' motion for partial summary judgment would significantly reduce the issues remaining for trial.

B. The Lower Court Erred in Denying Appellants' Motion for Partial Summary Judgment when Respondent Failed to Present any Facts Showing a Genuine Issue of Material Fact

Respondent was in the process of selling two dealerships when the APAs were terminated. In a highly unusual set of facts, Respondent admitted that it completely mitigated its damages as to the Chevrolet dealership by selling the dealership to a third party for $500,000 more than the APA price (R. 203-204), while claiming at the same time it was not required similarly to attempt to mitigate its damages as to the Hyundai/Genesis dealership. (R. 143).

Regardless of whether a jury was to find that Stivers failed to mitigate its damages by retaining the Hyundai/Genesis dealership or that its retention was proper mitigation, there is no issue of material fact for the jury because the only reasonable inference from either conclusion is that Stivers suffered no damages as a result of the termination of the Hyundai/Genesis APA. ". . .

[I]f the evidence is susceptible of only one reasonable inference, the question is no longer one for the jury but one of law for the Court." *Hancock v. Mid-South Management, Co., Inc.*, 370 S.C. 131, 135, 634 S.E.2d 12, 14 (Ct. App. 2006) *quoting Ward v. Zelinski*, 260 S.C. 229, 232, 195 S.E.2d 385, 387 (1973).

During oral argument of Appellants' motion, the lower court stated from the bench ". . . I think it's something that needs to be fleshed out at trial."[12] The lower court overlooked that once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the non-moving party cannot simply rest on mere allegations or denials contained in the pleadings. *Regions Bank v. Schmauch*, 354 S.C. 648, 660, 582 S.E. 2d 432, 438 (Ct. App. 2003). The nonmoving party must come forward with specific facts showing there is a genuine issue for trial and no evidence was presented. *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005).

Respondent's memorandum in opposition to Appellants' motion argued only that the motion had previously been heard and should not be heard again pursuant to Rule 43(l), SCRCP. (R. 131-132). The lower court denied this argument and heard Appellants' motion. (R. 367, ll. 19-21; R. 8). At the hearing, Respondent's counsel stated:

> We've got an expert opinion, we are prepared to go to the jury on that expert opinion and let the finder of fact make a determination of whether indeed there was loss to Stivers at the time of the breach.

(R. 374, ll. 18-21).

[12] The lower court's July 31, 2023 form order stated only that it denied Appellants' motion for partial summary judgment. However, the lower court noted in its July 31st order granting Respondent's summary judgment motion, "[a]fter carefully considering the memoranda and arguments of counsel, this Court found there exist genuine issues of material fact regarding the [Respondent's] recoverable damages, and on that basis, denied [Appellants'] motion." (R. 8).

Respondent therefore stipulated through its counsel in open court that the damages it is claiming are the $2.3 million attested to by its expert. (R. 373, ll. 13-17; R. 392-393).

While many factors can comprise recoverable damages, Respondent limited the damages it is claiming. *See Widdicombe v. Tucker-Cales,* 366 S.C. 75, 90 n.5, 620 S.E.2d 333, 341 n.5 (Ct. App. 2005) ("[A] party is generally bound by stipulations made by their counsel."); *Hall v. Benefit Ass'n of Ry. Employees*, 164 S.C. 80, 83, 161 S.E. 867, 868 (1932) ("The parties to a suit are bound by admissions, made by their attorneys of record, in open court, or elsewhere, touching matters looking to the progress of the trial."). Viewing the evidence in the light most favorable to Respondent, their claimed damages are limited to $2.3 million.

Respondents presented no evidence to refute the following facts:

> (1) Respondent sold the Chevrolet dealership for $500,000 more than it would have received under the APAs (R. 225);
> (2) Respondent admitted this sale completely mitigated its damages as to the Chevrolet dealership (R. 203-204);
> (3) Respondent realized $265,398 in net profit at the Chevrolet dealership prior to closing (R. 209, ¶ 13);
> (4) Respondent declined Appellants' two subsequent offers to purchase the Hyundai/Genesis dealership and decided to retain it rather than selling to any third party (R. 132);
> (5) the value of Hyundai/Genesis dealership rose 52% in 2020 alone (R. 211-212, ¶ 21);
> (6) Respondent realized over $5.8 million in net profits in the two years after it chose to retain the Hyundai/Genesis dealership (R. 213).

Respondent had a duty to mitigate as a matter of law. *Newman v. Brown,* 228 S.C. 472, 480, 90 S.E.2d 649, 653 (1955). A jury could find that it failed to mitigate by refusing to sell the dealership as it sold Chevrolet, in which case Respondents' damages (as it has admitted) were offset completely as it could have sold the dealership for more than the APA value.

Viewing the evidence in the light most favorable to Respondent could also yield an inference that establishes Respondent did mitigate its damages by retaining the dealership and

operating it in an appropriate manner. In that case, the damages claimed by Respondent must be reduced by any amounts Respondent received in mitigation. *See LaSalle Talman Bank, F.S.B. v. United States*, 317 F.3d 1363, 1371 (Fed. Cir. 2003). Even in the light most favorable to Respondent, it profited almost $6 million by retaining the Hyundai/Genesis dealership, significantly more than the $2.3 million it claims in damages.

The lower court further erred to the extent that it considered costs incurred by other entities as potentially recoverable by Respondent in determining an issue of material fact existed for a jury. (*See* July 31, 2023 order granting Respondent's summary judgment motion, p. 2 stating: ". . . this Court found there exist genuine issues of material fact regarding the Plaintiff's recoverable damages, and on that basis, denied Defendants' motion." R. 8).

Not only has Respondent limited its damages to the $2.3 million claimed by its expert, but also cannot recover for costs incurred by another entity as a matter of law. *See Sossamon v. Nationwide Mut. Ins. Co.*, 243 S.C. 552, 135 S.E.2d 87 (1964) (finding a husband could not recover for damage to the station wagon owned by his wife.). Respondent presented no evidence to refute the following:

a. Any costs in the form of additional rent, property taxes, and insurance were not incurred by Respondent Stivers Brothers Automotive, Inc.[13];
b. Stivers Realty, not the Respondent, purchased the property to which Stivers relocated the Hyundai/Genesis dealership[14] and is the entity indebted on the mortgage for construction of the new facilities[15]; and
c. E.M. Stivers, Inc. purchased another dealership[16].

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[13] See (R. 267) (Commercial Insurance Policy with Stivers Ford Lincoln, Inc. as the insured, and not Stivers Brothers Automotive, Inc.); (R. 270) (Sublease Agreement in which Stivers Realty, LC is responsible for the lease payments); Stivers Hyundai/Genesis shows no liabilities for mortgage or rent and a single line item for long term liabilities. (R. 286). Stivers Genesis shows no long-term debt. (R. 288).

[14] (R. 280). Stivers Realty is now the owner of the property to which Stivers relocated.

[15] (R. 320). Further, Stivers Realty has received equivalent value for the price it paid and, therefore, has suffered no damages.

[16] (R. 292).

These are separate and distinct corporate entities. Along with the advantages, these entities also are bound by the disadvantages of forming separate corporations. *See Terry v. Yancey,* 344 F.2d 789, 790 (4th Cir.1965) (stating "where an individual creates a corporation as a means of carrying out his business purposes he may not ignore the existence of the corporation in order to avoid its disadvantages").

C. The Lower Court Erred in Failing to Consider Respondent's Duty to Mitigate and Respondent's Admission it Completely Mitigated its Damages as to the Chevrolet Dealership

If the lower court found Respondent did present evidence to refute Appellants' summary judgment motion, it failed to properly consider that the doctrine of mitigation completely offset the damages Respondent claims. This may be a further indication the lower court determined the doctrine of mitigation does not apply in the present case or that positive mitigation does not apply to reduce potential damages.

"It is the undoubted general rule that it is the duty of the owner of the property, which is injured by the negligence of another, to use reasonable means to minimize the damages." *Newman v. Brown,* 228 S.C. 472, 480, 90 S.E.2d 649, 653 (1955). "The duty to mitigate losses applies to contracts." *Cisson,* supra. Generally, a party cannot recover damages for losses that could have been avoided by reasonable efforts.[17]

[17] The market for resale was available in Columbia. Respondent was able to enter into an agreement to resell the Chevrolet store almost immediately. (R. 220-223). The Kerrigan Report noted the significant increase in sales of Hyundai/Genesis dealerships in 2020 (R. 223). As explained in the Restatement (Second) of Contracts § 350.cmt. b. (1981):

> It is sometimes said that it is the "duty" of the aggrieved party to mitigate damages, but this is misleading because he incurs no liability for his failure to act. The amount of loss that he could reasonably have avoided by stopping performance, making substitute arrangements or otherwise is simply subtracted from the amount that would otherwise have been recoverable as damages.

Following the termination of the APAs, Respondent sold Chevrolet in October of 2020 for $4 million, a $500,000 gain over the original $3.5 million APA price.[18] Respondent agreed that this sale mitigated any damages related to the APA sales price. (R. 203-204).

Respondent admitted that although negotiations in early June reached an impasse, they were resumed beginning June 30th. (R. 162-175). The parties reached an agreement as to almost all the terms of the new APA when Respondent imposed a one-day arbitrary July 15th deadline on Peacock on July 14th and announced that it would not negotiate the terms beyond that deadline. (R. 164).

Respondent admitted that when Peacock was not available to discuss the one remaining issue or to sign an APA by their one-day deadline, they simply stopped negotiations. (R. 164). Appellants offered to buy the Hyundai/Genesis dealership again on July 23rd and October 26th on better terms. (R. 254-256; R. 257-259). Respondent rejected these offers. (R. 254-256).[19]

Respondent also did not attempt to sell the Hyundai/Genesis dealership to anyone. (R. 132) and made no efforts to list the dealership for sale despite the fact the market for sales of dealerships was at a record high. (R. 211). Respondent could have avoided its claimed damages altogether by selling the dealership as it did the Chevrolet dealership.

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[18] (R. 223).

[19] Respondent claimed Appellants' offer was not legitimate and that it became exasperated with the attempt. It still had a duty to pursue an opportunity to avoid its alleged damages. In *Schiavi Mobile Homes, Inc. v. Gironda*, 463 A.2d 722 (Me. 1983), the Supreme Judicial Court of Maine found:

> . . the duty to mitigate is more than just a duty to accept legally enforceable offers. Upon learning of the Defendants' breach, the Plaintiff was obligated to take reasonable affirmative measures to keep its losses to a minimum. Palmer's conversation with Frank Gironda, Sr., in September, 1979, revealed that he had a party willing to pay the full price of the mobile home. Regardless of whether the father actually made a valid "offer," the retailer had a duty to pursue this opportunity to minimize the effects of the breach. Instead, the Plaintiff waited another two months and then sold the home for $1,028.69 less than Frank Gironda, Sr., was willing to pay.

Appellants presented undisputed evidence that Respondent realized close to $6 million in net profits from the operation of its Hyundai/Genesis dealership from April, 2020 through March, 2022.[20] Stivers also realized $265,398 operating net profits for the Chevrolet dealership for the period of April, 2020 – September, 2020.[21] The value of Respondent's Hyundai/Genesis dealership increased substantially, resulting in a multi-million dollar financial gain to Stivers by retaining the dealership past April 2020 in excess of any recoverable damages it may claim. [22]

Even taking the evidence in the light most favorable to Respondent to find that it did mitigate its damages by retaining the dealership, any damages resulting from the termination of the APA must be offset by the benefits it received as a result. *See South Carolina Fin. Corp. of Anderson v. West Side Fin. Co.*, 236 S.C. 109, 113 S.E.2d 329 (1960) (the proper measure of damages for breach of contract is the loss actually suffered as the result of the breach); *United States v. City of Twin Falls*, 806 F.2d 862, 873–74 (9th Cir.1986) (contract damages to non-breaching party are reduced by gains after breach because contract damages seek only to "fairly compensate the injured party for his loss");[23] 22 Am. Jur.2d Damages § 45 (limiting a party's recovery in a breach of contract action to "the loss that he has actually suffered by reason of the breach"). *See Lasalle v. Talman Bank*, F.S.B. v. US, 317 F.3d 1363, 1371 (Fed. Cir. 2009) (quoting Professor McCormick, *supra*. *See also Old Stone Corp. v. U.S.*, 450 F.3d 1360, 1378 (Fed. Cir. 2006) (holding non-breaching party should not be placed in a better position through the award of damages than if there had been no breach).

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[20] R. 213.

[21] R. 213.

[22] Industry publications report an increased multiplier to be used for evaluating the goodwill value of these franchises. (R. 250-251; R. 252-253).

[23] Respondent has alleged causes of action for breach of contract, breach of contract accompanied by a fraudulent act, and tortious interference with contractual relations. An action for breach of contract accompanied by a fraudulent act is an action in contract. *Peeples v. Orkin Exterminating Company, Inc.*, 244 S.C. 173, 135 S.E.2d 845 (1964).

Professor Michael B. Kelly notes:

> The law attributes the market price to the seller not because she *could have* realized that value by reasonable efforts to sell the goods, but because she *did* realize that value by retaining the goods. The goods are valuable; retaining them is a benefit. The plaintiff, thus, has received an actual benefit from the breach, not merely an opportunity to reduce the loss. The expectation interest requires an offset for the value of that benefit.[24]

Further, the profits Respondent realized as a result of retaining the dealership are not treated as a collateral source. *See Crossman Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.*, No. 4:09-cv-1379-RBH, 2013 WL 5437712, at *27 (D.S.C. Sept. 27, 2013) (finding that applying the collateral source rule to contract law would contravene the principle that contractual damages are measured by the amount that the non-breaching party would have received if the contract had been performed as promised by awarding the non-breaching party more damages than necessary to compensate it for the breach.).

The unrefuted evidence presented is that the value of Respondent's dealership greatly increased following the termination of the APA. The Haig Report, a widely used industry guide for determining the value of a dealership's blue sky[25], lists a multiplier to be applied to the dealership's adjusted profits to determine the blue sky value. The multiplier for Hyundai/Genesis was 3-3.5 of annual net profits in the fourth quarter of 2019[26] (the APAs were executed January 7, 2020). The multiplier rose to 3.75-4.75 by the third quarter of 2021.[27] This would have resulted in an estimated increase in value to $6.125-7.875 million even if Respondent did not experience

[24] Michael B. Kelly, *Living Without the Avoidable Consequences Doctrine in Contract Remedies,* 33 San Diego L. Rev. 175, 190 (1996).
[25] Blue sky is the intangible/goodwill value of the business above the tangible book value of the hard assets.
[26] (R. 181; R. 251).
[27] (R. 183; R. 253).

an exponential increase in profits. Thus, Respondent would have enjoyed a $2.65-4.375 million increase in value of the retained dealership.

Respondent realized an unrefuted total economic benefit from the termination of the APAs, not only because it has retained an asset of value, but also because it has realized net profits in excess of the amount it would have been paid for the franchise in 2020. The fact Respondent did not sell its dealership was its own affair, but its profits and the significant increase in the value of its asset makes any further recovery inequitable. Because these undisputed benefits far exceed the $2.3 million it claims, Respondent has suffered no damages as a matter of law.

CONCLUSION

The parties are two sophisticated businesses that engaged in an arms-length transaction. That transaction happened to terminate during the Covid-19 pandemic. While the pandemic may have been a cause for concern for some individuals, it did not abrogate the defenses of mitigation or liquidated damages available to Appellants.

The damages to be considered by a jury are the actual losses suffered by a non-breaching party to a contract. The party is to be restored to the position it would have been in had the contract been performed. The lower court's order regarding the measure of damages is ambiguous and could be read to transform only one element a jury can consider to determine any actual loss suffered by Respondent into the sole factor that can be considered. Appellants are entitled, as a matter of law, to the defense of mitigation. They are additionally entitled to any contractually negotiated limitation on damages.

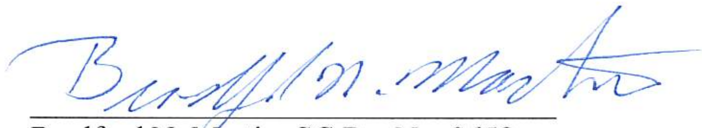
Respondent promptly sold its Chevrolet dealership to another party and admits mitigation applies and it indeed more than fully mitigated its damages. Respondent is required also to mitigate its damages as to the Hyundai/Genesis dealership. Taking the evidence in the light most

favorable to Respondent, it mitigated those damages by continuing to operate the dealership. Respondent would have received $3.5 million if Peacock Automotive purchased the Hyundai/Genesis dealership in 2020 and no profits beyond the date of the sale. By retaining the dealership, Respondent had an asset that was appreciating in value and additionally realized almost $6 million in net profits it would not have received had it sold the dealership.

Respondent additionally agreed, contractually, to liquidated damages in the amount of the escrow deposit if the APAs were terminated. The lower court erred in overlooking these contractual limitations. Appellants therefore respectfully request this Court to reverse the lower court's orders, denying Respondent's motion for summary judgment as to the measure of damages and granting Appellants' partial motion for summary judgment.

Respectfully submitted,

October 6, 2025

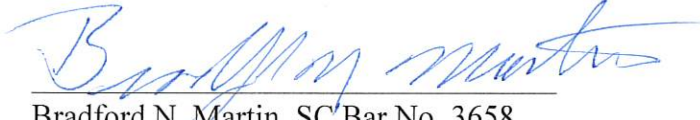


Bradford N. Martin, SC Bar No. 3658
Laura W. H. Teer, SC Bar No. 16698
BRADFORD NEAL MARTIN & ASSOCIATES, PA
Post Office Box 10410
Greenville, SC 29603
864.552.9990
**ATTORNEYS FOR APPELLANTS
W. WARNER PEACOCK AND
PEACOCK AUTOMOTIVE, LLC**

CERTIFICATE OF COUNSEL

The undersigned, attorney for Appellants, hereby certifies that this Final Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.

October 6, 2025



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ATTORNEYS FOR APPELLANTS
PEACOCK AUTOMOTIVE, LLC AND
W. WARNER PEACOCK