

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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**SC Court of Appeals**

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

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

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

v.

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

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**FINAL REPLY BRIEF OF APPELLANTS**

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## COUNTERSTATEMENT OF THE CASE

Rule 208(b)(1)(c), SCACR requires the Statement of the Case to include a concise history of the proceedings “insofar as necessary to an understanding of the appeal.” It further requires that “[t]he statement shall not contain contested matters.” Respondent’s Statement of the Case contains unnecessary and contested matters.

Appellants have the right to terminate a contract under South Carolina law, contrary to Respondent’s claim in its Statement of the Case.<sup>1</sup> Respondent falsely claims the limitation of damages clause does not apply to the Hyundai/Genesis APA. Respondent also includes the statement that the market measure of damages is the only applicable measure of damages, which is refuted by Appellants.

Respondent alleges that Appellants terminated the APAs as a response to the Covid-19 pandemic. Appellants denied these allegations in their answer and counterclaims to Respondent’s amended complaint<sup>2</sup> and alleged Respondent did not “keep its word regarding its financial position, net profitability, goodwill value, ongoing management and operations of the dealerships in the ordinary course, and best efforts to maintain the goodwill value of the dealerships prior to closing.”<sup>3</sup>

Finally, Respondent includes a highly contested quotation from a treatise that forms the heart of this Appeal.<sup>4</sup> Respondent’s arguments in support of its position are not appropriate in the Statement of the Case.

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<sup>1</sup> Respondent’s Brief, p. 2.

<sup>2</sup> R. 84, ¶ 50.

<sup>3</sup> R. 79-80, ¶ 8.

<sup>4</sup> Respondent’s Brief, p. 4.

## COUNTERSTATEMENT OF THE FACTS

Respondent is attempting to introduce highly contested assertions not in the Record. Rule 210(h), SCACR limits appellate review to facts appearing in the Record on Appeal.

Appellants sent an LOI in June of 2020 and signed APAs in July and October of 2020 offering to purchase the Hyundai/Genesis dealership following the termination of the January 7, 2020 APAs.<sup>5</sup> Appellants did not decline to execute the July 2020 APA counter-offered by Respondent, as stated in its Brief, rather it was not available to discuss the one remaining issue or to sign an APA by Respondent's unilateral one-day deadline.<sup>6</sup>

Appellants did not engage Stephens, Inc. in May of 2020 to sell its South Carolina assets as alleged by Respondent. Stephens, Inc. is involved in various aspects of capital management and Peacock was looking for investors to potentially increase the number of its dealerships. Appellants' post-termination offers to purchase Respondent's Hyundai/Genesis dealership were made in good faith<sup>7</sup> and there is no evidence in the Record to the contrary.

To the extent Respondent includes provisions from the Chevrolet and Hyundai/Genesis APAs in its Statement of the Facts to suggest the Chevrolet APA is ambiguous, that issue is not before this Court. Respondent requested the lower court find 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).

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<sup>5</sup> R. 118

<sup>6</sup> R. 164, ¶ 20.

<sup>7</sup> R. 166-168, ¶ 11.

## ARGUMENTS

### I. RESPONDENT'S ARGUMENTS MISCONSTRUE THE APPLICATION OF MITIGATION TO ANY DAMAGES ALLEGED

South Carolina law is clear that a party who has allegedly suffered damage from the conduct of another is under a duty to make all reasonable efforts to minimize the damages and cannot recover damages that might have been avoided by the use of reasonable care.<sup>8</sup> Respondent admits in its Brief<sup>9</sup> that it has a duty to mitigate in the present case. Respondent admits that it mitigated by selling the Chevrolet dealership to a third party<sup>10</sup> and by retaining the Hyundai/Genesis dealership and operating it at a profit.<sup>11</sup> The approximate \$6 million net profits for retaining the Hyundai/Genesis dealership admitted by Respondent far exceed all damages alleged by Respondent.

Respondent appears to argue that mitigation applies only to the Chevrolet APA but not the Hyundai/Genesis APA. Respondent cites *Jackson v. Midlands Human Resources Center*, 296 S.C. 526, 374 S.E.2d 505 (Ct. App. 1988) for the proposition that it was able to mitigate as to Chevrolet because the proper measure of damages is the difference between the contract price and either (1) the fair market value on the date of the breach or (2) the price obtained in a subsequent sale. A review of the cases cited by *Jackson*<sup>12</sup> demonstrates these are not separate factors but rather that the subsequent sale is *prima facie* evidence of the market value at the time of the breach.

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<sup>8</sup> *Newman v. Brown*, 228 S.C. 472, 480, 90 S.E.2d 649, 653 (1955) (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.); *Currie v. Davis*, 130 S.C. 408, 422, 126 S.E. 119, 124 (1923) (affirming a jury instruction stating it is the duty of the injured party to mitigate his damages); *Cobb v. Western Union Tel. Co.*, 85 S.C. 430, 433, 67 S.E. 549, 551 (1910); *Sullivan v. Anderson*, 81 S.C. 478, 480, 62 S.E. 862, 863 (1908); *Jones v. Telegraph Co.*, 75 S.C. 208, 213-214, 55 S.E. 318, 320 (1906); *Willis v. Telegraph Co.*, 69 S.C. 531, 539, 48 S.E. 538, 540 (1904).

<sup>9</sup> Respondent's Brief, p. 18.

<sup>10</sup> Respondent's Brief p. 32; R. 203.

<sup>11</sup> Respondent's Brief, p. 32.

<sup>12</sup> *Bannon v. Knauss*, 282 S.C. 589, 320 S.E.2d 470 (Ct.App.1984); *Benya v. Gamble*, 282 S.C. 624, 321 S.E.2d 57 (Ct.App.1984); *Barr v. MacGlothlin*, 176 Va. 474, 11 S.E.2d 617 (1940).

“In a breach of contract action, damages serve to place the nonbreaching party in the position he would have enjoyed had the contract been performed.” *Road, LLC v. Beaufort Cnty.*, 433 S.C. 164, 175, 857 S.E.2d 371, 376 (Ct. App. 2021) (quoting *S.C. Fed. Sav. Bank v. Thornton-Crosby Dev. Co.*, 303 S.C. 74, 77, 399 S.E.2d 8, 10 (Ct. App. 1990) ). “The measure of damages for breach of contract is the loss actually suffered by the contractee as the result of the breach.” *Id.* (quoting *S.C. Fin. Corp. of Anderson v. W. Side Fin. Co.* , 236 S.C. 109, 122, 113 S.E.2d 329, 335 (1960). Therefore, the non-breaching party should not be placed in a better position through the award of damages than if there had been no breach. *See Old Stone Corp. v. U.S.*, 450 F.3d 1360, 1378 (Fed. Cir. 2006).

Separate from the measure of damages is the duty of the non-breaching party to use reasonable means to minimize the damages. *Newman v. Brown*, 228 S.C. 472, 480, 90 S.E.2d 649, 653 (1955). 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.

Respondent’s damages are reduced by both its successful mitigation efforts and its failure to mitigate. This is a fair result with the non-breaching party recovering only the damages actually incurred (including through a reduction of damages that could have been avoided). *See LaSalle Talman Bank, F.S.B. v. United States*, 317 F.3d 1363, 1371 (Fed. Cir. 2003).<sup>13</sup> Respondent does not cite any cases in support of its suggestion that mitigation only applies where a business is sold following the termination of a sales contract. Such an argument would result in an improper

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<sup>13</sup> “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)).

windfall as Respondent received a greater profit from retaining the Hyundai/Genesis dealership than it did from selling Chevrolet.<sup>14</sup>

## **II. THE LOWER COURT ERRED IN CONSIDERING RESPONDENT'S SUMMARY JUDGMENT MOTION WHEN THE ISSUES PRESENTED WERE NOT A PART OF ITS DECLARATORY JUDGMENT CAUSE OF ACTION**

Respondent's Amended Complaint seeks a declaration "that the APAs between the Plaintiff and Defendants remain valid and enforceable contracts, notwithstanding the Defendants' purported termination for pretextual reasons."<sup>15</sup> The measure of damages to be applied to any alleged breach of contract is not necessarily a part of the determination of whether the APAs remain valid and enforceable contracts.

Stivers references provisions in the APAs which it claims raise questions regarding the damages available under the contracts. However, the lower court did not determine "any question of construction or validity arising under the instrument. . . and obtain a declaration of rights, status, or other legal relations thereunder" as required by S.C. Code § 15-53-30. The lower court's July 31, 2023 order does not address the specific provisions of the Chevrolet or Hyundai/Genesis APAs. It clearly was not addressing an issue of construction under those contracts. Respondent did not file a Rule 59(e) motion, so these issues are not preserved. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004).

The lower court's order does not terminate uncertainty or controversy. If Appellants' motion for partial summary judgment is not granted, the amount of damages will still be subject to testimony by experts from both parties that will have to be presented to and decided upon by a

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<sup>14</sup> The value of Hyundai/Genesis dealership rose 52% in 2020 alone (R. 211-212, ¶ 21) and Respondent realized over \$5.8 million in net profits (after hiring a competent GM) in the two years after it chose to retain the Hyundai/Genesis dealership (R. 213). This far exceeds the \$3.5 Million Respondent would have received if Appellants had purchased the Hyundai/Genesis dealership in March of 2020.

<sup>15</sup> R. 71-72, ¶ 66.

jury. Further, if this Court agrees with Respondent's argument that the lower court's order does not find that mitigation was inapplicable<sup>16</sup>, the issue of mitigation will be argued again at trial, with the potential for another appeal.

### **III. THE LOWER COURT'S ORDER IS AMBIGUOUS**

Respondent's own Brief confirms that the language in the lower court's July 31, 2023 order is ambiguous. Respondent states on p.14 that it is "implied that Appellants may not present arguments that Stivers suffered no damages by virtue of retaining and operating the Hyundai dealership for a profit in the months following the breach." This is different than a finding that the "market measure" of damages applies in a contract case.<sup>17</sup> If a limitation on the arguments that can be made at trial are "implied" but not clearly stated, the order is ambiguous as to whether other doctrines potentially impacting a jury's consideration of damages, including mitigation and a liquidated damages, are applicable.

### **IV. A DETERMINATION OF THE MEASURE OF DAMAGES THAT LIMITS THE EVIDENCE OR LAW TO BE PRESENTED TO A JURY IS NOT APPROPRIATE PRIOR TO TRIAL**

#### **A. The Lower Court is Required to Allow all Proper Statements of the Law to be Argued to a Jury**

Respondent cites no cases providing a different standard in a civil trial from that in a criminal trial regarding the principle that, "[t]he trial court must determine the law to be charged based on the evidence at trial." *State v. Smith*, 363 S.C. 111, 115, 609 S.E.2d 528, 530 (Ct.App.2005). *State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007) cites a civil case, *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000), in finding:

An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary

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<sup>16</sup> Respondent Brief, p. 18.

<sup>17</sup> R. 11.

support. *Id.* The refusal to grant a requested jury charge that states a sound principle of law applicable to the case at hand is an error of law. *Id.* at 390, 529 S.E.2d at 539. The law to be charged must be determined from the evidence presented at trial.

*Id.*, 647 S.E.2d 144 at 167.

The applicable law on damages that can be presented by Appellants should not be limited prior to the presentation of all the evidence at trial. *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.”).<sup>18</sup> Also, 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).

#### **B. The Lower Court Erred in Taking the Determination of Damages Away from the Jury**

Respondent misconstrues Appellants’ argument, which is that the lower court improperly limited the damages that could be considered by a jury when its 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.”<sup>19</sup>

Appellants understand the role of the judge and jury. The judge determines issues of law but cannot withhold some issues of law from jury consideration on the basis that it may be

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<sup>18</sup> *Southern Glass & Plastics Co., Inc. v. Kemper*, 399 S.C. 483, 732 S.E.2d 205 (2012), cited by Respondent, does not hold that the measure of damages is an appropriate issue for summary judgment. Rather *Kemper* finds, “[t]he construction and enforcement of an unambiguous contract is a question of law for the court, and thus can be properly disposed of at summary judgment.” *Id.* at 67, 565 S.E.2d at 116 (internal quotation marks omitted). When the terms of a contract are ambiguous, the question of the parties’ intent must be submitted to the jury. *Id.* at 68, 565 S.E.2d at 116.

<sup>19</sup> R. 11-12.

intellectually challenging in some way. Respondent appears to cite *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010) to argue the lower court in the present case made an admissibility ruling regarding post-termination profits or conditions. Evidence regarding Covid-19 and its impact on the market was not presented to the lower court for a determination as to admissibility.<sup>20</sup>

The lower court did not make an admissibility finding, stating at the hearing:

. . . It does give me some heartburn, just the -- the simple fault [sic] of trying to put before a jury economic numbers, given the fact that COVID was going on as well as the -- the influx of billions and billions of dollars. I just -- trying to -- to then say, well, the market approach and the -- the amount that this -- that -- the value of the damages and the mitigation, that -- that just seems --well, it's a head scratcher. We'll just put it that way.<sup>21</sup>

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). The lower court's July 31, 2023 order could be construed to limit the ability of a trial judge to give a full charge on the law according to the evidence presented at trial.

Respondent argues that *Road LLC v. Beaufort County*, 433 S.C. 164, 857 S.E.2d 371 (Ct. App. 2021) is inapplicable because it did not involve the breach of an executory contract to purchase an ongoing business. The lower court notes in its order that "Case law on breach of executory contracts for the sale of an ongoing business is scarce in South Carolina."<sup>22</sup> The lower court then relies on distinguishable cases from other jurisdictions.

Although the South Carolina Supreme Court is analyzing lost profits in *Drews Co. v. Ledwith-Wolfe Assocs.*, 296 S.C. 207, 213, 371 S.E.2d 532, 535 (1988), it makes clear that that it applying generally applicable contract principles:

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<sup>20</sup> R. 347-390.

<sup>21</sup> R. 389, II. 5-12.

<sup>22</sup> R. 10.

We begin our analysis of the lost profits issue by recognizing an elementary principle of contract law. The purpose of an award of damages for breach is "to give compensation, that is, to put the plaintiff in as good a position as he would have been in had the contract been performed." 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS, § 1338 (3d ed. 1968). The proper measure of that compensation, then, "is the loss actually suffered by the contractee as the result of the breach." *South Carolina Finance Corp. v. West Side Finance Co.*, 236 S.C. 109, 122, 113 S.E.2d 329, 335 (1960).<sup>23</sup>

Therefore, there is applicable South Carolina law to support Appellants' position.

Appellants cited *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) and *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) in which Appellate Courts found evidence of sale prices other than the date of termination to be admissible as to the fair market value of property when determining the proper measure of damages.

Respondent argues that *Benya* is inapplicable because it involved the sale of real estate, rather than a business.<sup>24</sup> No reason is provided regarding why an executory contract for the sale of real estate would be treated differently than an executory contract for the sale of a business. Respondent also claims *Wilson* is distinguishable because it does not involve a breach of contract. Again, no reason is provided as to why admissible evidence regarding the fair market value of real property would be treated differently in a condemnation case than in one involving breach of contract.

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

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<sup>23</sup> *Drews Co.*, 296 S.C. 207 at 209-210, 371 S.E.2d 532 at 533-534.

<sup>24</sup> Respondent's Brief, p. 16.

(2014); *S.C. Cable Television Ass'n. v. S. Bell Tel. & Tel. Co.*, 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992). It was error for the lower court to invade the province of the jury by considering facts outside of the record and 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.

**V. THE LOWER COURT'S ORDER COULD BE READ TO ELIMINATE THE APPLICATION OF LIQUIDATED DAMAGES THAT WAS CONTRACTUALLY AGREED BY THE PARTIES**

Respondent incorrectly states Appellants claim they were precluded from presenting arguments regarding liquidated damages to the lower court.<sup>25</sup> Rather, the lower court's order overlooked the liquidated damages provisions in the APAs and its order could be read to foreclose Appellants from presenting evidence of contractual limitation of damages at trial as agreed to by the parties.

**VI. THE LOWER COURT'S ORDER COULD BE READ TO FIND MITIGATION IS NOT APPLICABLE TO THE PRESENT CASE**

Respondent states the lower court's order did not find that mitigation was inapplicable<sup>26</sup> but at the same time claims the order "implied that Appellants may not present arguments that Stivers suffered no damages by virtue of retaining and operating the Hyundai dealership for a profit in the months following the breach."<sup>27</sup>

Respondent admits that the duty to mitigate losses applies to contracts.<sup>28</sup> It cites no case law that mitigation is inconsistent with or foreclosed under the market measure of damages. Respondent's cite *Hugenot Mills v. George F. Jempson & Co.*, 68 S.C. 363, 47 S.E.2d 687 (1904);

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<sup>25</sup> Respondent's Brief, p. 17.

<sup>26</sup> Respondent's Brief, p. 18.

<sup>27</sup> Respondent's Brief, p. 14.

<sup>28</sup> Respondent's Brief, p. 19.

*Swift & Co. v. Goldberg*, 121 S.C. 190, 113 S.E.2d 358 (1922); *Jackson v. Midlands Human Resources Center*, 296 S.C. 525, 374 S.E.2d 526 (Ct. App. 1988); and *Ackerman v. McMillan*, 324 S.C. 440, 477 S.E.2d 267 (Ct. App. 1996) in support of its argument regarding the market measure of damages. None of these cases addresses the issue of mitigation. Neither do the foreign jurisdictions cited by the lower court.

While the North Dakota Supreme Court in *D.G. Porter, Inc. v. Fridley*, 373 N.W.2d. 917 (1985) stated: "Porter was required under the circumstances to act reasonably in assuming control of the business in order to mitigate his damages," it did not address the impact of mitigation on damages. Rather the North Dakota Court remanded the case to determine damages, including the issue of the fair market value of the business.

Respondent claims the North Dakota Court found in *D.G. Porter* that Porter would be fully compensated by retaining the business and receiving the difference between the contract price and value of the business on the date of the breach. This argument 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.

Stivers admits that it completely mitigated its losses as to Chevrolet by selling that dealership for a \$500,000 higher price seven months after the APA was terminated.<sup>29</sup> In making this argument it admits that the mitigation efforts offset any damages it may claim. At the same time it makes the incongruous argument that because it retained the Hyundai/Genesis dealership (which it claims is mitigation,<sup>30</sup> and admits profiting in doing so (*Id.*)), those profits do not offset

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<sup>29</sup> Respondent's Brief, p. 21.

<sup>30</sup> Respondent's Brief, p. 32.

its damages in the same way as the profits do from the sale of the Chevrolet dealership. The Respondent has admitted that it received almost \$6 million in net profits by retaining the Hyundai/Genesis dealership thereby fully avoiding all alleged damages by a significant amount.

Respondent claims for the first time in its Brief that it was required to retain “the Hyundai assets due to the lack of prospective buyers.”<sup>31</sup> However, in its memorandum in support of its motion for summary judgment, it claims that it was not required to sell the dealership.<sup>32</sup> There is no evidence in the Record of the absence of a willing buyer for the Hyundai/Genesis dealership. Respondent turned down repeated offers by Appellant to purchase the dealership<sup>33</sup> and clearly indicated it was hiring a new General Manager on July 15, 2020, after which time it would be unwilling to sell.<sup>34</sup> Therefore, there is sufficient evidence that a buyer was willing to purchase Respondent’s assets.

## **VII. THE COURT ERRED IN ASSUMING FACTS NOT IN EVIDENCE**

The lower court could take judicial notice of the fact COVID-19 occurred. That fact is of common and general knowledge. However, the impact of Covid-19 on the fair market value of Respondent’s Hyundai/Genesis dealership is not a fact that is appropriate for judicial notice. The lower court’s order states:

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.<sup>35</sup>

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<sup>31</sup> Respondent’s Brief, pp. 11, 20, 32.

<sup>32</sup> R. 143-144.

<sup>33</sup> R. 254-256.

<sup>34</sup> R. 164.

<sup>35</sup> R. 12.

The impact, extent, and timing of any market fluctuations in the automotive sales industry in 2020 is certainly not a fact that was of such common knowledge that it is accepted by the general public without qualification or contention. 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.”). Respondent did not present any evidence to the lower court from which it could draw its conclusions. See *Bowers v. Bowers*, 349 S.C. 85, 561 S.E.2d 610 (Ct. App. 2002) (rejecting the application of the doctrine of judicial notice to valuations of marital residence). This Court noted in *Bowers*:

Any finding concerning the value of the home, particularly a valuation outside the realm of competent evidence offered at trial, required proof. The record is completely devoid of any such proof. There exists no competent evidence in the record establishing even a range by which such homes generally appreciated during the time period relevant to this case, let alone by how much the parties' home would have appreciated. We reject the application of the doctrine of judicial notice to valuations of marital residence.

*Id.* 349 S.C. 85 at 94.

Numerous factors affect the value of an automobile franchise and the same was true during COVID-19. Respondent attempts to present information on pages 22-24 of its Brief that was not cited by the lower court nor presented in evidence to the court. Therefore, the lower court erred in assuming facts that were not in evidence.<sup>36</sup>

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<sup>36</sup> For example, Respondent states on page 22 of its Brief that the major automobile manufacturers in the United States announced that they were halting production. However, Respondent makes no such claim regarding Hyundai or Genesis cars. In contrast, Appellants presented evidence to the lower court that the value of the dealership greatly increased.

### **VIII. RESPONDENT'S ARGUMENT REGARDING RULE 43(I), SCRPC IS NOT BEFORE THIS COURT**

The lower court rejected Respondent's argument pursuant to Rule 43(I), SCRPC that Appellants' motion for partial summary judgment had previously been heard and should not be heard again.<sup>37</sup> Respondent did not appeal this ruling; therefore, it is not before this Court. *Austin v. Specialty Transp. Servs.*, 358 S.C. 298, 320, 594 S.E.2d 867, 878 (Ct. App. 2004) (a portion of a judgment that is not appealed presents no issue for determination by the reviewing court).<sup>38</sup>

### **IX. THE LOWER COURT'S ORDER IS IMMEDIATELY APPEALABLE TO THE EXTENT IT LIMITS DEFENSES AVAILABLE TO APPELLANTS**

If Respondent's interpretation of the lower court's July 31, 2023 order is accepted, it belies Respondent's assertion that Appellants have not been deprived of a substantial right.<sup>39</sup> Appellants have a substantial right to argue the defenses of mitigation and contractual liquidation of damages. These principles are separate and apart from the statement of the measure of damages generally applicable to a breach of contract.

Respondent states on p.14 that it is "implied that Appellants may not present arguments that Stivers suffered no damages by virtue of retaining and operating the Hyundai dealership for a profit in the months following the breach." They argue again on page 32 that "the circumstances of certain cases ought to preclude the breaching party from claiming the benefit of the non-breaching party's effort to mitigate." To the extent this Court finds that was the ruling of the lower court's July 31, 2023 order, that ruling is immediately appealable.

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<sup>37</sup> R. 367, ll. 19-21; R. 8.

<sup>38</sup> Additionally, Appellants are not precluded from bringing a renewed motion for summary judgment based on new evidence. "[I]f the first motion for summary judgment is unsuccessful the court has the power to permit a second motion for summary judgment prior to trial." *Dorrell v. South Carolina Dept. of Transp.*, 361 S.C. 312, 325, 605 S.E.2d 12 (2004) citing *Crosswell Enter., Inc. v. Arnold*, 309 S.C. 276, 279, 422 S.E.2d 157, 159 (Ct.App.1992).

<sup>39</sup> Respondent's Brief, p. 27.

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). 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. Therefore, this matter is properly before this Court.

#### **X. THIS COMPANION ISSUE SHOULD BE HEARD BY THE COURT**

Respondent agrees that this Court has discretion to consider the lower court’s denial of Appellants’ motion for partial summary judgment where such a ruling will avoid unnecessary litigation.<sup>40</sup> *Morris v. Anderson County*, 349 S.C. 607, 610, 564 S.E.2d 649, 651 (2002). In the present case the grant of Appellants’ motion for partial summary judgment would significantly reduce the issues remaining for trial as to which party would receive the escrow deposit and 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.)”). This companion issue is properly before this Court.

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<sup>40</sup> Respondent’s Brief, p. 28.

**XI. THE LOWER COURT ERRED IN DENYING APPELLANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT WHEN THE PRINCIPLE OF MITIGATION YIELDED ONLY AN INFERENCE IN FAVOR OF APPELLANTS**

Respondent admits it has no damages as to the Chevrolet dealership because the realized profits from its sale of the dealership after the termination of the Chevrolet APA mitigated those damages.<sup>41</sup> It then argues that it mitigated its damages as the Hyundai/Genesis dealership by retaining the franchise.<sup>42</sup> It admits that it realized profits as a result of retaining the Hyundai/Genesis dealership.<sup>43</sup> Respondent presents no support for the argument that the approximate \$6 million net profits realized from retaining the Hyundai/Genesis dealership as a mitigation effort should be treated differently from the profits realized when it sold the Chevrolet dealership.

Respondent also argues that the application of the market measure of damages means Appellants are precluded from introducing the post-termination profits from the Hyundai/Genesis dealership to refute Respondent's contention it is entitled to an inference that it suffered substantial losses by retaining the Hyundai/Genesis dealership.<sup>44</sup> The Court has recently reiterated that stating as to the summary judgment standard "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine" *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 462, 892 S.E.2d 297, 301 (2023), quoting *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013). A reasonable inference is not reasonable if it can only be created by artificially removing the long-standing principle of mitigation.

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<sup>41</sup> R. 203-204.

<sup>42</sup> Respondent's Brief, p. 32.

<sup>43</sup> *Id.*

<sup>44</sup> Respondent's Brief, p. 29.

Respondent's return to Appellants' motion argued only that the motion had previously been heard and should not be heard again pursuant to Rule 43(l), SCRCP.<sup>45</sup> Respondent stipulated through its counsel in open court and the Affidavit of its expert that the damages it is claiming are the \$2.3 million attested to by its expert.<sup>46</sup> Dayman states that these damages were calculated as of March 30, 2020.

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.”). Respondent profited almost \$6 million by retaining the Hyundai/Genesis dealership.<sup>47</sup>

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 Respondent's damages (as it has admitted) were offset completely as it could have sold the dealership for more than the APA value.

Respondent states in its Brief there was no willing buyer for the Hyundai/Genesis assets;<sup>48</sup> however, there is no evidence in the record from which a reasonable inference can be drawn in Respondent's favor that it was unable to find a buyer for the Hyundai/Genesis dealership. 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,

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<sup>45</sup> R. 131-132.

<sup>46</sup> R. 373, ll. 13-17; R. 392-393.

<sup>47</sup> R. 213.

<sup>48</sup> Respondent's Brief, p. 32.

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. *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005). While the lower court is required to view the evidence in the light most favorable to the nonmoving party,<sup>49</sup> it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine. *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

The only evidence in the Record yields the opposite reasonable inference: a buyer existed in the market for the Hyundai/Genesis dealership at a price at least equivalent to the APA and Respondent chose to retain the dealership. Respondent admits it was able to find a buyer for its Chevrolet dealership for \$500,000 more than the price in the APA.<sup>50</sup> It is undisputed that the value of automobile franchises increased dramatically in 2020.<sup>51</sup> The Kerrigan Report noted the significant increase in sales of Hyundai/Genesis dealerships in 2020.<sup>52</sup>

Respondent turned down repeated offers by Appellant to purchase the dealership<sup>53</sup> and clearly indicated it was hiring a new General Manager on July 15, 2020, after which time it would be unwilling to sell.<sup>54</sup> Finally, Respondent admitted in its return to Appellants' motion for partial summary judgment that it retained the Hyundai/Genesis assets.<sup>55</sup> It does not once argue, prior to this Brief, that it was unable to find a buyer and has presented no evidence that it even offered the Hyundai/Genesis dealership for sale.

Respondent argues it mitigated 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

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<sup>49</sup> *Quail Hill, LLC v. Cty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (citation omitted).

<sup>50</sup> R. 225.

<sup>51</sup> R. 211-212.

<sup>52</sup> R. 220-222.

<sup>53</sup> R. 254-256.

<sup>54</sup> R. 164.

<sup>55</sup> R. 132.

amounts it received in mitigation in the same way that Respondent admits the profits from its sale of the Chevrolet dealership mitigated its damages. See *LaSalle Talman Bank, F.S.B. v. United States*, 317 F.3d 1363, 1371 (Fed. Cir. 2003). Respondent incorrectly argues *LaSalle* holds Appellants should not be credited with the profits it realized in retaining the Hyundai/Genesis dealership. The Federal Circuit in *LaSalle* recognized:

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)).

Also, the approximate \$6 million net 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.).<sup>56</sup> The undisputed facts of this case lead to but one conclusion: Respondent suffered no damages once mitigation is properly applied.

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<sup>56</sup> See also *Cnty. 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.”).

## CONCLUSION

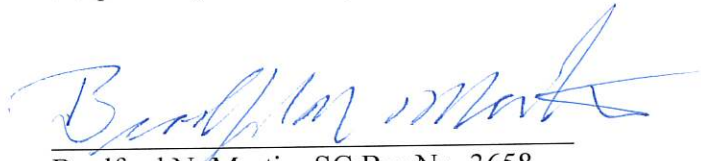
The lower court's order regarding the measure of damages is ambiguous and could be read to transform one element a jury can consider to determine any actual loss suffered by Respondent into the sole factor that can be considered. Appellants are entitled, as a matter of law, to the defense of mitigation. They are additionally entitled to any contractually negotiated limitation on damages.

Respondent's admission that mitigation applies to the Chevrolet dealership applies equally to the Hyundai/Genesis dealership regardless of whether Respondent chose to sell or retain the dealership following termination of the APAs. Taking the evidence in the light most favorable to Respondent, it mitigated alleged damages as to the Hyundai/Genesis dealership 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 otherwise received.

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



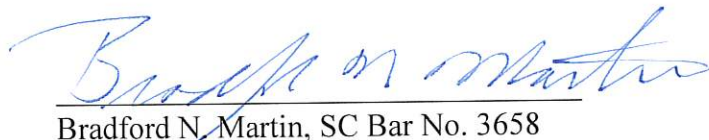
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The undersigned, attorney for Appellants, hereby certifies that this Final Reply Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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