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February 18, 2014

Via Hand Delivery
The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

RE: Floyd E. Jernigan v. Suzanne Boone Katz and Bank of America, N.A.
Case No.: 2009-CP-10-2433
Our File No.: 05100/02101

Dear Mr. Shearouse:

Pursuant to Rule 208(b)(7), SCACR, the Appellant Bank of America, N.A. ("Appellant") hereby notifies the Court of pertinent and significant authority that has come to its attention after briefing was completed as follows:

> Richardson v. Rent-A-Center East, Inc., 2011 U.S. Dist. LEXIS 93214, *14-15 (D.S.C. 2012) (holding no South Carolina authority has found a duty of care in negligence to arise between customer and a merchant who identifies him in connection with potential criminal activity and dismissing negligence claim based upon defendant's misidentification of plaintiff as a thief).

Appellant respectfully requests that the aforementioned case supplement Appellant's Final Brief at pp. 18-20 and 43-44 and Appellant's Reply Brief at pp. 6-12 as it is relevant to the issue of whether Appellant owed an affirmative duty of care to Respondent Jernigan under the circumstances.

> Sparrow v. Toyota of Florence, Inc., 396 S.E.2d 645, 422-423 (Ct. App. 1990) (mental anguish, emotional distress, inconvenience and embarrassment are not recoverable elements of damage in an action for fraud and deceit).

Appellant respectfully requests that the aforementioned case supplement Appellant's Final Brief at pp. 30 as it is relevant to the issue of whether damages for emotional distress and mental anguish are recoverable in the instant case.

Copies of these cases are attached hereto for the Court's convenience. In addition, by copy of this letter, we are serving opposing counsel with copies these supplemental citations.

We appreciate your consideration in this matter.

Very truly yours,

Merritt G. Abney

MGA:ll
Enclosure
cc: Brooks R. Fudenberg, Esq.
Geoffrey H. Waggoner, Esq.
Aaron E. Edwards, Esq.
Lawrence E. Richter, Jr., Esq. (all w/enclosures)

Richardson v. Rent-A-Center East, Inc.

Richardson v. Rent-A-Center East, Inc.

United States District Court for the District of South Carolina, Columbia Division
August 19, 2011, Decided; August 19, 2011, Filed
C/A No.: 3:11-cv-1408-JFA

Reporter: 2011 U.S. Dist. LEXIS 93214; 2011 WL 3665036

Perry Richardson, Plaintiff, v. Rent-A-Center East, Inc., Defendant.

Subsequent History: Summary judgment granted by *Richardson v. Rent-A-Center East, Inc., 2012 U.S. Dist. LEXIS 6617 (D.S.C., Jan. 20, 2012)*

Core Terms

arrest, cause of action, malicious prosecution, false imprisonment, distressing, shoplifter, video surveillance, defame, intentional infliction of emotional distress, internal quotation, motion to dismiss

Counsel: [*1] For Perry Richardson, Plaintiff: John Wesley Locklair, LEAD ATTORNEY, Locklair and Locklair, Columbia, SC; Joshua Snow Kendrick, LEAD ATTORNEY, Joshua Snow Kendrick Law Office, Columbia, SC; Tivis Colley Sutherland, IV, LEAD ATTORNEY, Tivis Colley Sutherland IV Law Office, Columbia, SC.

For Rent-a-Center East Inc, Defendant: Paula M Burlison, Richard H Willis, LEAD ATTORNEYS, Bowman and Brooke, Columbia, SC.

Judges: Joseph F. Anderson, Jr., United States District Judge.

Opinion by: Joseph F. Anderson, Jr.

Opinion

ORDER

Defendant Rent-A-Center East, Inc. moves the court to dismiss Plaintiff Perry Richardson's amended complaint pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* for failure to state a claim upon which relief can be granted. Plaintiff opposes the Defendant's motion, and after reviewing the parties' briefs and inviting oral argument, the court grants in part and denies in part the Defendant's motion.

BACKGROUND

On March 9, 2009, an unidentified male stole a Nintendo Wii gaming system from one of Defendant's stores in Cayce, South Carolina, and the theft was recorded by a store security camera. A store employee watched the video surveillance with a Cayce Department of Public Safety investigator [*2] and reported Plaintiff's name to law enforcement as the person in the video. The store employee also later identified Plaintiff in a photographic line-up on April 13, 2009. The Cayce Department of Public Safety obtained an arrest warrant for Plaintiff for the charge of shoplifting based solely on the store employee's identification of the Plaintiff, and Plaintiff's name and picture appeared in "Runners" magazine. Plaintiff learned that law enforcement was looking for him from the publication in the "Runners" magazine, as well as the publication of his arrest warrant to the general public, and he voluntarily surrendered to police on July 10, 2009. He spent the night in jail and was released on bond the next day. On or about March 8, 2010, as Plaintiff's criminal trial was getting ready to begin, Plaintiff's

counsel watched the security video with a Cayce Department of Public Safety detective and one of Defendant's employees. According to Plaintiff, the criminal case against him was dismissed because it was concluded that the person in the surveillance video, who stole the gaming system, looks nothing like the Plaintiff.

Now, Plaintiff filed suit against Defendant, alleging five state [*3] law causes of action: (1) false imprisonment; (2) malicious prosecution; (3) defamation; (4) intentional infliction of emotional distress; and (5) negligence. Defendant does not believe that Plaintiff can legally establish any of these causes of action against it based on the facts alleged in the Plaintiff's amended complaint; therefore, it asks the court to dismiss this case.

LEGAL STANDARD FOR A MOTION TO DISMISS PURSUANT TO *RULE 12(b)(6)*

When considering a 12(b)(6) motion to dismiss, the court must accept as true the facts alleged in the complaint and view them in a light most favorable to the plaintiff. *Ostrzenski v. Seigel*, 177 F.3d 245, 251 (4th Cir. 1999). The United States Supreme Court has stated, however, that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* [*4] Although "a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations," a pleading that merely offers "labels and conclusions," or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Likewise, "a complaint [will not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancements.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 557). Accordingly, Plaintiffs must put forth claims that crosses "the line from conceivable to plausible." *Id.* at 1950—51 (internal quotation omitted).

ANALYSIS

I.False Imprisonment & Malicious Prosecution

Plaintiff first asserts a false imprisonment claim against Defendant. "The essence of the tort of false imprisonment consists of depriving a person of his liberty without lawful justification." *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 440, 629 S.E.2d 642, 651 (2006). "To prevail on a claim for false imprisonment, the plaintiff must establish: (1) the defendant restrained the plaintiff, (2) the restraint was intentional, and (3) the restraint was unlawful." *Id.* (citations omitted). Although both sides went into depth about whether or not probable [*5] cause existed to support this cause of action, the court finds the fact that the Plaintiff was arrested pursuant to a facially valid warrant precludes him from asserting a false imprisonment claim against Defendant, being the one who caused the arrest. In *Dorn v. Town of Prosperity*, the Fourth Circuit determined that longstanding precedent in South Carolina dictated there cannot be a claim for false arrest where the arrest was effectuated pursuant to a facially valid warrant. *375 F. App'x 284, 288 (4th Cir. March 18, 2010)*. On this point, the Fourth Circuit stated in *Dorn*:

> At common law, allegations that a warrantless arrest or imprisonment was not supported by probable cause advanced a claim of false arrest or imprisonment. However, allegations that an arrest made pursuant to a warrant was not supported by probable cause, or claims seeking damages for a period after legal process issued, are analogous to the common-law tort of malicious prosecution.

. . . .

> The distinction between malicious prosecution and false arrest in this situation is whether the arrest was made pursuant to a warrant. As a general rule, an unlawful arrest pursuant to a warrant will be more closely analogous to the [*6] common law tort of malicious prosecution. An arrest warrant constitutes legal process, and it is the tort of malicious prosecution that permits damages for confinement pursuant to legal process. On the other hand, wrongful warrantless arrests typically resemble the tort of false arrest.

Id. at 285—86 (internal quotations and citations omitted). The court proceeded to cite several South Carolina district court and state court decisions, which have continuously made this distinction. *Id.* at 286—88. Following this line of authority, the court dismisses Plaintiff's false imprisonment cause of action, as Plaintiff has conceded that he was arrested pursuant to a facially valid warrant.

With respect to his malicious prosecution cause of action, however, the court denies the Defendant's motion. To make out such a claim, Plaintiff must establish: (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the Defendant; (3) termination of such proceedings in Plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 435, 629 S.E.2d 642, 648 (2006). [*7] In this cause of action, malice is "the deliberate intentional doing of a wrongful act without just cause or excuse." *Id.* at 437, 629 S.E.2d at 649 (internal quotation omitted). Plaintiff essentially contends that he was prosecuted for shoplifting because the Defendant's employee maliciously, and without probable cause, identified him as the shoplifter, when in fact he was not the culprit and looked nothing like the man recorded by the surveillance camera. Defendant counters with the assertion that its employee merely gave honest assistance to the police and did no more than to report truthfully such information as came into its possession to the police authorities. Defendant further argues that it did not institute criminal proceeding against Plaintiff; rather, it argues that the police department is the prosecuting entity in this case.

After considering the parties' arguments, the court believes the Plaintiff has pled sufficient factual allegations to withstand dismissal with respect to this claim. Again, he claims that one of Defendant's employees watched the video surveillance footage with police officers and identified him as the shoplifter in the video. The court can infer from [*8] this allegation, as it must at this stage of the litigation, that if the employee was able to name the Plaintiff to the police officers, then that employee knew Plaintiff and was aware of the Plaintiff's appearance and other physical features at that point in time. It was not until after the employee already identified the Plaintiff as the culprit that he pointed him out in a photo line-up, so the employee presumably had a familiarity with the Plaintiff. Considering this inference in conjunction with the Plaintiff's allegation that the person in the video surveillance footage looks nothing like him, the court believes Plaintiff has sufficiently pled a malicious prosecution cause of action. If the employee knew the Plaintiff and knew that the person in the video surveillance footage looks nothing like the Plaintiff, then the court must accept as true at this stage of the proceedings that the employee knew he was giving false information to the police, thereby maliciously instituting a criminal investigation and proceedings against the Plaintiff. Moreover, Plaintiff alleges that the store employee's identification was the sole basis for the warrant issued for Plaintiff's arrest. As a [*9] result, Plaintiff alleges that

he was forced to spend a night in jail, was subjected to an outstanding criminal charge for almost one year, but that the charge against him was eventually terminated in his favor. All of these allegations defeat the Defendant's motion with respect to this claim.

II.Defamation

Next, Plaintiff claims that the Defendant defamed him by falsely identifying him as the shoplifter. "The tort of defamation allows a plaintiff to recover for injury to his or her reputation as the result of the defendant's communications to others of a false message about the plaintiff." *Argoe v. Three Rivers Behavioral Health, L.L.C.*, 392 S.C. 462, 474, 710 S.E.2d 67, 73 (2011) (internal quotation omitted). "In order to prove defamation, the plaintiff must show (1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Id.*, 710 S.E.2d at 74. "The publication of a statement is defamatory if it tends to harm the reputation of another as to lower him in the estimation of **[*10]** the community or to deter third persons from associating or dealing with him." *Id.*, 710 S.E.2d at 74.

Defendant moves the court to dismiss this cause of action because it believes any communication its employee made to the police was qualifiedly privileged because it was made in good faith and on a subject matter in which the Defendant has an interest—that is, finding the person who stole from it. While Defendant may ultimately be entitled to judgment as a matter of law on this claim based on its defense of qualified immunity, the court does not believe it can dismiss this claim at this stage of the litigation based on the Plaintiff's allegations. As the South Carolina Supreme Court has noted:

> To prove actual malice, the plaintiff must show that the defendant was activated by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff; or that the statements were published with such recklessness as to show a conscious disregard for plaintiff's rights. In addition, the person making the defamatory statement must be careful to go no further than his interests or his duties require . . . . And the fact that a duty, a common interest, or a confidential relation **[*11]** existed to a limited degree, is not a defense, even though the publisher acted in good faith.
>
> In general, the question whether an occasion gives rise to a qualified or conditional privilege is one of law for the court. However, the question whether the privilege has been abused is one for the jury. Factual inquiries, such as whether the defendants acted in good faith in making the statement, whether the scope of the statement was properly limited in its scope, and whether the statement was sent only to the proper parties, are generally left in the hands of the jury to determine whether the privilege was abused.

Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 485, 514 S.E.2d 126, 134 (1999) (internal quotations and citations omitted).

In his allegations, Plaintiff contends that the identification of him as a culprit was done with malice. He claims that he looked nothing like the person who appeared on the video surveillance and that the store employee who identified Plaintiff as the shoplifter knew that this information was false. After considering these allegations, the court believes the Defendant's motion should be denied, and it

will have every opportunity to reassert [*12] its argument at the conclusion of discovery.

III.Intentional Infliction of Emotional Distress

The Plaintiff also asserts a claim for intentional infliction of emotional distress against the Defendant. In order to recover for intentional infliction of emotional distress, Plaintiff must establish: (1) the Defendant intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct; (2) the conduct was so "extreme and outrageous" so as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community;" (3) the actions of the Defendant caused Plaintiff's emotional distress; and (4) the emotional distress suffered by the Plaintiff was "severe" such that "no reasonable man could be expected to endure it." *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 356, 650 S.E.2d 68, 70 (2007).

Without reciting what has already been discussed in the prior sections of this order, the court believes the Plaintiff has sufficiently pled factual allegations to withstand dismissal of this claim. If Defendant's employee knew he or she was falsely identifying [*13] the Plaintiff in both the video surveillance footage and the photo line-up, that employee should have been certain that his or her conduct would lead to a criminal prosecution of the Plaintiff for a crime he did not commit. The court finds that such conduct would be so extreme as to exceed all possible bounds of decency, and Plaintiff has alleged that he has suffered severe emotional distress as a result of this. Again, Defendant will have every opportunity to reassert its objections to this claim at the conclusion of discovery, but the court believes the amended complaint contains sufficient factual allegations for this cause of action to proceed. Thus, the Defendant's motion is denied in this respect.

IV.Negligence

Lastly, Plaintiff alleges a negligence cause of action against Defendant. "To recover on a claim for negligence, a plaintiff must show (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach." *Andrews v. Piedmont Air Lines*, 297 S.C. 367, 369, 377 S.E.2d 127, 128 (1989). "The absence of any one of these elements renders the cause of action insufficient." *Id.*, 377 S.E.2d at 128—29. [*14] Here, Plaintiff contends that Defendant owed it a duty of care once it took action to identify him as the shoplifter who stole from its store. In making this argument, Plaintiff asks the court to carry over into this factual scenario the line of cases that impose a duty on a person who voluntarily takes action to assist someone. In response, the Defendant notes that no South Carolina authority has ever found a duty of care to exist between a person and a merchant who identifies them in an effort to solve a crime. Because there is no South Carolina authority to support the Plaintiff's position, the court believes this cause of action should be dismissed. This court is not sure that the South Carolina Supreme Court would recognize such a duty, and to the extent that it might, the court believes it prudent for that court to deal with it on first impression. Therefore, the court dismisses Plaintiff's negligence cause of action.

CONCLUSION

For the foregoing reasons, the court grants in part and denies in part Defendant Rent-A-Center East, Inc.'s motion to dismiss. Plaintiff's false imprisonment and negligence causes of action are hereby dismissed, but his malicious prosecution, defamation, [*15] and intentional infliction of emotional distress claims will proceed to discovery.

IT IS SO ORDERED.

August 19, 2011

Columbia, South Carolina

/s/ Joseph F. Anderson, Jr.

Joseph F. Anderson, Jr.

United States District Judge

Document(1)

1. *Shepard's*®: Richardson v. Rent-A-Center East, Inc., 2011 U.S. Dist. LEXIS 93214, 2011 WL 3665036(D.S.C.,Aug. 19, 2011)

Client/Matter: 05100/02101-MS11
Requested Categories: Appellate History - Requested
Citing Decisions - None applied
Citing Law Reviews, Treatises... - None applied
Table of Authorities - Not Requested

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Appellate History: Requested
Citing Decisions: None Applied
Citing Law Reviews, Treatises...: None Applied
Table Of Authorities: Not Requested

Shepard's®: Richardson v. Rent-A-Center East, Inc. 2011 U.S. Dist. LEXIS 93214,2011 WL 3665036: (D.S.C. Aug. 19, 2011)

No negative subsequent appellate history

Appellate History

1 - 2 of 2

	Appellate History	Court	Date
1.	Citation you *Shepardized* ™ Richardson v. Rent-A-Center East, Inc. 2011 U.S. Dist. LEXIS 93214	D.S.C.	Aug. 19, 2011
Subsequent			
2.	Summary judgment granted by: Richardson v. Rent-A-Center East, Inc. 2012 U.S. Dist. LEXIS 6617	D.S.C.	Jan. 20, 2012

Citing Decisions

Narrow by: None Applied

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Citing Law Reviews, Treatises...

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Sparrow v. Toyota of Florence

Westlaw.
396 S.E.2d 645
302 S.C. 418, 396 S.E.2d 645
(Cite as: 302 S.C. 418, 396 S.E.2d 645)

Court of Appeals of South Carolina.
Michael K. SPARROW, Respondent,
v.
TOYOTA OF FLORENCE, INC., Appellant.

No. 1543.
Heard April 9, 1990.
Decided Sept. 17, 1990.

Car buyer brought action against dealer for fraud and deceit in misrepresenting car as new. The Common Pleas Court of Florence County, Ralph King Anderson, Jr., J., entered judgment on jury verdict for buyer in amount of $4,000 actual damages and $6,000 punitive damages. Dealer appealed. The Court of Appeals, Bell, J., held that: (1) evidence supported fraud finding, but (2) evidence did not support award of $4,000 actual damages.

Affirmed in part, reversed in part and remanded.

West Headnotes

[1] Sales 343 ⇐38(5)

343 Sales
343I Requisites and Validity of Contract
343k37 Misrepresentation and Fraud by Seller
343k38 In General
343k38(5) k. Concealment. Most Cited Cases

Evidence established fraud on part of car dealer in selling previously owned car as new, notwithstanding dealer's contention that it relied on unwritten "policy" of highway department when it represented that car that had been returned by previous owner was new; car bore new car sticker and, when dealer was asked about extensive mileage, dealer represented that dealer's own employees had driven it; moreover, there was evidence showing that dealer did not know about "policy" at time of sale.

[2] Sales 343 ⇐38(1)

343 Sales
343I Requisites and Validity of Contract
343k37 Misrepresentation and Fraud by Seller
343k38 In General
343k38(1) k. In General. Most Cited Cases

In action for fraud in sale of goods, plaintiff may elect to return goods and recover consideration paid or retain goods and sue for damages.

[3] Sales 343 ⇐384(1)

343 Sales
343VII Remedies of Seller
343VII(F) Actions for Damages
343k384 Damages
343k384(1) k. In General. Most Cited Cases

If plaintiff in action for fraud in sale of goods retains goods, measure of actual damages is difference between value plaintiff would have received if facts were as represented and value plaintiff actually received.

[4] Fraud 184 ⇐50

184 Fraud
184II Actions
184II(D) Evidence
184k50 k. Presumptions and Burden of Proof. Most Cited Cases

Burden is on plaintiff in action for fraud in sale of goods to prove his measure of damages.

[5] Fraud 184 ⇐62

184 Fraud
184II Actions
184II(E) Damages

184k62 k. Amount Awarded. Most Cited Cases

Evidence did not support award of $4,000 in actual damages to buyer who prevailed on claim for fraud in sale of car; while fair market value of car if it had been new as represented was over $18,000, only evidence as to fair market value of car as used was buyer's own testimony that he would have paid "$2,000 or $3,000 less" had he known car was not new, and such testimony did not establish $4,000 differential.

[6] New Trial 275 ⚿68.1

275 New Trial
275II Grounds
275II(F) Verdict or Findings Contrary to Law or Evidence
275k67 Verdict Contrary to Evidence
275k68.1 k. Contrary Verdict in General. Most Cited Cases
(Formerly 275k68(1))

Where there is no evidence on which jury could have based finding of actual damages, it is error for court to refuse motion for new trial.

[7] Damages 115 ⚿57.1

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.1 k. In General. Most Cited Cases
(Formerly 115k49.10)

Mental suffering, emotional shock, inconvenience, or embarrassment are not elements of damage in fraud case.

****646*419** Helen T. McFadden, of Bridges & Orr, of Florence; John I. Rogers, III, of Rogers & Powers, of Bennettsville, and David M. Beasley, Hartsville, for appellant.

William P. Hatfield and Mary L. Wells, Hyman, Brown, Jeffords, Rushton & Hatfield, Florence, for respondent.

***420** BELL, Justice:

This is an action for fraud and deceit in the sale of an automobile. [FN1] Michael K. Sparrow alleged that Toyota of Florence, Inc., induced him to purchase a 1986 Toyota Cressida for $18,649.00 by falsely and knowingly telling him it was a "new" car, when in fact Toyota had sold it to a prior purchaser named Jones, who took title. Thereafter, Jones returned the car because of alleged defects in the exterior finish. The jury found for Sparrow on his cause for fraud and deceit and returned a verdict for $4000.00 actual damages and $6000.00 punitive damages. At the proper times Toyota made motions for a directed verdict and a new trial. The court denied the motions. Toyota appeals. We affirm in part and reverse in part and remand for a new trial solely on the issue of damages.

FN1. The case went to trial on five causes of action. Only the fraud claim remains viable at this stage of the litigation.

I.

Toyota contends it is not guilty of fraud.

[1] The evidence, viewed in the light most favorable to Sparrow, shows that Sparrow and his wife went to Toyota's new car lot for the purpose of purchasing a new car. A salesman named Keels showed them the Cressida, which had a new car sticker on the window and a sticker price of $20,737.74. The Sparrows liked the Cressida and began to negotiate a price with Bucky Lynch, a sales manager. Because the car had 1224 miles on the odometer, the Sparrows rejected Lynch's first offer. Mrs. Sparrow specifically asked Lynch why the car had so many miles on it. Lynch replied he had driven the car home and on out of town business for Toyota. According to Mrs. Sparrow, he also explained that the Cressida was a favorite car at Toyota and "we've just put those miles on it."

Lynch did not tell the Sparrows the Joneses had purchased and driven the car nor that it was previously titled in their name-matters which are admittedly true. After further negotiations, the parties agreed on a purchase price of $18,649.00. Sparrow discovered the car was a previously owned automobile when the Highway Department issued him a title marked "used." He testified he would not ***421** have purchased the Cressida at the agreed price had he known the car was used.

****647** This evidence is unquestionably sufficient to support the verdict for fraud. Toyota knew of the car's prior ownership, yet it misrepresented it as a new car by placing it on a new car lot, writing the word "new" on the window sticker, and giving a false explanation for the high mileage. Even without the false explanation of the mileage, the jury could find that Toyota knowingly and falsely misrepresented the car as new, by words and by conduct. *See Satcher v. Berry,* 299 S.C. 381, 385 S.E.2d 41 (Ct.App.1989) (fraud may be committed by conduct as well as by words).

Toyota argues in defense that it cannot be liable for fraud, because it relied on an unwritten "policy" of the Highway Department when it represented the Cressida as new. The short answer to this argument is that reliance was a question of fact for the jury to decide, and it decided against Toyota.

In addition, the evidence tends to show that Toyota did not know about the so-called "policy" at the time of the sale but only discovered it after Sparrow complained about the title. Toyota could not possibly have relied on a policy it did not know of when it made the false representations.

Finally, Toyota's argument that it has a right to represent a previously owned car as "new" on the strength of an informal bureaucratic practice which the state agency has never adopted in writing nor promulgated by rule or regulation is extremely doubtful as a statement of the law. We find the "reliance" defense to be without merit. The judgment as to liability for fraud is affirmed.

II.

Toyota also argues that the verdict for damages cannot be upheld, because there is no evidence of $4000.00 in actual damage to Sparrow.

[2][3][4] In an action for fraud in the sale of goods, the plaintiff may elect to return the goods and recover the consideration paid or retain the goods and sue for damages. *See Baeza v. Robert E. Lee Chrysler, Plymouth, Dodge, Inc.*, 279 S.C. 468, 309 S.E.2d 763 (Ct.App.1983). If he retains the goods, the measure of actual damages is the difference between the value the purchaser would have received if the ***422** facts were as represented and the value the purchaser actually received. *Id.* The burden is on the plaintiff to prove the measure of his damages. *Jackson v. Midlands Human Resources Center,* 296 S.C. 526, 374 S.E.2d 505 (Ct.App.1988).

[5][6] In this case, Sparrow elected to retain the Cressida and sue for damages. Therefore, the measure of actual damages was the difference in fair market value between a new 1986 Cressida and a used one at the time of sale. On the evidence presented, the fair market value of the Cressida as a new car may be taken to be $18,649.00, the price a willing buyer (Sparrow) and a willing seller (Toyota), not acting under compulsion, would agree upon. *See Housing Authority of City of Charleston v. Olasov,* 282 S.C. 603, 608, 320 S.E.2d 478, 481 (Ct.App.1984). However, to receive a verdict of $4000.00, Sparrow had to prove the Cressida had a fair market value, as a used car, of $14,649.00 or less. The only evidence presented to establish the differential in fair market value was Sparrow's own testimony that he would have paid two or three thousand dollars less for the Cressida had he known it was not new. [FN2] There was no evidence that the differential was $4000.00. Thus, the jury arbitrarily and capriciously fixed damages without reference to the evidence presented. ****648** Where there is no evidence on which the jury could have based their finding of actual damages, it is error for the court to

refuse a motion for a new trial. *Carrigg v. Blue*, 283 S.C. 494, 323 S.E.2d 787 (Ct.App.1984). Since the verdict for actual damages cannot stand, the verdict for punitive damages also falls. *Id.*

> FN2. In our view, this testimony cannot properly be regarded as an owner's estimate of fair market value, since there is no evidence that Toyota would have sold the car for two or three thousand dollars less. Because Toyota admittedly rejected Sparrow's counter offer of $17,000.00, the evidence tends to show that no bargain would have been struck at a lesser price. Fair market value is the price at which the parties will reach agreement and not the amount one party will offer. Sparrow testified only to the price he would *offer* for the used Cressida. He easily could have put up testimony to show the going price in the market at the time of sale for a used car of a similar type and condition as the 1986 Cressida. He failed to introduce any such evidence.

[7] Sparrow attempts to rehabilitate the verdict for actual damages by pointing to evidence that he and his wife suffered mental anguish when they discovered the ***423** fraud. He argues that the sum in excess of the value of the car was awarded as compensation for mental suffering. Mental suffering, emotional shock, inconvenience, or embarrassment are not elements of damage in a fraud case. *Id.* Therefore, this argument is without merit.

III.

This is a case in which the issues of liability and damages are distinct issues. Since the error as to the damages does not affect the determination of Toyota's liability for fraud, the scope of the new trial may be limited to the issue of damages. *See Industrial Welding Supplies, Inc. v. Atlas Vending Co.*, 276 S.C. 196, 277 S.E.2d 885 (1981). Accordingly, we reverse the judgment for actual and punitive damages and remand for a new trial solely on the question of damages.

AFFIRMED IN PART, REVERSED IN PART and REMANDED.

SHAW and GOOLSBY, JJ., concur.

S.C.App.,1990.
Sparrow v. Toyota of Florence, Inc.
302 S.C. 418, 396 S.E.2d 645

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Negative Citing References (U.S.A.)

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2 Hoffman v. Stamper, 385 Md. 1, 867 A.2d 276 (Md. Feb 04, 2005) (NO. 33 SEPT.TERM 2004)
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