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STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

Appeal from Richland County Common Pleas Court  
Hon. Alison Renee Lee  
Docket Number: 2008-CP-40-1839

**S.C. Supreme Court**

Latoya Brown.....Petitioner,

vs.

Dick Smith Nissan, Inc. and Old Republic  
Surety Company .....Respondents.

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**BRIEF OF PETITIONER**

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**STATEMENT OF ISSUES ON APPEAL**

**I.**

Did the court below, contrary to established law, ignore a critical finding of fact?

**II.**

Considering the omitted critical finding of fact, does the decision below  
contravene established contract law.

**III.**

Did defendant commit any action which contravened the Motor Vehicle Dealer's  
Act?

## STATEMENT OF THE CASE

This action was initiated by the filing of a Summons and Complaint on March 10, 2008. In her complaint, Latoya Brown ("Brown") alleged that she went to Dick Smith Nissan ("Dick Smith") on June 1, 2007, to purchase a 2005 Mazda MX6 and signed an offer that included a financing contingency for acceptance of the offer. She further alleged that after taking possession of the car, she received a series of letters from various lenders, including Sovereign Bank ("Sovereign"), declining to provide financing for her.

She further alleged that on June 29, 2007, she returned the car to Dick Smith and was given a document indicating that financing had been approved by Sovereign on a Nissan Altima, contingent upon proof of monthly income of \$2,800.00 Brown further alleged that she subsequently received a repossession notice from Sovereign claiming a deficiency of \$3,843.00 plus interest from November 8, 2007, at 11 ½% per annum.

Brown alleged that Dick Smith committed the following arbitrary, unconscionable, malicious and fraudulent acts in bad faith:

- a. failing to accept the return of the automobile when the loan had not been funded;
- b. submitting a fraudulent loan application;
- c. submitting a loan application on a car which Brown had not agreed to buy;
- d. presenting to Brown a purported loan approval which had conditions and representations which were false; and
- e. failing to refund Brown's down payment.

Brown sought double actual damages and treble damages as punitive damages against Dick Smith under the Act Regulating Manufacturers, Distributors, and Dealer's ("The Dealer's Act"). Brown also sought judgment against Old Republic Surety Company ("Old Republic"), the surety on Dick Smith's licensing bond.

On May 20, 2008, Dick Smith and Old Republic filed and served their answer denying the material allegations of the complaint.

This matter came before the Honorable Alison Renee Lee for a bench trial on September 22, 2009. On April 8, 2010, Judge Lee issued an order concluding that Brown was treated in an unfair and deceptive manner and specifically, that the actions of Dick Smith constituted bad faith. She found that the money received by Dick Smith from Sovereign Bank was "based on an approval for financing of a Nissan Altima not a Mazda MX6 and that the representation that she was approved for financing on the vehicle she possessed was unfair and deceptive." (R-003). The lower court further concluded that Brown was entitled to double the amount of the deficiency claimed by Sovereign plus two times the interest accrued and attorney's fees and costs.

Dick Smith and Old Republic received written notice of entry of the order on August 25, 2010. On September 1, 2010, Brown filed a motion to alter or amend seeking additional damages and attorney's fees. On September 3, 2010, Dick Smith and Old Republic served and filed a motion to alter or amend seeking to vacate the judgment on the ground that Latoya Brown's damages were the result of her own actions in returning the Mazda. A hearing on the

motions to alter or amend was conducted on November 15, 2010. Appellants argued as to damages, that there were none because of the statute of limitations. Brown filed a Motion to Alter or Amend to add attorney's fees and other damages.

On December 9, 2010, Judge Lee issued an order on the motions. Therein, the motion of Dick Smith and Old Republic was denied and Brown was awarded judgment for \$9,286.00, interest of \$1,367.67, attorney's fees of \$8,925.00 and costs of \$384.38 for a total of \$19,963.05. On January 11, 2011, Dick Smith and Old Republic served notice of appeal.

The Final Brief of Appellant raised the following issues:

1. Is the lower court's finding that Brown was interested in a Nissan Altima wholly unsupported by the evidence?
2. Is the lower court's finding that Hiller could not find a Nissan Altima within Brown's budget wholly unsupported by the evidence?
3. Is the lower court's finding that Dick Smith received \$13,091.00 from Sovereign on June 26, 2007 based on an approval for financing on a Nissan Altima not a Mazda MX6 wholly unsupported by the evidence?
4. Does the Dealer's Act require a motor vehicle dealer to provide a consumer with copies of its accounting entries or (yet to be received) bank statement to prove that it has received funding on an installment contract assigned to a lender?
5. Does the Dealer's Act authorize a consumer (represented by an attorney) who is aware of a lender's confusion over the identity of its collateral, who has been warned that abandoning the collateral will result in repossession, and who has received a notice to cure, to lie in wait until a repossession occurs and a deficiency results, to recover a \$20,000.00 windfall from a dealer arising out of an unliquidated deficiency claim barred by the statute of limitations?

On December 28, 2012, the Court of Appeals issued its opinion reversing the verdict for Latoya Brown. The opinion found there was no violation of the Dealer's Act as applied to Brown. It dismissed the trial court's finding that "Dick Smith did not take any steps to help Brown verify the financing or provide her with information so that she could speak with the appropriate person at Sovereign Bank." It found, without reference to any testimony in the record that "[a]ny misconceptions Brown had about her financing that caused her to leave the Mazda MX6 at Dick Smith and incur damages were made by Sovereign Bank; therefore Dick Smith did not cause Brown to incur damages." It recognized "that the approval letter contained information that was puffed for the purpose of helping Brown to obtain financing." As to Brown, however, the court below found that those representations did not rise to the level of bad faith, fraud or a deceptive act in violation of the Dealer's Act. The opinion did not mention the finding that the representation to Plaintiff that she was approved for financing on the vehicle she possessed was a failure to act in good faith, nor the finding that the funding received by Dick Smith from Sovereign Bank was for a Nissan Altima, not a Mazda MX6.

Latoya Brown's Petition for a Rehearing was denied by the Court of Appeals on February 1, 2013. A Petition for a Writ of Certiorari was filed on February 28, 2013. This court granted the writ on July 10, 2014.

## STATEMENT OF FACTS

Defendant Old Republic Surety company issued its surety bond, numbered L-1017485, to indemnify any owner of a motor vehicle “who may be aggrieved by any fraud, fraudulent representation or violation by [Dick Smith Nissan], salesmen, or representatives acting for [Dick Smith Nissan] of any of the provisions of Title 56 of the South Carolina Code of Laws. . . .” The amount of the surety bond was thirty thousand (\$30,000.00) dollars.

On June 1, 2007, Latoya Brown went to Dick Smith Nissan to purchase a Mazda 6 vehicle and traded in her old vehicle receiving an \$800.00 credit on her old vehicle. (R-189). At that time she was informed that her vehicle would be financed through BB&T. (R-31, lines 17-18). The buyer’s order provided:

This contract is not binding upon dealer unless accepted in writing by an officer or a sales manager or assistant sales manager of Dealer and until a retail installment contract has been approved and funded by a third party financing source. (R-187)

Thereafter, Latoya Brown received rejection letters on her loan application from Wachovia Dealer Services, Wells Fargo Auto Finance, Inc., Bank of America, Nissan Motors Acceptance Corporation, South Carolina Federal Credit Union, Credit Union Acceptance Corporation and M&J Credit Services, LLC. (R-190 - 195). When Latoya Brown called the salesman on June 23rd (R-32, lines 9-22), she said she wanted to bring the automobile in because it was not financed. She was told that if she brought the vehicle in, it would go down as a repossession. Later that same day, Mr. Hiller called to say that Sovereign Bank had financed the car. (R-32, lines 23-25) Mr. Hiller’s statement was false. Sovereign Bank did not finance any

car until June 25, 2007, and the car financed was not the Mazda in Brown's possession. (R-3).

By letter dated June 25, 2007, Sovereign Bank rejected Brown's application numbered 2520051. (R-195). Upon receipt of the letter on June 29, 2007, Brown went back to defendant Dick Smith's place of business and asked to speak to the general manager. She was directed to speak to Mr. Hiller and the finance manager. They told her the loan was approved and funded; but the money was not received. (R-62, lines 6-8). As proof of funding they showed her an approval letter from Sovereign for a loan in a different amount, with a different application number (2497943) on a Nissan Altima – V6, with an income Brown didn't have. The conditional funding letter also falsely stated that a family member worked at Dick Smith. Brown was told that these documents constituted proof of her loan approval. At the time this conversation took place, defendant Dick Smith had in its possession a document confirming funding for Brown on a Nissan Altima (R-118, lines 16-19).

Immediately after the conversation with the salesman, the keys to the Mazda were left with the receptionist and the Mazda was left at the Dealership. (R-145, lines 19 – 126, line 22). Sovereign Bank repossessed the Mazda, sold it and assessed a deficiency of \$3,843.00. Interest on the deficiency through September 1, 2009, is \$1,367.67 and is \$1.315 per day thereafter. Latoya Brown lost \$800.00 from the trade-in.

## ARGUMENTS

### I.

The court below failed to mention the finding that Dick Smith received funding for a Nissan, not a Mazda. That finding is critical because under basic principles of contract law, Latoya Brown was entitled to return the Mazda.

Latoya Brown signed a Buyer's Order offering to purchase the Mazda MX6 (T-201). The Buyer's Order contained no obligation on the part of Dick Smith to seek financing or perform any act. Where there is no mutuality of obligation, there is no contract. See, e.g., International Shoe v. Herndon, 135 S.C. 138, 133 S.E. 202 (1926). It was an offer to purchase which could be accepted by Dick Smith by an authorized signature and an approval and funding by a third party financing source. (R-201). Because Dick Smith had received funding for an automobile not mentioned in the purchase order, it had not accepted the offer to purchase. The returning of the Mazda was a withdrawal of the offer. A formal withdrawal of the offer was not required; only an act inconsistent with the existence of a contract is required. See Masonic Temple v. Ebert, 199 S.C. 5, 18 S.E.2d 584 (1942). Dick Smith was obligated to take the Mazda back. Dick Smith insistence that Latoya Brown would be required to pay on the vehicle and that she had no right to return it was not made "honestly and in good faith." South Carolina Code § 56-15-10(m).

The Brief of Appellant in the Court of Appeals attempted to avoid these basic contract rules by asserting there was no evidence that Dick Smith had received funding for a Nissan Altima (Brief of Appellant, p. 11). The record contains a letter approving funding for a 2005 Nissan Altima V6. (R-207).

There was, accordingly, evidence upon which the trial judge could find, as she did, that the Mazda was not funded when Latoya Brown withdrew her offer. As challenged in the Complaint (T-14, paragraph 7) and argued in the Brief of Respondent (p. 8), she had the right to return the car. The failure to accept the car back was unfair and fraudulent.

Less egregious conduct has been deemed unfair by this court. In Taylor v. Nix, 307 S.C. 551, 416 S.E.2d 619 (S. Ct. 1992) ignoring and avoiding a customer and laughing and joking was sufficient evidence of a violation of South Carolina Code § 56-15-30. See also, Fanning v. Fritz's Pontiac-Cadillac-Buick, 322 S.C. 399, 472 S.E.2d 242 (S. Ct. 1996) (statements about fees may be violation); Estate of Carr v. Circle S Enterprises, 379 S.C. 31, 664 S.E.2d 83 (Ct. App. 2008)(misrepresentation about credit life). Here Dick Smith ignored Brown's legitimate concern about funding. Moreover it chose to try to deceive her by claiming a document proved their receipt of funds. It was an intentional misrepresentation. Brown had previously been told she had funding at BB&T. That representation was false. She was told that she had funding with Sovereign Bank at a time when she did not. She had a letter turning down funding. The letter had a different contract number, it had a different car, a different income and false statement about a family member working at the dealership.

Unfair or deceptive acts by a motor vehicle dealer are unlawful. (South Carolina Code §56-15-30.) It is unlawful for any motor vehicle dealer to engage in any action which is arbitrary, in bad faith or unconscionable and which causes damages to any party. (South Carolina Code §56-15-40.) Fraud includes in addition to its normal connotation, the following: a misrepresentation in any manner, whether intentionally false or due to gross negligence of a

material fact, a promise or representation not made honestly and in good faith and an intentional failure to disclose a material fact South Carolina Code §56-15-10 (m).

Brown was fully justified in believing she had the right to leave the car. Beyond that Brown had the right to return the car because all the proof is that a different car had been funded. (R-118, lines 16-19). Dick Smith had no letter that an Altima had been funded. (Id.)

The court below found that Brown's recollection of the facts was more credible than that of the salesman. (R-158, line 23 – T-139, line 10). The salesman's assertion and indeed Dick Smith's continued assertion that the documents handed to Brown on the day she brought the car back was proof of their having funding was false. The opinion below pretends that the information on the conditional acceptance is there because Sovereign put it there. Sovereign clearly did not make up the fiction about a family member working at Dick Smith. Nor is it likely that Sovereign pulled a number out of the air for Brown's income or made up the make and model of the car. The reasonable inference from the evidence is that Dick Smith provided the wrong information. There is certainly no testimony that Sovereign made up that information and the suggestion defies logic. If Dick Smith had some proof on that day that the loan for a Mazda had been funded; they intentionally failed to disclose a material fact. Brown's decision to leave the car at Dick Smith Nissan was prompted by the false assertions of Dick Smith Nissan that the false document proved funding. The decision was not based on Sovereign's information, but on Dick Smith Nissan's.

## II.

By showing the financing statement to Latoya Brown, Dick Smith made her a participant in the “inaccuracies.” It was an unfair and fraudulent act to place her in that position.

The court, by way of footnote, holds that “inaccuracies in the financing letter” did not rise to the level of bad faith, fraud or a deceptive act” as to Brown. The false statements were regarded as “puffing”. The possible effect on Brown was great and it was unfair not only to the financing bank but to her. 18 U.S.C. §1005 provides that anyone who with intent to defraud any bank received any money is subject to up to 30 years imprisonment. 18 U.S. C. §3 provides punishment for an accessory after the fact. South Carolina law is no less a threat. South Carolina Code §16-13-10 makes it a felony to publish as true any false instrument in writing. South Carolina Code §16-1-55 provides punishment as an accessory after the fact. Latoya Brown was thrust into a horrible position of guessing whether the inaccuracies would be considered by the bank to have influenced the decision to fund. She knew that the bank would be looking for different collateral and had no way of determining whether the other “inaccuracies” puffed up the bank enough to influence the loan. Her decision to leave the car was based on the unfair dilemma the “inaccuracies” caused. Thus, even if the court below were correct in holding that the failure to provide accounting entries were not in error, other unchallenged findings of fact by the trial court justified her decision.

## III.

The decision of the Court is based on a ground not raised by any Issue on Appeal.

The issues raised by Dick Smith in the Court of Appeal’s are listed in the Statement of Facts (R-32, lines 9 – 22).

The opinion of the Court of Appeals answers none of the issues raised. Indeed, answering the first, second and fourth statements could have had no effect on the verdict rendered in the trial court. Instead, the opinion of the Court of Appeals held that “the trial court erred in finding Dick Smith violated the Dealer’s Act by acting in bad faith and by treating Brown in an unfair and deceptive manner.” The opinion does not hold that any one of the alleged wrongful factual findings was in fact wrong. It makes no mention that Brown was not interested in a Nissan or that such a vehicle could not be found.

It omitted entirely any reference to which vehicle was financed or to the representation by Dick Smith that she was approved for financing on the vehicle she possessed. Thus even if the court below were not in error in holding that the failure to provide accounting entries violated the Dealer’s Act, other factual findings which led to liability were unchallenged by any Issue on Appeal. The opinion simply ignores the failure to verify financing by other means and even more critically the false representation that Latoya Brown was funded for the car she was driving.

The court also held in footnote 1 of the opinion and on page 3 of the opinion that because Latoya Brown brought the Mazda back due to the letter from Sovereign Bank rejecting the loan, the false information in the loan application did not cause her damages. The court confuses the motive for bringing back the car with the multiple reasons why the car was left. Latoya Brown also testified that she decided to bring back the car because it had no funding (R-32, lines 5-17). Moreover, this matter was not argued by Dick Smith. Causation is mentioned only on page 20 of the Brief of Appellant. The argument there was that Latoya Brown caused her own damages by the failure to mitigate her damages after receiving a right to cure letter. This alternate rationale

of the court below was not raised by any issue on appeal.

If the court were to find for Dick Smith on the first, second and fourth issues raised by it, there remain unchallenged facts which support the decision of the court below. Neither the third or fifth issue received any mention in the opinion. Latoya Brown is entitled to have her case decided upon the issues raised and by any sustaining ground found in the record. Gamble v. International Paper Realty Corp., 323 S.C. 367, 474 S.E.2d 438 (1966).

### CONCLUSION

The Court of Appeals chose to make its own findings of fact, rather than applying the facts as found by the trial court. Using the facts as found by the trial court, contract law requires that the verdict rendered at trial be restored. Other conduct of Dick Smith constituted violations of the Dealer's Act. The decision of the Court of Appeals should be reversed and judgment entered for Latoya Brown.

Respectfully submitted,

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**CERTIFICATE OF SERVICE BY MAIL**

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I, Melisa Y. McClurkin, employee of Johnson, Toal & Battiste, P.A., Attorneys for the  
Petitioner, in the above-captioned case, hereby certify that I have served the **Brief of Petitioner** on J.  
Gregory Studemeyer, Counsel for Respondents, by hand delivering one copy of the same on August 7,  
2014, at the following address:

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JOHNSON, TOAL & BATTISTE, P.A.

BY:   
Melisa Y. McClurkin

Columbia, South Carolina  
August 7, 2014