THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2013-000417

Latoya Brown, ... Petitioner,

v.

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

BRIEF OF RESPONDENTS

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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 6 and signed a contract that included a financing contingency. 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 11½ % per annum.

Brown alleged that Dick Smith committed various arbitrary, unconscionable, malicious and fraudulent acts in bad faith. Brown sought double actual damages and treble damages as punitive damages against Dick Smith under the Act Regulating Manufacturers, Distributors, and Dealers ("the Dealers 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. Therein, they denied 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. 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. A hearing on the motions to alter or amend was held on November 15, 2010.

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 Court of Appeals reversed the lower court in an unpublished opinion filed on December 28, 2012.

On January 11, 2013, Brown filed a Petition For Rehearing. On February 1, 2013, the Court of Appeals issued an Order denying the petition.

On February 28, 2013, Brown filed a Petition For A Writ Of Certiorari. On March 14, 2013, Dick Smith and Old Republic filed a Return To Petition For Writ Of Certiorari. On July 10, 2014, this Court issued its Order granting the Petition.

FACTS

Brown and Robert Hiller ("Hiller") met one another while attending Allen University ("Allen"). (R. p. 42, lines 4-7). Hiller was Brown's "big brother" in a fraternity at Allen. (R. p. 90, lines 8-12). Brown, a Math major, was to begin working at Allen as a Math tutor on June 9, 2007. (R. p. 41, lines 12-13, p. 42, lines 13-18 and p. 211).

Hiller had been employed by Dick Smith for almost 15 years (R. p. 89, line 8 – p. 90, line 2) and Brown knew that Hiller was working at Dick Smith as a car salesman. (R. p. 42, lines 10-12). Brown had already considered purchasing a used Saturn from Dodgeland, knew that her credit was limited, and was concerned about qualifying for financing. (R. p. 46, lines 9-18).

On May 31, 2007, Brown visited Hiller at Dick Smith. (R. p. 42, line 19 – p. 43, line 9). At that time, Hiller asked Brown questions about what type of car she wanted and how much she could afford to pay. (R. p. 50, lines 1-11). Brown told Hiller that she wanted payments of no more than $250.00 per month. (R. p. 50, lines 9-14 and p. 91, lines 7-9).

Hiller believed that a used Nissan Altima would fit Brown's budget but recognized that he first needed to determine if Brown could qualify for financing at all. He also knew that if Brown could qualify for financing, another vehicle could always be substituted. (R. pp. 91-93).

Brown and Hiller discussed arranging financing through BB&T. (R. pp. 53-55). Hiller believed that Brown might qualify for a financing program offered to recent college graduates. (R. – p. 91, lines 21-24).

Hiller provided information to Kent Guthrie ("Guthrie"), a finance manager for Dick Smith, in an effort to pre-qualify Brown for financing. (R. p. 91, line 5 – p. 93, line 25). Guthrie then submitted the information to several lenders for preliminary *approval* using a 2004 Nissan Altima as a general type of collateral for which financing was sought. (R. p. 121, line 21 – p. 123, line 7, p. 124, line 17 – p. 125, line 4).

Guthrie also recognized that a different vehicle could be substituted once he obtained a preliminary *approval* from a lender. (R. p. 135, lines 11-15). Guthrie submitted Brown's information to a number of lenders, including BB&T, in an effort to arrange financing for Brown. (R. p. 122, line 23 – p. 124, line 16). Brown qualified for up to $13,545.00 in financing on a 2004 Nissan Altima. (R. p. 135, lines 9-11).

Brown wanted a Mazda 6. (R. p. 50, lines 15-19). Hiller determined that Dick Smith had a 2005 Mazda 6 at a different location and printed out a photograph of the car with certain information about it and gave it to Brown. (R. p. 43, line 14 – p. 44, line 2).

The 2005 Mazda was the only car that Brown ever considered at Dick Smith. (R. p. 45, lines 8-12). Brown really wanted the Mazda and it was a car that she could afford to purchase. (R. p. 53, lines 18-22).

On June 1, 2007, **Brown agreed to purchase the 2005 Mazda.** (R. p. 49, lines 5-7). **Brown signed a buyer's order for the Mazda** (R. p. 201) which provided as follows:

> 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** for any deferred balance has been approved and **funded** by a third party financing source. (emphasis added).

The buyer's order was accepted in writing by Dick Smith. (R. p. 48, lines 15-17 and p. 61, lines 14-16). Brown then met with Guthrie. (R. p. 51, lines 17-22).

Brown was willing to cooperate with Dick Smith to arrange financing for the **Mazda** and placed no restrictions upon Dick Smith as to which lenders it might contact to accomplish that

purpose. (R. p. 49, lines 21-23 and p. 55, lines 10-13). **Brown signed one, and only one, retail installment contract ("contract") to purchase a car from Dick Smith.** (R. p. 56, lines 3-25; p. 120, lines 13-20; and p. 128, line 22 – p. 129, line 7). **The contract clearly identified the car as a Mazda.** (R. p. 204). The contract incorporated by reference the terms and conditions of the buyer's order and set forth **Federal Truth-In-Lending Disclosures** including the **Amount Financed** of **$13,091.00**. (R. p 204).

The contract identified Dick Smith as Creditor – Seller and provided for 63 monthly payments of $286.15 beginning July 16, 2007. A condition precedent to Dick Smith's obligation to perform was **approval** and **funding** of **the contract** by a third party financing source. (R. pp. 201 and 204).

The **contract** was stamped with the following language.

> THIS INSTRUMENT IS CONDITIONED UPON **APPROVAL** AND **FUNDING** BY A THIRD-PARTY FINANCING SOURCE. I AGREE THAT THE BUYER'S ORDER EXECUTED BY ME IN CONNECTION WITH THIS TRANSACTION IS THE CONTRACT BETWEEN DEALER AND ME AND THAT THIS INSTRUMENT IS SIMPLY AN EFFORT TO SATISFY MY OBLIGATIONS UNDER THE BUYER'S ORDER. THE ADDITIONAL TERMS AND CONDITIONS PRINTED ON THE REVERSE SIDE OF THE BUYER'S ORDER ARE INCORPORATED HEREIN BY REFERENCE. (emphasis added).

Brown also signed below the stamped language. Brown knew on the date that she signed the **contract** that there was a financing contingency. (R. p. 57, line 20 – p. 58, line 1).

Brown took possession of the Mazda on June 1, 2007. (R. p. 58, lines 8-11). Thereafter, Brown received a letter from BB&T indicating that her request for financing had been declined. (R. p. 31, lines 20-21).

Brown called Hiller to find out why BB&T had declined. (R. p. 31, lines 21-24). Hiller explained that Dick Smith was trying to arrange financing through another lender and Brown acquiesced. (R. p. 31, line 25 – p. 32, line 2).

Thereafter, Brown received a number of letters from various lenders declining to provide financing for her purchase of the Mazda. (R. p. 32, lines 3-4 and pp. 190-195). Brown called Hiller and Hiller told her that Dick Smith was still trying to find someone to finance the **Mazda**. (R. p. 32, lines 5-8). Brown told Hiller that if he didn't find someone to finance the **Mazda**, she was going to bring it back. (R. p. 32, lines 14-17). Later that evening, Brown received a telephone call from Hiller indicating that "I was financed through Sovereign". (R. p. 32, lines 22-25). Brown responded, "OK, no problem". (R. p. 32, line 25).

Dick Smith assigned **the contract** to Sovereign. (R. p. 143, lines 2-7). Guthrie faxed a copy of the contract to Sovereign to advise that the 2005 Mazda had been substituted for the 2004 Nissan Altima. (R. pp. 140-141). The documents signed by Brown were then transmitted by Guthrie to another department at Dick Smith. There, the appropriate documents were forwarded to Sovereign for **funding**. (R. p. 111, line 10 – p. 112, line 5 and p. 130, lines 6 – 16). **No contract on a Nissan was ever submitted by Dick Smith to Sovereign for funding**. (R. p. 120, lines 18-20).

On June 25, 2007, Dick Smith received a letter by fax from Sovereign. (R. p. 113, lines 11-22 and p. 207). The letter confirmed that Brown's **contract** had been **funded**.

Dick Smith actually received **$13,091.00** from Sovereign for **the contract** on the **Mazda** by a wire transfer on June 26, 2007. (R. p. 118, line 8 – p. 119, line 2). Dick Smith's receipt of the money was reflected by an accounting entry on that date at 10:22 a.m. (R. p. 111, line 10 – p. 115, line 19 and pp. 208-209) and on a bank statement dated June 29, 2007, that Dick Smith subsequently received. (R. p. 116, line 7 – p. 117, line 3 and p. 210).

Three days after Dick Smith received **funding** for **the contract** on the **Mazda**, Brown received a letter in the mail **from Sovereign** dated June 25, 2007. (R. p. 34, lines 7-15 and p. 195). That letter erroneously stated:

> Thank you for your **application**. We regret that we are unable to approve your request for credit through DICK SMITH NISSAN BELTLINE at this time for the following reason(s):
>
> Insufficient credit file

(R. p. 34, lines 7-15 and p. 195). (emphasis added).

Brown then called Hiller. Hiller assured Brown that financing had been completed through Sovereign and if she brought the car back, it would result in a repossession. (R. p. 63, lines 13-16 and p. 152, lines 15-17).

Brown called Sovereign. A representative of Sovereign indicated that Sovereign's records reflected a transaction involving a Nissan Altima and in the event of a default, Sovereign would seek to repossess a Nissan Altima. (R. p. 64, lines 16-23).

Brown came back to Dick Smith **to return the Mazda** and asked to speak with the general manager. She was asked to speak with Hiller first. (R. p. 35, lines 7-13).

Hiller showed Brown a Sovereign Bank Application Status reflecting preliminary **approval** for financing. (R. p. 35, lines 20-23, p. 124, line 17 – p. 126, line 2 and p. 196). Actually, Hiller **gave her a copy**. (Brief of Petitioner p. 2 and R. pp. 14, 103, and 150, lines 23-25).

Hiller took Brown to an office and called Sovereign on a speaker phone. A representative of Sovereign confirmed that financing had been completed on the **Mazda**. (R. pp. 96 and 108).

Brown recognized the confusion created by her receipt of the letter from Sovereign and the assurance provided by Hiller. (R. p. 64, lines 6-13). **Brown only bought one car and she wasn't confused about which car she bought.** (R. p. 69, lines 3-14).

Hiller assured Brown that financing had already been arranged. (R. p. 63, lines 23-24). Hiller told the Plaintiff not to leave the **Mazda** at Dick Smith because it would result in repossession. (R. p. 63, lines 13-16, p. 65, lines 2-4, p. 68, lines 16-23, and p. 74, lines 6-9). Brown didn't believe Hiller. (R. p. 70, lines 6-8).

Although Brown knew that Guthrie was the finance manager and that it was his job to arrange financing for her (R. p. 51, lines 20 – 25), Brown did not show the letter she received from Sovereign to Guthrie or anyone else in the finance department. (R. p. 151, lines 16-21). Brown did not renew her request to speak with the general manager or any other supervisor.

Notwithstanding all of her conversations with Hiller by telephone and in-person, Brown returned 29 days after taking possession, left the keys to the Mazda with a receptionist, and

abandoned the Mazda at Dick Smith. (R. p. 74, lines 19-25; p. 149, line 25, - p. 150, line 2; and Brief of Petitioner p. 7). **Brown's decision to return the Mazda was based upon the letter she received from Sovereign and the conversations she had with representatives of Sovereign.** (R. p. 74, lines 22-25, and p. 75, lines 8-13).

Thereafter, just as Hiller had predicted (R. p. 68, line 16 – p. 69, line 7) Brown received a NOTICE OF INTENT TO REPOSSESS (notice to cure) from **Sovereign** dated September 1, 2007. (R. p. 66, line 24 – p. 67, line 5). Brown understood what the notice to cure meant when she received it. (R. p. 71, lines 9-11). At that time, Brown could have cured her default for $600.90. (R. p. 71, lines 23 – 25 and p. 206). Brown did not attempt to cure but rather took the letter to her lawyer. (R. p. 68, lines 8-15).

Dick Smith received a letter from Sovereign dated November 1, 2007, indicating that the Mazda purchased by Brown on June 1, 2007, had been repossessed on September 28, 2007. (R. p. 131, lines 8-14 and p. 213).

Thereafter, Brown received a letter from **Sovereign** dated November 16, 2007, indicating that the car had been sold resulting in a deficiency of $3,843.00. (R. p. 38, lines 4-13 and p. 197). Thereafter, Brown received a collection letter from C.L.X. Recovery Systems dated November 21, 2007. (R. p. 38, lines 14-17 and p. 198).

Brown never paid Sovereign anything but did not dispute the validity of the debt. (R. p. 73, lines 6 – 18). Sovereign never brought an action against Brown to recover the deficiency and the statute of limitations on that claim expired. **Brown sued Dick Smith, not Sovereign, the author of the erroneous letter.**

ARGUMENTS

I. NOT EVEN BROWN'S SELECTIVE VERSION OF THE FACTS DEMONSTRATE THAT DICK SMITH VIOLATED THE DEALERS ACT

Brown's testimony in the Record extends from p. 28 – p. 79. However, Brown only devoted two pages of her brief to the facts. She completely ignored her unfavorable testimony including the repeated warnings from Hiller about the consequences of abandoning the Mazda and her receipt of a notice to cure from Sovereign, all of which should have prevented the underlying deficiency claim.

Brown entered into a contract with Dick Smith to purchase a Mazda subject to a condition precedent. A condition precedent to a contract is any fact other than the lapse of time, which unless excused, must exist or occur before a duty of immediate performance arises. Brewer v. Stokes KIA, Isuzu, Subaru, Inc., 364 S.C. 444, 613 S.E.2d 802 (Ct. App. 2005).

Dick Smith received *funding* from Sovereign satisfying the condition precedent. Unfortunately, on the very same day that "Sovereign issued a funding notice to Dick Smith (R. p. 207), Sovereign also issued the erroneous letter to Brown advising that her *application* for financing had been declined. (R. p. 195).

Brown abandoned the Mazda at Dick Smith against the advice of Dick Smith. **Brown testified that her decision to abandon the car at Dick Smith was prompted by information that she received from Sovereign, not Dick Smith, that proved to be inaccurate.** (R. 74, lines 22-25 and P. 75, lines 8-13).

Sovereign sent Brown a notice to cure dated September 1, 2007. After receiving the notice to cure, Brown consulted with her lawyer. Brown could have cured her default by paying Sovereign $600.90, but made no effort to cure her default, nor did she contact Sovereign.

Sovereign repossessed the **Mazda**, sold it, and sent a letter to Brown *claiming* a deficiency of $3,843.00. Brown paid nothing towards the deficiency but did not dispute the validity of the claim. In fact, she testified, "I have no problem with paying that." (R. p. 73, lines 12 – 15).

After Brown received the erroneous letter from Sovereign, Brown sued Dick Smith but not Sovereign. Ostensibly, Brown was concerned that Sovereign might actually sue her for the deficiency.

Notwithstanding the truth of Hiller's statements and Brown's unfortunate reliance upon erroneous communications from Sovereign, the lower court opined that Dick Smith had an obligation to convince Brown that she was wrong. The lower court suggested that telling Brown that financing had been completed was not enough. Moreover, the lower court suggested that Dick Smith had an obligation to show Brown documents to prove that Hiller was telling the truth and that any statements attributed by Brown to Sovereign were mistaken.

The lower court stated:

> . . . And I understand that the dealership may not necessarily have had documents in hand to be able to [show] her specifically that it had been approved, but the best way for them to do that would be to show them the documents that they had, because at least the bank statement is dated the 29th. (R. p. 155, lines 14 – 19).

* * *

> And you know, maybe it's not the dealership's fault, maybe it's Sovereign's fault, I don't know, but in light of the information that it hadn't been approved, the only way for the dealership to be able to prove that [it] had been was to show we've gotten the funding, and if that wasn't done, that creates a problem. (R. p. 157, line 23 - p. 158, line 3).

If the lower court had doubts about Dick Smith's culpability when the evidence was fresh, it should have entered judgment for Dick Smith for Brown's failure to meet her burden of proof. It is unlikely that the lower court's confusion would have improved after seven months.

The lower court never even considered that it was Brown's fault. There is no evidence that Brown or her lawyer ever asked for the funding notice, Dick Smith's accounting entries, or its bank statement dated June 29, 2007, the same date that Brown abandoned the car. In all likelihood, Dick Smith didn't even receive the bank statement until the following day at the earliest.

The lower court also mused:

> Now whether or not that amounts to bad faith, unconscionable conduct, fraud, misrepresentation, I think that there's some issues and that's why I'm particularly interested in Mr. Toal's argument as to how that rises to that level, and I'm sure he'll make a good argument. (R. p. 157, lines 14 – 18).

The lower court's concern, about whether Dick Smith's failure to do more than tell Brown the absolute truth about financing provided by Sovereign amounted to a violation of the Dealers Act, was well founded. No argument, good or bad, was ever submitted. Rather, seven months later, when the evidence was no longer fresh, the lower court drafted its own order.

In its order, the lower court found that Hiller and Guthrie showed Brown an "approval letter" from Sovereign. (R. p. 9, par. 21). Brown's testimony was that it was Hiller who provided the

document. Even in the face of the lower court's suggestion that Guthrie provided the document, Brown was steadfast that Hiller, not Guthrie, provided the document to her. (R. p. 150, line 23 – p. 151, line 2).

In fact, what the lower court referred to as an "approval letter" was actually a document entitled "Sovereign Bank Application Status" issued by Sovereign, not Dick Smith. (R. p. 196). As Guthrie explained, and as the document itself reflects, the application status was only a preliminary approval, subject to certain stipulations, including proof of income.

The lower court further found that the application status "listed" Brown's income as $2,800.00 per month. Actually, as set forth above, the Sovereign Bank Application Status is a document issued by Sovereign, not Dick Smith. There is no evidence that Dick Smith ever represented to Sovereign that Brown's income was $2,800.00 per month. The Sovereign Bank Application Status **requested proof of income** and what Guthrie submitted was a letter provided by Brown from Allen stating that she earned $1,720.00 per month and a pay stub provided by Brown from her second job at Shoney's where she represented that she earned $1,000.00 per month in wages and tips. (R. p. 126, line 7 – p. 128, line 4 and pp. 211-212).

The lower court also found that neither Hill [sic] nor Guthrie ever told Brown that Dick Smith had already received $13,091.00 from Sovereign. (R. p. 9, par. 23). Whether anyone at Dick Smith told her the exact amount or not, Brown admitted that Hiller told her repeatedly that financing had already been completed and that if she abandoned the car it would result in repossession.

In its order, the lower court concluded that Brown was treated in an unfair and deceptive manner. Moreover, the lower court concluded that:

> Specifically, the actions of the Defendant Dick Smith constitute bad faith. (R. p. 10, par. 8).

The order does not indicate who treated Brown in an unfair and deceptive manner. While Dick Smith agrees that perhaps Sovereign may have been negligent in making inaccurate statements to Brown, the record simply does not reflect that Dick Smith treated Brown in an unfair or deceptive manner. Moreover, there is absolutely no evidence that Dick Smith did anything to constitute bad faith.

As the lower court's order correctly states:

> Bad faith has been defined as:
>
> > The opposite of good faith, generally implying or involving **actual or constructive fraud**, or **a design to deceive or mislead** another, or a neglect or refusal to [fulfill] some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by **some interested or sinister motive**. (emphasis added).

Dick Smith did not engage in any fraud. Dick Smith never attempted to deceive or mislead Brown. Dick Smith never neglected or refused to fulfill any duty or contractual obligation to Brown prompted by some interested or sinister motive.

Brown simply became frustrated with the delay in securing financing on her car. When she received the letter from Sovereign which turned out to be inaccurate, she threw her hands up and basically said "the hell with it, I'm taking the car back no matter what Hiller tells me". At that point, no funding notice, no accounting entry, and no bank statement would have changed her mind.

The lower court also concluded that Brown had taken all measures reasonably expected of her, including making various attempts to verify that she was financed by Sovereign for the proper vehicle, at the correct amount financed, and reflecting accurate income. (R. p. 11, par. 10). Brown testified that she made two telephone calls, one to Valerie Whitman and one to Jimmy Bonners. (R. p. 77, lines 13 – 25). She did not testify regarding the substance of those conversations or identify who those individuals purported to be. Were Whitman and Bonners operators, clerks, or janitors?

As set forth above, Brown recognized that Sovereign was confused over the identity of its collateral. Nonetheless, Brown understood that if she defaulted, Sovereign was going to repossess a car from her and the only car she purchased from Dick Smith was the Mazda.

According to Brown, when she abandoned the car, she told Hiller that she would be seeking legal advice and that he would be hearing from her lawyer. (R. p. 37, lines 8 – 17). In fact, Hiller acknowledged receiving a call from Brown's attorney. (R. p. 98, line 24 – p. 99, line 2).

Brown did not present evidence of any effort in the form of telephone calls or letters written by her lawyer to address Sovereign's confusion, which Brown acknowledged, long before Sovereign sent Brown the notice to cure, repossessed her car, or demanded a deficiency from her. Since Brown followed through with her threat to seek legal advice, but presented no testimony that her lawyer made any effort to address the confusion before it resulted in her default, there is no basis for the lower court's conclusion that Brown took all measures reasonably necessary to verify her financing.

The lower court also concluded 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. (R. p. 11, par. 11). Although Brown testified that she got the phone number for Sovereign off of the denial letter she received from Sovereign, when presented with the denial letter she acknowledged that there was no phone number listed. (R. p. 76, lines 4 – 14 and p. 195). Moreover, Hiller testified that he took Brown into an office, called the dealer finance department for Sovereign on a speaker phone in Brown's presence, and confirmed that financing for the Mazda had been completed. (R. p. 96, lines 2 – 19). Although Brown was presented as a rebuttal witness, she did not refute Hiller's testimony. (R. p. 149, lines 3 – 22).

After considering motions to alter or amend and conducting a hearing, the lower court refused to vacate the award. Opining that notwithstanding Brown's admissions that she was repeatedly warned about the consequences of abandoning her car by Dick Smith, the lower court said:

> "I think there should have been some additional steps taken by Dick Smith to get to the bottom of whatever the issue was . . ."
> R. p. 179, lines 20 – 22).

Moreover, even though the lower court was advised that the statute of limitations on any *claim* for a deficiency by Sovereign against Brown had expired (R. p. 169, lines 5 – 13), the lower court entered judgment in favor of Brown against Dick Smith and Old Republic for double that amount, awarded Brown interest of $1,367.67 on the unliquidated and expired deficiency *claim*, gave Dick Smith no credit for the use of the car by Brown for 29 days, and awarded Brown $8,925.00 in attorney's fees and costs of $384.38 for a total of $19,963.05.

II. THE COURT OF APPEALS PROPERLY DETERMINED THAT ITS FINDING THAT DICK SMITH DID NOT VIOLATE THE DEALERS ACT WAS DISPOSITIVE.

A. THE TRIAL COURT'S FINDING IN THE ORDER ON MOTIONS TO ALTER OR AMEND DATED DECEMBER 9, 2010, THAT DICK SMITH RECEIVED $13,091.00 FROM SOVEREIGN ON JUNE 26, 2007, BASED ON AN APPROVAL FOR FINANCING OF A NISSAN ALTIMA, NOT A MAZDA MX6, WAS WHOLLY UNSUPPORTED BY THE EVIDENCE.

1. LENDERS FUND (PURCHASE) RETAIL INSTALLMENT CONTRACTS, NOT CREDIT APPLICATIONS, AND BROWN SIGNED A SINGLE INSTALLMENT CONTRACT FOR A MAZDA.

STANDARD OF REVIEW

An action under the Dealers Act is an action at law. Adams v. Grant, 292 S.C. 581, 582, 358 S.E.2d 142, 143 (Ct. App. 1986). In an action at law tried without a jury, an appellate court will not disturb the trial court's findings of fact unless they are wholly unsupported by the evidence or unless it clearly appears the findings are controlled by an error of law. Wilder v. Blue Ribbon Taxicab Corp., 396 S.C. 139, 144, 719 S.E.2d 703, 706 (Ct. App. 2011). An appellate court may decide questions of law with no particular deference to the [circuit] court. Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010).

The Court of Appeals properly reversed the trial court since the trial court's finding that Dick Smith violated the Dealers Act by acting in bad faith and by treating Brown in an unfair and deceptive manner was wholly unsupported by the evidence. Moreover, the Court of Appeals recognized that any damage claimed by Brown resulted from her reliance upon an erroneous letter issued by Sovereign, not by any statements made by Dick Smith.

S.C. Code Ann. §56-15-30(a) provides:

> (a) Unfair methods of competition and unfair or deceptive acts or practices as defined in §56-15-40 are hereby declared to be unlawful.

S.C. Code Ann. § 56-15-40(1) provides:

> (1) It shall be deemed a violation of paragraph (a) of §56-15-30 for any ... motor vehicle dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public.

Arbitrary conduct is readily definable and includes acts which are unreasonable, capricious or nonrational; not done according to reason or judgment; depending on will alone, Taylor v. Nix, 307 S.C. 551, 416 S.E.2d 619 (1992).

Bad faith is defined as "the opposite of good faith, generally implying or involving actual or constructive fraud, or a design to deceive or mislead another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. State v. Griffin, 100 S.C. 331, 333, 84 S.E. 876, 877 (1915).

Unconscionability has been recognized as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them. Jones Leasing v. Gene Phillips and Assoc., 282 S.C.327, 318 S.E.2d 31 (Ct. App. 1984); Fanning v. Fritz's Pontiac-Cadillac-Buick, 322 S.C. 399, 472 S.E.2d 242 (1996).

The only car Brown ever considered was the **Mazda**. (R. p. 45, lines 8-12). She signed a buyer's order for the **Mazda**. (R. p 201). She signed an **installment contract** for the **Mazda**. (R. p. 204).

Brown did not know and could not be expected to know when Dick Smith received *funding* for the installment contract from Sovereign (R. p. 61, line 17 – p. 62, line 3) or for which vehicle funding was received. Brown only bought one car and was not confused about which car it was. (R. p. 69, lines 3 – 14).

As Guthrie pointed out, Brown never signed a contract to buy a Nissan Altima and he never submitted any contract for *funding* to Sovereign for a Nissan Altima. (R. p. 120, lines 13-20). The only contract that Sovereign ever *funded* for Brown was the contract for the **Mazda** she purchased (R. p. 128, line 22 – p. 130, line 5) and the one Sovereign eventually repossessed. (R. p. 213). Had Sovereign repossessed the Mazda without having funded a contract for the Mazda, surely Brown would have sued Sovereign for wrongful repossession.

Sovereign didn't just willy-nilly wire transfer **$13,091.00** to Dick Smith. The amount wired by Sovereign to Dick Smith just happened to match the **Amount Financed** in the **FEDERAL TRUTH-IN-LENDING DISCLOSURES** set forth on Brown's **contract** for the **Mazda**. (R. p. 204). In exchange for its payment to Dick Smith, Sovereign expected to receive the monthly payments set forth in the **contract** secured by the **Mazda** Brown purchased.

Dick Smith's treasurer, a certified public accountant, Russell Andrew McFall ("McFall"), testified unequivocally that Dick Smith's records reflected that it received **$13,091.00** for a **Mazda**, not a Nissan Altima or any other vehicle. (R. p. 111, line 10 – p. 119, line 2 and pp. 207-210). Both

McFall and Guthrie tracked the receivable for **$13,091.00** for the **Mazda** on a daily basis until it was received by wire transfer. (R. p. 111, line 19 - p. 113, line 22 and p. 130, lines 6-25).

Although Sovereign issued a preliminary *approval* of a credit application of up to $13,545.00 for financing on a 2004 Nissan Altima (R. p. 196), there is no evidence in the record or anywhere else that Dick Smith ever received *funding* for an installment contract from Sovereign for a Nissan Altima. Clearly, Sovereign's reference to a 2005 Nissan Altima in its *funding* notice was an error just like the error in the letter it sent to Brown indicating that her application for financing had been declined. As set forth above, Sovereign repossessed the **Mazda**, not a Nissan Altima.

While the trial court indicated that she found Brown's testimony to be more credible than Hiller's, the testimony of these two witnesses was not materially different. Moreover, Brown had no knowledge and offered no testimony on the two critical issues: (1) when did Dick Smith receive *funding* for the contract and (2) for what type of car did Dick Smith receive *funding*.

The facts simply do not demonstrate any wrongdoing by Dick Smith. Certainly the facts do not suggest that Dick Smith engaged in any conduct which can be characterized as arbitrary, in bad faith, or unconscionable. What the facts do suggest is that Sovereign issued an erroneous letter to Brown advising that her application for financing had been declined on the same day that it issued a funding notice to Dick Smith. Brown chose to believe a representative of Sovereign rather than Hiller. When it turned out that Sovereign was wrong, Brown inexplicably chose to sue Dick Smith rather than Sovereign.

III. THE COURT OF APPEALS PROPERLY CONCLUDED THAT BROWN ABANDONED THE MAZDA IN RELIANCE UPON AN ERRONEOUS LETTER FROM SOVEREIGN, NOT FROM ANY STATEMENT ATTRIBUTABLE TO DICK SMITH.

Brown's testimony at trial as to why she abandoned the Mazda could not have been more clear:

Q Let me hand you what is marked as Plaintiff's Exhibit 10. This is the letter from Sovereign Bank to you dated June 25th, 2007.

A Yes, sir.

Q Now, was it your testimony that you received this letter on June 29th of 2007?

A Yes, sir.

Q Okay. And your decision to return the car was based upon the letter that you received from Sovereign Bank?

A Correct, and some of the representatives I spoke to from Sovereign Bank.

* * *

Q But Sovereign Bank sent you a letter telling you that your application for credit had been denied?

A That's correct.

Q Right. And that was the basis for you bringing the car back?

A Correct.

(R. pp. 74-75).

Now, 5 years later, Brown suggests that there was some "other" reason why she abandoned the Mazda. She suggests that she was "thrust into a horrible position of guessing" if inaccuracies on an email string between Dick Smith's finance manager, Guthrie, and Sovereign's credit analyst, influenced Sovereign's decision to fund.

Guthrie simply wrote:

KELLY – I NEED A FAVOR ON THIS DEAL – SHE IS FAMILY OF EMPLOYEE OF DICK SMITH WHO HAS WORKED HERE 15 YEARS. CUST WANTS NO MORE THAN 275 PER MONTH PLEASE HELP – THANKS KENT.

Guthrie referred to Brown's "big brother" as family and asked for a favor. Brown could not possibly have been harmed by Guthrie's request for a favor. Even if Guthrie's request for a favor could be characterized as arbitrary, in bad faith, or unconscionable, the Dealers Act also includes an element of causation.

Sovereign's credit analyst responded:

Please include proof of $2800/MO. Income with contract.

Either Brown is hopelessly confused between the terms *approval* and *funding* or seeks to create confusion. Brown erroneously uses these terms interchangeably in her brief as if they are one and the same.

As Guthrie explained, arranging financing is a negotiation process. (R. pp. 123-125). The Sovereign Bank Application Status reflected the status of those negotiations at a particular point in time, subject to certain stipulations. (R. p. 125, line 14 – p. 128, line 21).

Approval is a qualification process that includes a review of a customer's credit history. (R. p. 71, line 21 – p. 72, line 1). As Hiller explained, there is no reason to seek *funding* on a particular car until a lender reviews a customer's credit history. (R. p. 72, line 15 – p. 73, line 25). *Funding* occurs after all of a lender's underwriting requirements have been satisfied. (R. p. 108, line 6-21 and p. 113, line 24 – p. 114, line 10).

Brown's claim that Dick Smith misrepresented material information to Sovereign was rank speculation. Brown presented no witnesses from Sovereign to support her claims.

There was no evidence that Dick Smith ever represented to Sovereign that Brown's income was $2,800.00 per month. The Sovereign Bank Application Status requested proof of income and what Guthrie submitted was a letter provided by Brown from Allen University stating that she earned $1,720.00 per month and a pay stub provided by Brown from her second job at Shoney's where she represented that she earned $1,000.00 per month in wages and tips. (R. p. 126, line 7 – p. 128, line 4 and pp. 211 – 212).

Moreover, Brown completely overlooks the underwriting process. As Guthrie explained,

> They verify employment, references if need be, proof of insurance, documentation on all paperwork we send them, signatures, collateral, the car she bought, terms.
>
> * * *
>
> And they call anybody, if they have to, for verification.

(R. p. 128, lines 6 – 21).

Brown's new argument about why she abandoned her car is specious. On direct examination, she testified that she went back to return the vehicle (R. p. 35, line 10), not that she decided to leave it after returning to Dick Smith.

Brown didn't "have to wonder" about whether Guthrie's request for a favor to help her influenced Sovereign's decision to fund her contract. Brown testified that she made two telephone calls to Sovereign, one to Valerie Whitman and one to Jimmy Bonners. (R. p. 77, lines 13-25). Brown was also given a copy of the Sovereign Bank Application Status **which identified Sovereign's credit analyst as Kelly Trotta** and **her toll free telephone number, (888) 765-5571**. (R. pp. 14, 150, lines 23-25 and p. 196). If Brown had any question about her approval and funding by Sovereign, all she had to do was ask.

Brown testified that when she abandoned the car, she would be seeking legal advice and that Hiller would be hearing from her lawyer. (R. p. 37, lines 8 – 17). Hiller acknowledged receiving a telephone call from a lawyer on Brown's behalf. (R. p. 98, line 24 – p. 99, line 2). If Brown couldn't figure it out on her own, any lawyer interested in clarification could have figured it out with a single telephone call or letter of representation to Sovereign.

The Court of Appeals properly concluded that Brown's decision to abandon her car resulted from statements made by representatives of Sovereign, not Dick Smith

IV. THE DECISION OF THE COURT OF APPEALS IS BASED UPON THE GROUNDS RAISED BY THE ISSUES ON APPEAL.

The Opinion of the Court of Appeals, including the cover page, is less than 3 pages long. The Court of Appeals properly concluded: (1) that Brown's decision to abandon the Mazda was prompted by an erroneous letter that she received from Sovereign; and (2) that Dick Smith did not engage in bad faith or treat Brown in an unfair and deceptive manner.

Brown complains that the Court of Appeals did not specifically address the trial court's erroneous finding that Brown was interested in a Nissan and that such a vehicle could not be found. Surely, Brown can not seriously dispute these issues. Brown's testimony on direct examination addressed her interest in only one vehicle, the **Mazda**. (R. p. 28, line 21 – p. 29, line 6). As the lower court properly found, Dick Smith received a letter from Sovereign dated November 1, 2007, indicating that the **Mazda** had been repossessed from Brown. (R. p. 9, par. 27).

Brown's Final Brief of Respondent did not address these issues. Brown raised these issues for the first time in her Petition For Writ Of Certiorari in violation of Rule 242(d)(2), SCACR.

Except for the lower court's mistaken conclusion that Dick Smith received funding for a Nissan rather than a Mazda, whether Brown was interested in a Nissan or a Mazda didn't matter and whether Dick Smith could find a Nissan within Brown's budget didn't matter. What mattered was whether Dick Smith received *funding* on the contract for the **Mazda** Brown financed through Sovereign before Brown abandoned the vehicle.

As set forth above, Brown did not know and could not have been expected to know when Dick Smith received funding on the contract from Sovereign. The trial court certainly had no independent knowledge about that issue. The only witness presented at trial with knowledge about that issue was Dick Smith's treasurer, McFall.

His testimony was clear that Dick Smith received funding on the contract from Sovereign three days before Brown abandoned the Mazda. (R. pp. 114 – 117). If there was any legitimate reason to challenge McFall's testimony, Brown could have presented a witness from Sovereign but chose not to do so.

As set forth in Argument III above, Brown's testimony about why she abandoned the Mazda at trial was clear, i.e., **the erroneous letter she received from Sovereign**, a party she chose not to sue. Now, 5 years later, she attempts to distinguish between her motive for bringing the car back and her reasons for leaving the car when she brought it back. This claim was never raised at trial or in Brown's Final Brief Of Respondent.

CONCLUSION

There is no novel question of law here. There was no dissent in the Court of Appeals. The decision of the Court of Appeals is not in conflict with a prior decision of this Court. There are no constitutional issues involved. There is no federal question involved. In short, there were no special

or important reasons for granting a writ of certiorari. See Rule 242(b), SCACR. Perhaps, ceritiorari was improvidently granted.

In her brief, Brown spends very little time addressing the facts. The facts don't support her position. Rather, she simply implores this Court to find any violation of the Dealers Act, something she has failed to do on her own.

The Opinion issued by the Court of Appeals was unpublished. Appellate decisions in South Carolina in which a motor vehicle dealer actually prevailed are rare. Perhaps, this is an opportunity to remind the bench and bar that notwithstanding the availability of double actual damages under the Dealers Act and a bond for payment of same, a litigant must first prove conduct that is arbitrary, in bad faith, or unconscionable, as well as causation, before the low hanging fruit can be claimed.

The Court of Appeals properly concluded that Brown abandoned her car in reliance upon an erroneous letter issued by Sovereign, not Dick Smith. Brown's contract for the purchase of the car had already been funded by Sovereign when Brown abandoned the car against the advice of Dick Smith.

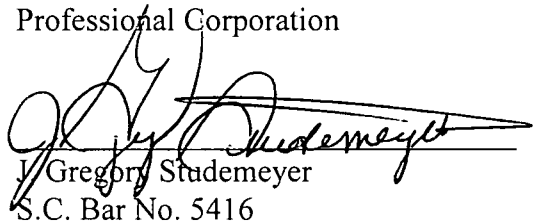
Fortunately for Brown, and perhaps Sovereign, Brown was never sued for the deficiency arising out of the repossession and sale of the Mazda. By the time the trial court issued its initial ruling, the statute of limitations on Sovereign's claim for the deficiency had expired.

Brown's difficulty was caused by Sovereign, not Dick Smith. In any event, Brown suffered no damage. For all of the reasons set forth herein, the Respondents submit that the decision of the Court of Appeals should be affirmed.

Signature Line Follows

Respectfully submitted,

J. GREGORY STUDEMEYER
Professional Corporation



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September 4, 2014

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2013-000417

Latoya Brown, ... Petitioner,

v.

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

PROOF OF SERVICE

I certify that I have served the Brief of Respondents on Latoya Brown by hand-delivery on September 5, 2014, to her attorney of record, William T. Toal, Esq., Johnson Toal & Battiste, PA, 1615 Barnwell Street, Columbia, SC 29201.

September 5, 2014

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