THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III

2012-CP-39-01554

Julie Freeman Hair,

Appellant-Respondent,

v.

J.L.H. Investments, LP, aka Hendrick Honda of Easley,

Respondent-Appellant.

RESPONDENT'S BRIEF OF RESPONDENT-APPELLANT HENDRICK HONDA OF EASLEY

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court act within its discretion in denying Julie Freeman Hair's motion for prejudgment interest on the grounds that an award under the Dealers Act is neither liquidated nor demandable?

STATEMENT OF THE CASE AND FACTS

Hendrick Honda of Easley ("Hendrick Honda") incorporates its Statements of the Case and Facts from its Appellant's Brief in this matter. As set forth there, this case is hardly the cut and dry case for recovery of "illegal" closing fees suggested by Julie Freeman Hair ("Hair") in her Appellant's Brief.

Hair's statement of the case incorrectly summarizes the jury's findings in this matter. The general verdict form submitted to the jury did not include any specific findings, much less any finding that "Hendrick Honda had arbitrarily and unfairly charged closing fees that were not levied for the purpose of reimbursing closing costs" as stated by Hair in her Appellant's Brief. (R. at 1666).

Hair's factual recitation also takes liberties with the evidence submitted at trial, as discussed below. With respect to Hendrick Honda's registration and disclosures, the South Carolina Department of Consumer Affairs ("Department") expressly authorized the form and content of the closing fee disclosures Hendrick Honda provided to its customers. The Department has provided two written sources of guidance for dealerships seeking to collect closing fees in compliance with S.C Code Ann. § 37-2-307 (the "Closing Fee Statute" or "Statute"): (1) Administrative Interpretation No. 2.307-0101 ("Administrative Interpretation") and (2) the Department's forms for registering a closing fee.

Hendrick Honda registered a closing fee of between $249 and $399 with the Department in each of the years at issue in this case. (R. at 1547:20-1549:20, 1736-1745). Hendrick Honda did so using the registration form provided by the Department, which the Department processed, marked "CERTIFIED MOTOR VEHICLE DEALER CLOSING FEE," and returned to Hendrick Honda. (*Id.*). The form provides the

following instruction: "3. Listed below on this form is a suggested format for disclosing closing fees. It is not required that dealers use this format and language on this form, *but if you do, you will be deemed compliant if the form is properly filled out.*" (R. at 1736, 1738, Supp. R. at 2 (emphasis added); *see also* R. at 1727). The disclosure language suggested by the Administrative Interpretation and the Department's registration forms and used by Hendrick Honda, states as follows:

> THIS DEALERSHIP CHARGES CLOSING FEES AS A MEANS OF REIMBURSING IT FOR CERTAIN OVERHEAD COSTS SUCH AS DOCUMENT RETRIEVAL AND DOCUMENT PREPARATION. IT IS A CHARGE THAT IS PERMITTED BUT NOT REQUIRED BY LAW. THE FULL CASH PRICE CHARGED AT ANY DEALERSHIP DEPENDS ON MANY FACTORS, INCLUDING ALL PRODUCTS AND SERVICES BOUGHT WITH THE VEHICLE.

(R. at 1728, 1736-47)

The Department does not require dealerships to use this form language, but Danny Collins, the Department's Deputy for Regulatory Enforcement and General Counsel, testified that if a dealership chooses to use it, "it gives them better protection." (R. at 1546:12-18). As provided in the Administrative Interpretation, "[f]orms considered to be deceptive or that misstate the law will be rejected by the Department." (R. at 1726). None of Hendrick Honda's registration forms were rejected by the Department. Nothing in the Closing Fee Statute, the Administrative Interpretation, or the registration forms requires any kind of formal accounting as a requirement. Hendrick Honda posted the form language in order to avail itself of the protection referenced in the Department's Administrative Interpretation and in Collins's testimony. In addition, Hendrick Honda trained its employees to answer any questions about the closing fee with a response that was consistent with the Department's advice and the understanding of

General Manager Don Pendleton and Hendrick Honda at that time, which is that the fees were charged to reimburse certain overhead costs such as document preparation and retrieval. (R. at 1470:4-11, 1569:10-1660:9). Nothing about the form notice or the statements given by employees was untruthful or misleading.

As noted in the Administrative Interpretation, closing fees can go by many names, such as "a 'closing' or 'documentation' fee (also occasionally denominated as an 'administrative,' 'processing,' or 'procurement' fee)"). (R. at 1725). Therefore, Hendrick Honda's use of the terms "procurement fee" and "administration fee" in the Hair paperwork is not in violation of the Statute or the Administrative Interpretation.

With respect to how the closing fee was determined at Hendrick Honda, the evidence at trial showed that Pendleton set the closing fee between 2002 and 2006 based on his thorough knowledge of the dealership's costs and relying on the guidance of the Closing Fee Statute and the Administrative Interpretation. (R. at 1495:4-1512:20). By 2002, Pendleton was well aware of how the fee was set and had full knowledge of all of the costs incurred by the dealership.[1] The evidence showed that Hendrick Honda charged closing fees to reimburse closing costs, including some components of salaries. (R. at 1504:6-1512:20). There was no evidence that closing fees were charged as a measure of profit or to pad senior management pay. (*See id.*). Hendrick Honda's expert witness, Michael Thompson, the only certified public accountant to testify at trial, confirmed that Hendrick Honda's closing costs, calculated according to generally accepted accounting

[1] Pendleton was the only witness who was asked specific questions about how the fee was set at different times. Randy Watkins, Hendrick Honda's Vice President for Financial Services and Transaction Compliance, was not asked about how the fee came to be set, nor did he testify that the closing fees at Hendrick Honda were unfair, unreasonable, or exceeded Hendrick Honda's costs of document preparation, storage, and retrieval.

principles, significantly exceeded its closing fees for the entire period at issue in this case. (R. at 1582:22-1585:3).

ARGUMENTS

I. THE TRIAL COURT APPLIED THE CORRECT STANDARD IN DENYING HAIR'S MOTION FOR PREJUDGMENT INTEREST, AND THAT DETERMINATION CANNOT BE REVERSED ABSENT AN ABUSE OF DISCRETION.

Consistent with this Court's prior rulings, there is nothing inherently illegal about closing fees. *See Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 402, 472 S.E.2d 242, 244 (1996). A closing fee is merely "an element of the negotiated *cash price* of the vehicle." *Id.* (emphasis added). Following *Fanning,* the General Assembly enacted the Closing Fee Statute, which provides for administrative oversight of closing fees by the Department, the registration of closing fees, and for certain disclosures to customers. S.C. Code Ann. § 37-2-307. Hendrick Honda proved at trial that it complied with the Statute at all times.[2]

With respect to the issue raised in Hair's appeal, "[t]he award of prejudgment interest will not be disturbed on appeal unless the trial court committed an abuse of discretion." *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 435, 673 S.E.2d 448, 457-58 (2009); *Jacobs v. Am. Mut. Fire Ins. Co.*, 287 S.C. 541, 544, 340 S.E.2d 142, 143 (1986). Further, "pre-judgment interest is not automatically applied to judgments." *Dixie Bell, Inc. v. Redd*, 376 S.C. 361, 373, 656 S.E.2d 765, 771 (Ct. App. 2007).

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[2] Hendrick Honda incorporates its arguments from its Appellant's Brief by reference. In the event the judgment is reversed, the issue raised in Hair's cross-appeal would be moot. *See Keane v. Lowcountry Pediatrics, P.A.*, 372 S.C. 136, 148, 641 S.E.2d 53, 60 (Ct. App. 2007) (finding prejudgment interest cannot be awarded in absence of an award of damages).

S.C. Code Ann. § 34-31-20(A) provides for prejudgment interest in cases "wherein any sum or sums of money shall be *ascertained* and, *being due*, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum." (emphasis added). Thus, prejudgment interest may only be recovered when a payment is (1) demandable and (2) liquidated. *Future Group v. Nationsbank*, 324 S.C. 89, 101, 478 S.E.2d 45, 51 (1996) (holding that to recover prejudgment interest, a claim must be demandable either by agreement of the parties or by the operation of law at some time "before entry of judgment"). Liquidated damages apply where a "sum is certain or capable of being reduced to certainty based on a mathematical calculation previously agreed to by the parties." *Butler Contracting, Inc. v. Court Street, LLC*, 369 S.C. 121, 133, 631 S.E.2d 252, 258 (2006). "In general, damages are unliquidated where they are an uncertain quantity, depending on no fixed standard, referred to the wise discretion of a jury, and can never be made certain except by accord or verdict." *Dixie Bell, Inc.* at S.C. 370-71, 656 S.E.2d at 770. As noted by Hair, "it is the character of the claim" that determines whether a court may award prejudgment interest. *Butler Contracting, Inc.* at 133, 631 S.E.2d at 259.

II. AN AWARD UNDER THE DEALERS ACT IS NEITHER LIQUIDATED NOR DEMANDABLE; THEREFORE, THE TRIAL COURT CORRECTLY DENIED HAIR'S MOTION FOR PREJUDGMENT INTEREST.

Hair sought recovery under the Dealers Act. She did not allege a claim for breach of contract, nor did she allege a claim for conversion. Thus, the analysis of whether Hair is entitled to prejudgment interest begins with an analysis of the measure of damages under the Dealers Act.

As set forth in the Dealers Act,

> 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.

S.C. Code Ann. § 56-15-40. In a Dealers Act case, a plaintiff is required to prove the dealer's underlying conduct caused him or her damage. *See Barton v. Superior Motors, Inc.*, 309 S.C. 491, 494, 424 S.E.2d 524, 526 (Ct. App. 1992) (affirming grant of directed verdict motion in Dealers Act case where there was no testimony showing the connection between the underlying conduct and the alleged damages). Actual damages are the amount needed to put the plaintiff in the same position he or she would have enjoyed if there had been no violation. *Austin v. Specialty Transp. Servs., Inc.*, 358 S.C. 298, 312, 594 S.E.2d 867, 874 (Ct. App. 2004). According to Hair's theory of liability in this case, the actual damages would be the difference, if any, by which the closing fee paid by Hair exceeded the dealership's "permissible" and "actual closing costs such as document preparation and document retrieval."[3]

As instructed by the trial court, "if the Defendant's closing fees exceeded the amount necessary to reimburse him for his actual closing costs, then actual damages [are] *a portion* of that fee which exceeded actual closing costs." (R. at 1661:19-23 (emphasis added); *see* R. at 1606:25-1607:1 (the jury "[could] find all of it was not part of the

[3] Hendrick Honda has argued the following in its cross-appeal: (1) the Dealers Act does not apply to cases arising from the imposition of closing fees in a vehicle purchase; (2) there was nothing improper about Hendrick Honda's closing fee, and it complied with the Closing Fee Statute as certified by the Department; and (3) Hair failed to prove any damages stemming from any alleged violation because there was no evidence showing her total purchase price would have been less had Hendrick Honda not charged a closing fee or had Hendrick Honda used a different method for determining its closing fee.

closing, [or] some of it")). The discretion afforded to the jury when reaching its award shows that the damages were not a sum certain and were not demandable prior to trial.

In the only reported case addressing whether prejudgment interest was allowable for a Dealers Act claim, this Court affirmed the trial court's denial of prejudgment interest because it found the damages were not liquidated. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 58-59, 691 S.E.2d 135, 153-54 (2010) ("Because [purchaser] alleged claims of fraud, constructive fraud, negligence, and *violations of state and federal motor vehicle acts* his prospective damages were unliquidated and could not have been ascertained without evidence of the retail value of the truck.") (emphasis added).

In *Austin*, the purchaser of a used car sought recovery against the dealer, "after he experienced problems with his used vehicle and discovered the vehicle had sustained extensive damage prior to the sale." *Id.* at 31, 691 S.E.2d at 139. In its analysis of the purchaser's claim under the Dealers Act, this Court reiterated that "[t]he measure of damages for the sale of a defective vehicle is the difference in fair market value between the car, having been wrecked, and the value of the car had it not been wrecked at time of sale." *Id.* at 43, 691 S.E.2d at 146, *quoting Barton* at 494, 424 S.E.2d at 526. In *Austin*, the jury found for the purchaser under the Dealers Act, and the recovery "equaled the purchase price of $25,981.10 plus $390.00 for the taxes and tags." *Id.* at 58, 691 S.E.2d at 154. This Court rejected the purchaser's argument that he was entitled to prejudgment interest simply because the jury's verdict was equal to the purchase price of the vehicle.

Similarly, in this case, the amount of the fee alone is not determinative of the measure of damages, and therefore, Hair's claims "were not liquidated at the time [her]

claim arose." *Id.* Given this precedent, prejudgment interest is not available in a case for damages under the Dealers Act.[4]

Hair's brief incorrectly characterizes the measurement of damages for a claim under the Dealers Act as a defense of Hendrick Honda. To the contrary, damages are an element of a claim under the Dealers Act on which the plaintiff has the burden of proof. Proof and proper measurement of damages according to law are not in any way a defense to a claim. The fact that Hair sought to maximize her recovery by seeking the return of all fees collected is not surprising; however, it does not change the nature of the claim from unliquidated, as found in *Austin*, to liquidated and subject to an award of prejudgment interest.

The same reasoning applies to Hair's argument that the full amount of the fee was demandable prior to the entry of judgment. That cannot be correct given the measure of damages required to establish a claim under the Dealers Act. This rule is bolstered by the language of the Dealers Act, which provides, "any person who shall be injured in his business or property by reason of anything forbidden in this chapter *may sue therefore in the court of common pleas* and shall recover double the actual damages by him sustained." S.C. Code Ann. § 56-15-110 (1) (emphasis added); *see also Tilley v. Pacesetter*, 355 S.C. 361, 375-76, 585 S.E.2d 292, 299 (2003) (holding pursuant to a statute providing for penalties if a creditor violates the statute, that the consumer "had no right to demand [the creditor] pay penalties until [the creditor's] liability was established"). The Dealers Act does not provide a mechanism for a prejudgment

[4] Hair has not sought to argue against the precedent set in *Austin*.

demand, nor would that be possible given the unliquidated nature of damages under the Dealers Act.

Hair's argument that the damages she sued to recover were demandable relies in part on cases involving claims for conversion. (*See* Pl. Mot. at 1-2 (citing *Robbins v. First Fed. Sav. Bank*, 294 S.C. 219, 224-25, 363 S.E.2d 418, 421-22 (Ct. App. 1987)). However, the measure of recovery for the damages under a conversion claim includes prejudgment interest and is not governed by the prejudgment interest statute, § 34-31-20(A). *See Tilley* at 375-76, 585 S.E.2d at 299 ("As a general rule, the measure of damages for the conversion of personal property is the value of the property with interest thereon, and the jury may give the highest value up to the time of trial."). Here, Hair has not asserted a claim for conversion, and the cases awarding prejudgment interest as a component of damages on a conversion claim do not apply.[5]

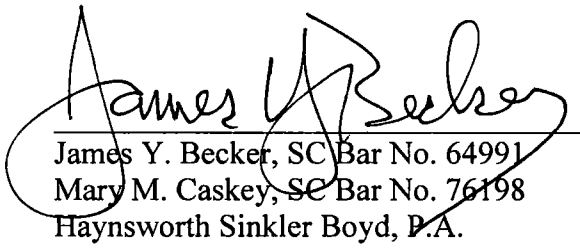
CONCLUSION

For all of these reasons, the trial court correctly denied Hair's motion for prejudgment interest. Hair's claim was neither liquidated nor demandable at the time her cause of action arose. Therefore, to the extent this issue is not rendered moot by the

[5] South Carolina statutory and case law includes other examples where prejudgment interest is available as an element of damages; however, given *Austin* and S.C. Code Ann. § 56-15-110 (1), Dealers Act claims do not fall into this category. *See, e.g., Republic Textile Equip. Co. of S.C. v. Aetna Ins. Co.*, 293 S.C. 381, 390-91, 360 S.E.2d 540, 545 (Ct. App. 1987) ("[W]here an insured seeks to recover interest under a contract of indemnity unless interest is expressly excluded by the contract, it is allowable as an element of damage."); *Vick v. S.C. Dep't of Transp.*, 347 S.C. 470, 481, 556 S.E.2d 693, 699 (Ct. App. 2001) ("South Carolina case law implies that interest recoverable in inverse condemnation actions is an issue to be charged to the jury for its determination as a measure of damages."); S.C. Code Ann. § 28-2-420 (providing for prejudgment interest in condemnation cases).

Court's ruling on Hendrick Honda's cross-appeal, the trial court's ruling denying prejudgment interest must be affirmed.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

I certify that the Final Briefs of Respondent-Appellant in this matter comply with Rule 211(b), SCACR and the April 15, 2014 Order of the South Carolina Supreme Court relating to personal data identifiers.

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PROOF OF SERVICE

I hereby certify that one copy of the Appellant's Brief of Respondent-Appellant Hendrick Honda of Easley, Respondent's Brief of Respondent-Appellant Hendrick Honda of Easley, Reply Brief of Respondent-Appellant Hendrick Honda of Easley, and Certificate of Counsel in the above-referenced matter were served on the following counsel of record for Appellant-Respondent, in the manner indicated below, on December 4, 2014:

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