THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM PICKENS COUNTY

Court of Common Pleas

Doyet A. Early, Circuit Court Judge

Case No. 2012-CP-39-01554

Appellate Case No. 2014 - 001110

Julie Freeman.....Appellant – Respondent

v.

J.L.H. Investments, LP, a/k/a Hendrick Honda of Easley.....Respondent – Appellant

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FINAL REPLY BRIEF OF APPELLANT-RESPONDENT

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CASES

ARGUMENT

Appellant-Respondent Julie Hair hereby submits this Reply to the Brief of Respondent-Appellant Hendrick Honda of Easley dated September 8, 2014. For the reasons stated below and those stated in Appellant-Respondent's Brief dated, July 8, 2014. Ms. Freeman respectfully requests that the trial court's Order denying the Motion for Prejudgment Interest be reversed and that this case be remanded back for a determination of the total amount of prejudgment interest owed.[1]

1. The Austin case cited by Hendrick in its response brief is not on point and does not deal with liquidated damages like the damages at issue in this case.

The damages in this case are the total amount of the fees collected by Hendrick because the jury determined that the fees collected were not charged for the permissible purpose of reimbursing closing costs. This amount was ascertainable at the time the Complaint was filed by simply looking at each customer's closing documents and there was no need for testimony to calculate the amount. Plaintiff's closing documents state her damages and provide:

[1] Hendrick erroneously argues in its "Facts" section that the jury did not find that Hendrick acted arbitrary and unfairly by charging fees that were not for purposes of reimbursing closing costs. See Hendrick Respondent brief, p. 2. Hendrick ignores the fact that the jury found for the Plaintiff after being charged on the cause of action for violating the Dealers Act which requires a finding that Hendrick acted arbitrarily and unfairly. [R.p. 1660, l. 19 to p. 1661, l. 5]. Similarly, Hendrick ignores the fact that the jury found for the Plaintiff and returned all of the illegally collected fees after being charged that Hendrick could not be liable if Hendrick charged fees to reimburse its closing costs. [R.p. 1656, l. 6 to p. 1657, l. 4]. Hendrick's arguments ignore the jury charge, ignore the role of the jury as the fact finder in our legal system, and should be rejected.

CASH PRICE OF VEHICLE & ACCESSORIES	$	17975.00
TRADE-IN ALLOWANCE	$	900.00
DIFFERENCE	$	17075.00
PROCUREMENT FEE	$	299 00
STATE TAXES	$	300.00
LICENSE, LICENSE TRANSFER, TITLE, REGISTRATION FEE	$	39.00
TOTAL PRICE OF UNIT	$	17713.00
LIEN PAYOFF OWED CUSTOMER GUARANTEES	$	377.57
DOWN PAYMENT	$	N/A
BALANCE	$	18090.57

[R.p. 1723, buyers order]. The damages here are liquidated because they were ascertainable at the time the complaint was filed. By comparison, Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 691 S.E.2d 135 (2010) (the case relied upon by Hendrick) dealt with damages that needed testimony in order to calculate the amount- i.e. unliquidated damages.

The damages at issue in Austin were those suffered by a plaintiff after buying a car without knowing the car had been in a prior wreck. The Court held the measure of damages in that case was as follows:

> The 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."

Austin, 387 S.C. at 43, 691 S.E.2d at 146 (citations omitted). The plaintiff, in the Austin trial, was required to presented expert testimony by an automobile appraiser to establish the fair market value of the vehicle. Austin, 387 S.C. at 40-41, 691 S.E.2d at 44-45 (2010).[2] This

[2]The expert's trial testimony is described in the opinion as follows: "In terms of assessing the value of Austin's truck, Morris testified that he inspected the truck and identified parts on the truck that had evidently been damaged and repaired. He characterized the damage as 'extensive.' Following his inspection, Morris discussed his assessment with Disher. Based on these data points, Morris ultimately testified to a reasonable degree of certainty that Austin's truck had a 'zero retail value' on June 1, 2002, the day that Austin purchased the vehicle. Morris explained

testimony was needed in order to calculate the damages and thus the damages were not liquidated at the time the case was filed. The Austin court held:

> Because Austin 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**. Given Austin's monetary recovery could not have been reduced to certainty, the trial judge correctly denied Austin's request for prejudgment interest.

Austin., 387 S.C. 58-59, 691 S.E.2d at 154 (emphasis added).

Again, the damages at issue in this case are different than the damages at issue in Austin. No testimony was needed to calculate the amount of the illegally collected closing fees here because this amount could be ascertained from the face of each customer's buyers order. There was no need for testimony to calculate the amount. Accordingly, the Austin case is not on point and has no bearing on whether prejudgment interest is appropriate in this case. Thus, all of Hendrick's arguments relying on Austin should be rejected.

2. The damages sought in the Complaint are Return of All of the Illegally Collected Closing Fees Which Was A Liquidated Amount.

Hendrick wrongly argues that that: "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." Hendrick brief, p. 7. This statement is wrong and misstates Plaintiff's allegations. Plaintiff has always contended that the damages that should be returned to all customers are the total amount of the illegally collected closing fees. For example, the Complaint filed in August 2006 states in part:

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that this value was based on the damage that had been done to the vehicle plus potential safety issues that were created by this damage."

77. Upon information and belief, Defendants each annually illegally make several hundred thousand dollars off the deceptive use and placement of the "administrative fee" line item and said illegal fees should be disgourged.

R. p. 125, para 77. As shown above, Plaintiff's theory has always been that the illegally collected closing fees should be disgorged (returned in their entirety to the Plaintiff and the affected customers). This is important because it is Plaintiff's allegations that determine the propriety of prejudgment interest not Hendrick's arguments based on off-set that the damages should be for less the total amount collected.

> The proper test for determining whether prejudgment interest may be awarded is whether the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose. The right of a party to prejudgment interest is not affected by rights of discount or offset claimed by the opposing party. **It is the character of the claim and not the defense to it that determines whether prejudgment interest is allowable.**

Butler Contracting, Inc. v. Court St., LLC, 369 S.C. 121, 133-34, 631 S.E.2d 252, 259 (2006) (emphasis added). Again, the amount of the illegally collected closing fees was known at the time the Complaint was filed because it was ascertainable on the face of each Plaintiff's closing documents. Plaintiff has consistently sought return of the entire amount of the illegally collected fees.[3] Thus, the damages were liquidated and an award of prejudgment interest should have been made in this case.

[3]The enactment of the Closing Fee Statute definitively shows that charging fees that are not in conformity with the statute is illegal. Any other interpretation would require a finding that the General Assembly engaged in a meaningless act when they passed the statute. Ms. Freeman and the all other purchasers were damaged by paying fees that were, as found by the jury, not for the permissible purpose of reimbursing closing fees. The damages at issue are the payment of illegal fees. Hendrick is not permitted under the Dealers Act to charge a fee that has nothing to do with reimbursing closing costs and then somehow get the benefit of an offset for what their

CONCLUSION

Ms. Freeman requests that the Court find that the damages at issue were a sum certain that was capable of mathematical calculation without additional testimony. Thus, Austin is not on point and Hendrick's arguments based on Austin should be rejected. As such, Ms. Freeman respectfully requests that the trial court's Order denying the Motion for Prejudgment Interest be reversed and that this case be remanded back for a determination of the total amount of prejudgment interest owed.

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closing costs could have been. *See* Kucharski v. Rick Hendrick Chevrolet Ltd. P'ship, 2002-UP-584, 2002 WL 31386090 (S.C. Ct. App. Sept. 18, 2002) ("To grant the offset to which the dealership claims to be entitled would confer a benefit which, in the context of the Dealers Act, would be inequitable and subvert the Act's remedial purpose. ...Considering the Dealers Act remedial purpose, the jury was free to conclude that actual damages included the value of the vehicle without any offset allowed for the amount of the debt.").

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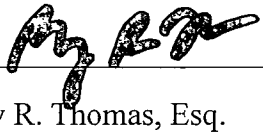
CERTIFICATE OF RULE 211(b) COMPLIANCE

I certify that this final brief complies with Rule 211(b), SCACR

By: 

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PROOF OF SERVICE

The undersigned of the law offices of Richardson, Patrick, Westbrook & Brickman, LLC attorneys for the Respondent, do hereby certify that service of (1) the FINAL APPELLATE BRIEF OF APPELLANT-RESPONDENT; (2) the FINAL RESPONSE BRIEF OF APPELLANT-RESPONDENT; and (3) the FINAL REPLY BRIEF OF APPELLANT-RESPONDNET was made on all counsel of record, specified below, by mailing a copies of the same by United States Mail, postage prepaid, to the following addresses:

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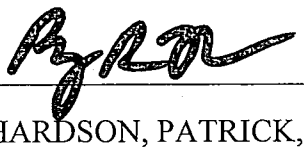
By: 

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