

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III

Case No. 2012-CP-39-01554

Appellate Case No. 2014-000642

RECEIVED

APR 7 2015

S.C. Supreme Court

Julie Freeman Hair,

Appellant-Respondent,

v.

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

Respondent-Appellant.

SUPPLEMENTAL RECORD ON APPEAL

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FREEMAN v. J.L.H., LP, a/k/a HENDRICK HONDA OF EASLEY

SUPPLEMENTAL RECORD ON APPEAL

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Becker letter to Judge Early re Double DamagesSupp.R.000010

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
Case No. 2012-CP-39-01554
2013 OCT 21 P 12:35

STATE OF SOUTH CAROLINA
COUNTY OF PICKENS

Julie Freeman, et al.

Plaintiffs,

v.

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

Defendant.

**DEFENDANT'S RESPONSE TO PLAINTIFF'S
MOTION TO DOUBLE DAMAGES AWARD IN THIS CASE**

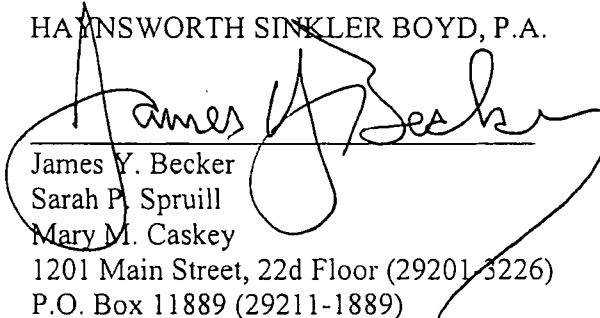
Defendant Hendrick Honda of Easley ("Defendant") responds to Plaintiff's Motion to Double the Damages Award in this Case as follows:

Defendant specifically renews its arguments that closing fees are governed by the Closing Fee Statute, S.C. Code Ann. § 37-2-307, and not by the Dealers Act, S.C. Code Ann. § 56-15-30, *et seq.* Defendant further renews and reserves its argument that Plaintiff has failed to establish that Defendant acted arbitrarily, in bad faith, or unconscionably in charging closing fees, or that Defendant engaged in any activity that would entitle Plaintiff to relief. Defendant further renews and reserves its arguments relating to the propriety of the jury's calculation of damages.

Subject to Defendant's arguments set forth in its pleadings, motions, and memoranda filed to date, at trial, and in its post-trial motions, Defendant acknowledges that S.C. Code Ann. § 56-15-110(1) provides for a plaintiff to recover double the actual damages sustained for a violation of the Dealers Act. Defendant notes that the language of the statute limits this doubling to actual damages. Defendant does not concede that Plaintiff is entitled to any damages, pre-judgment interest, or equitable relief.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.



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*Attorneys for J.L.H. Investments, Inc. d/b/a
Hendrick Honda of Easley*

October 18, 2013

2013 OCT 21 P 12: 35

Julie Freeman,

Plaintiffs,

v.

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

Defendants.

CERTIFICATE OF SERVICE

I, the undersigned employee of the law offices of Haynsworth Sinkler Boyd, P.A., attorneys for Defendant J.L.H. Investments, LP, d/b/a Hendrick Honda of Easley, do hereby certify that I have served counsel specified below in this action with a copy of the Document specified below by e-mail only except as otherwise noted to the following e-mail addresses:

DOCUMENT: Defendant's Response to Plaintiff's Motion to Double Damages Award in This Case

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October 18, 2013



Charlotte D. Ariail, Legal Secretary

Supp.R.000005

STATE OF SOUTH CAROLINA
COUNTY OF PICKENS

IN THE COURT OF COMMON PLEAS
Case No. 2012-CP-39-01554

Julie Freeman, et al.

Plaintiffs,

v.

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

Defendant.

**DEFENDANT'S SUPPLEMENTAL RESPONSE TO PLAINTIFF'S
MOTION TO DOUBLE DAMAGES AWARD IN THIS CASE**

Defendant Hendrick Honda of Easley ("Defendant") supplements its response to Plaintiff's Motion to Double the Damages Award in this Case as follows:

While Defendant acknowledges that S.C. Code Ann. § 56-15-110(1) provides for a plaintiff to recover double the actual damages "by him sustained," Defendant does not concede that Plaintiff is entitled to have any damages doubled that she may have obtained on behalf of a group.

Section 56-15-110(1) authorizes a private right of action on behalf of an individual and provides that if an individual proves damages, then the individual is entitled to double actual damages. Subsection 1 expressly limits the damages that can be doubled to those actual damages sustained by the individual bringing the suit, and does not provide for the doubling of any damages on behalf of anyone else.¹ Subsection 1 also provides for the recovery of fees and costs.

¹ Courts have recognized that an individual may pursue a class action under subsection (1), but only when Rule 23 applies. In *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 404 S.E.2d 200 (1991), the Supreme Court held in a class action that Rule 23(a)(5)'s requirement that the "amount in controversy" exceed \$100.00 included double damages available under S.C. Code Ann. § 56-15-110(1). The plaintiff in *Gardner*, however, did not pursue

Section 56-15-110(2) allows actions to be brought “for the benefit of the whole.” This is the subsection that Plaintiff relies upon in this case as the authority for her to recover damages for the “group.” In contrast to subsection 1, subsection 2 makes no mention of doubling damages, nor does it provide for the recovery of costs or attorneys’ fees.

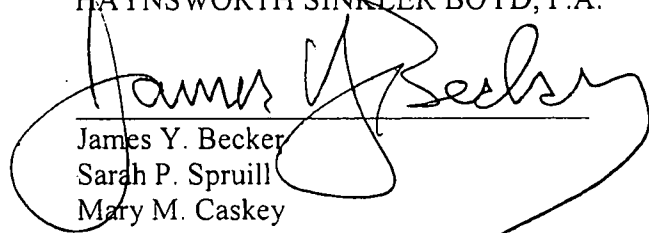
Subsections 1 and 2 deliberately provide for different relief. For the individual plaintiff, who may have a small claim but nevertheless has been injured, the legislature provided an incentive to bring the claim to remedy violations of the statute—double damages, costs, and attorneys’ fees. For the plaintiff who brings the claim “for the benefit of the whole”, no such incentive was needed because in the case of a “group” action, the damages awarded would reflect the damages sustained by the entire group. Subsection 2 specifically contemplates substantial damages because it requires the “group” to be “numerous” and it must be “impracticable to bring them all before the court.”

Based on the foregoing, Defendant requests that Plaintiff’s Motion to Double Damages be denied.

a “group” action under subsection 2 of § 56-15-110; and the issue raised in this response was not addressed by the Supreme Court. Instead, this issue appears to be one of first impression because it appears to be the first case concerning subsection 2. Because the Court has ruled in this case that Rule 23, SCRCP, does not apply, subsection (1) of § 56-15-110 does not apply to any group or mass action, and the Plaintiff “group” is limited to the recovery provided for in subsection 2.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

A handwritten signature in black ink, appearing to read "James Y. Becker", is written over a horizontal line. The signature is stylized and somewhat cursive.

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December 3, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF PICKENS

Case No. 2012-CP-39-01554

Julie Freeman,

Plaintiffs,

v.

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

Defendants.

CERTIFICATE OF SERVICE

2012-12-03 10:00 AM
JULIE FREEMAN
J.L.H. INVESTMENTS, LP
OF EASLEY, SC

I, the undersigned employee of the law offices of Haynsworth Sinkler Boyd, P.A., attorneys for Defendant J.L.H. Investments, LP, d/b/a Hendrick Honda of Easley, do hereby certify that I have served counsel specified below in this action with a copy of the Document specified below by e-mail only except as otherwise noted to the following e-mail addresses:

DOCUMENT: Defendant J.L.H. Investments, LP d/b/a Hendrick Honda of Easley's Supplemental Response to Plaintiff's Motion to Double Damages Award in this Case

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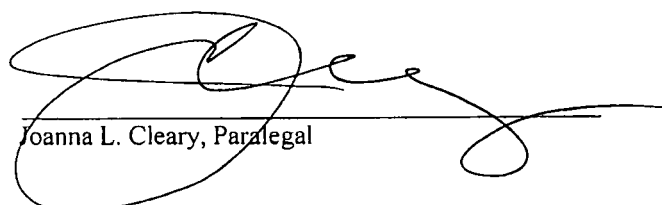
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December 3, 2013


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Via Email and U.S. Mail

January 6, 2014

The Honorable Doyet A. Early, III
Judge, Second Judicial Circuit
P.O. Box 90
Bamberg, S.C. 29033

RE: *Julie Freeman v. J.L.H. Investments, LP a/k/a Hendrick Honda*
Case No. 2012-CP-39-01554
HSB File No. 32239.0001

Dear Judge Early:

Per your instructions at the December 4th hearing in this case, enclosed are proposed orders on Plaintiff's Motion to Double Damages and Plaintiff's Motion for Prejudgment Interest.

The proposed order on Plaintiff's Motion to Double Damages includes the arguments made by Hendrick Honda of Easley prior to and at the hearing, but also includes an additional argument that Plaintiff waived her right to demand double damages by failing to present her claim to the jury. At trial, Plaintiff's counsel argued repeatedly that the only damages Plaintiff sought was a return of the closing fee she paid and the closing fees paid by the group she represents—no more, no less. The jury was never charged with subsection 1 of § 56-15-110, and Plaintiff never requested twice the amount of her actual damages, or twice the amount of damages she sought on behalf of the group she represents.

Because subsection 2 of § 56-15-110 does not provide for double damages and because the jury was never charged with the double damages provision in subsection 1 of § 56-15-110, Hendrick Honda of Easley contends that Plaintiff is not entitled to have the jury verdict in this case doubled by the Court. Thank you for your consideration.

Haynsworth
Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

The Honorable Doyet A. Early, III
January 6, 2014
Page 2

With kind regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read "James Y. Becker". The signature is fluid and cursive, with a long horizontal stroke at the end.

James Y. Becker

JYB:mmc

Enclosures

cc: (via e-mail only)

Plaintiffs' Counsel of Record

Defendant's Counsel of Record

STATE OF SOUTH CAROLINA
COUNTY OF PICKENS

IN THE COURT OF COMMON PLEAS
Case No. 2012-CP-39-01554

Julie Freeman,

Plaintiffs,

v.

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

Defendants.

**ORDER DENYING PLAINTIFF'S MOTION
TO DOUBLE DAMAGES AWARD IN THIS CASE**

This matter comes before the Court on the motion of Julie Freeman ("Plaintiff") to double the damages awarded by the jury following the trial of this case pursuant to S.C. Code Ann. § 56-15-110(1) ("Subsection (1)"). A hearing was held on December 4, 2013. Plaintiff appeared through her attorney, Brady R. Thomas, Esq., and Hendrick Honda of Easley ("Defendant") appeared through its attorney, James Y. Becker, Esq.

S.C. Code Ann. § 56-15-110, provides as follows:

(1) In addition to temporary or permanent injunctive relief as provided in Section 56-15-40(3)(c), 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, and the cost of suit, including a reasonable attorney's fee.

(2) When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief.

Throughout the seven years this case has been pending, Plaintiff has maintained that she brought this action pursuant to § 56-15-110(2) ("Subsection (2)"), which the Court has held creates a substantive right for Plaintiff to pursue a "group" action on behalf of other persons. (See Order

Denying Motions to Dismiss, filed August 1, 2007.) Nevertheless, at the hearing on Plaintiff's motion to double the damages award, Plaintiff's counsel suggested that in addition to the Dealers' Act group claim that she pursued under Subsection (2) on behalf of others similarly situated, she also *could have* pursued an action under Rule 23, SCRCP.

In this case, however, Plaintiff indisputably chose to pursue her claim under Subsection (2) alone, and sought only actual damages on her behalf and on behalf of the group she represents—not double damages. Plaintiff argued at trial that the jury should return only the fees paid to the group and did not request double damages. (*See* Trial Transcript at 840:23-25 (“We believe that [Defendant] ought to give all of these folks their money back. They ought to refund the full amount of all of that.”); *id.* at 95:21-22 (“[W]e’re going to ask you to give those illegally collected fees back.”).) Consequently, the Court specifically charged the jury that Plaintiff “cannot recover more than her loss.” (*Id.*, Charge at 12, 15:14.) The award of double damages under the Dealers Act is up to the jury, and Plaintiff waived her right to request double damages by failing to request double damages from the jury. *Compare* S.C. Code Ann. § 56-15-110(1) (simply providing that a party “shall recover double the actual damages by him sustained”), *with* S.C. Code Ann. § 39-5-110 (“If the *court* finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of § 39-5-20, the court shall award three times the actual damages sustained and may provide such other relief as it deems necessary or proper.”) (emphasis added), *and* S.C. Code Ann. § 41-10-80(c) (providing the *court* may award treble damages for violation of the Wage Payment Act) (emphasis added).)

Moreover, Subsection (2) provides for a group action “for the benefit of the whole,” but it does not authorize the doubling of an actual damages award and does not provide for the recovery of costs or attorneys’ fees. Only Subsection (1) of § 56-15-110, which provides for a

private right of action *on behalf of an individual*, contemplates an award of “double the actual damages by him sustained,” along with costs to include a reasonable attorney’s fee. Subsection (1) expressly limits the damages that can be doubled to those actual damages “*by him sustained*,” it does not provide for the doubling of any damages on behalf of anyone else. Nothing in Subsection (2) provides that a plaintiff claiming under that section may recover double damages.

The Court “must follow the plain and unambiguous language in a statute and ha[s] no ‘right to impose another meaning’” unless the literal meaning “leads to a result so patently absurd that the General Assembly could not have intended it.” *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 535-36, 725 S.E.2d 693, 695-96 (2012). The plain language of § 56-15-110 deliberately provides for different recoveries under Subsections (1) and (2). For the individual plaintiff, who may have a small claim but nevertheless has been injured, the legislature provided an incentive under Subsection (1) to bring the claim to remedy violations of the statute—the availability of double damages, costs, and attorneys’ fees. For the plaintiff who brings the claim “for the benefit of the whole” under Subsection (2), no such incentive was needed because in the case of a “group” action, the damages awarded would reflect the damages sustained by the entire group. Subsection (2) already contemplates substantial damages, even without doubling, because it requires the “group” to be “numerous” and the claims “impracticable to bring them all before the court.”

Plaintiff has repeatedly argued that Subsection (2) was her sole authority for pursuing a “group” claim, and Subsection (2) does not permit the Court to double the jury’s damages calculation. Thus, because the Court cannot grant Plaintiff a remedy that the statute does not permit and because Plaintiff did not request double damages from the jury, Plaintiff’s motion is DENIED.

AND IT IS SO ORDERED.

The Hon. Doyet A. Early, III

_____, 2014

_____, South Carolina

DM: 2162299 V.9

STATE OF SOUTH CAROLINA
COUNTY OF PICKENS

IN THE COURT OF COMMON PLEAS
Case No. 2012-CP-39-01554

Julie Freeman,

Plaintiffs,

v.

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

Defendants.

**ORDER DENYING PLAINTIFF'S MOTION
FOR PREJUDGMENT INTEREST**

This matter comes before the Court on the motion of Julie Freeman ("Plaintiff") for prejudgment interest. A hearing was held on December 4, 2013. Plaintiff appeared through her attorney, Brady R. Thomas, Esq., and Hendrick Honda of Easley ("Defendant") appeared through its attorney, James Y. Becker, Esq. For the reasons set forth below, Plaintiff's motion is denied.

S.C. Code Ann. § 34-31-20(A) provides for prejudgment interest only 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). As interpreted by South Carolina courts, 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). Neither of these requirements is met here.

First, Plaintiff's claim for damages was not demandable before the entry of the jury verdict, so she is not entitled to prejudgment interest. *See id.* at 101, 478 S.E.2d at 51 (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”) (emphasis added); *BB&T of S.C. v. Kidwell*, 350 S.C. 382, 391, 565 S.E.2d 316, 320 (Ct. App. 2002) (finding that prejudgment interest was appropriate where an amount was due and payable as of a certain date); *T.W. Morton Builders v. Von Buedingen*, 316 S.C. 388, 399, 450 S.E.2d 87, 93 (Ct. App. 1994) (finding that plaintiff, to be entitled to prejudgment interest, “had the burden of establishing a stated account and the parties’ agreement, express or implied, that the account is a true statement due at a specific point”).

Here, there is no agreement between the parties establishing a demandable amount, and Plaintiff had no right by operation of law to demand damage prior to the entry of judgment. The Dealers Act does not entitle a plaintiff to monetary recover *unless and until* a judge or jury determines liability. See S.C. Code Ann. § 56-15-110 (1) (“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”) (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”).

Plaintiff’s argument that the damages she sued to recover were demandable relies heavily on cases involving claims for conversion. (See Pl. Mot. at 1-2 (citing *Robbins v. First Fed. Sav. Bank*, 294 S.C. 219, 224-225, 363 S.E.2d 418, 421-22 (Ct. App. 1987).) But an award of prejudgment interest in a conversion case has nothing to do with the prejudgment interest statute, § 34-31-20(A), and instead, the measure of recovery for the damages under a conversion claim *includes* prejudgment interest. See *Tilley*, 355 S.C. 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.”); *McShane v. Howard Bank*, 73 Md. 135, 20 A. 775 (1890) (“Where money has been converted, the measure of damages is its amount with legal interest from the date of conversion.”). Here, Plaintiff 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.

Plaintiff’s claim for damages also fails to satisfy the second prerequisite for an award of prejudgment interest under § 34-31-20(A): The damages were not ascertainable. Plaintiff’s claim is simply a statutory claim for unliquidated damages, which differs significantly from a claim for liquidated damages. Liquidated damages involve a “sum certain or [are] capable of being reduced to certainty based on a mathematical calculation previously agreed upon by the parties.” *Butler Contracting, Inc. v. Court Street, LLC*, 369 S.C. 121, 133, 631 S.E.2d 252, 258 (2006). In contrast, as Plaintiff herself has acknowledged, unliquidated damages are damages “depending on no fixed standard, referred to the wise discretion of a jury, and can never be made certain except by accord or verdict.” (See Pl. Mot. at 2 (citing *Beckmann Concrete Contractors, Inc. v. United Fire and Casualty Co.*, 360 S.C. 127, 131, 600 S.E.2d 76, 78 (Ct. App. 2004).)

Here, the Court left the amount of damages to the discretion of the jury, and much like the court in *Tilley*, the amount of damages was not a sum certain. In her reply, Plaintiff argues that “[t]he Court in *Tilley* had discretion to award a penalty in an amount determined by the Court,” and “[t]he penalty amount in *Tilley* was not a sum certain because the amount of the penalty could vary.” (Pl. Reply at 3.) This argument is not persuasive because the situation in *Tilley* is indistinguishable from this case. Like the Court in *Tilley*, the jury here had the discretion to award damages in an amount of anything between \$0 and \$249 or \$299. The Court

specifically charged the jury that it could award damages within a “wide range . . . anywhere from zero to two hundred ninety-nine dollars.” (Trial Trans., Charge at 15:11-24.)

The Court is likewise not persuaded by Plaintiff’s contention that if the jury had awarded less than the full amount of the aggregate closing fees charged by Defendant, then the difference between the full amount of fees collected and the verdict would be a “right of discount or offset” claimed by Defendant. (Pltff. Mot. at 4.) Defendant has never argued that it was entitled to a discount or right of setoff, and the Court did not charge the jury regarding discount or setoff. Instead, the measure of damages on Plaintiff’s claim was described by the Court as follows: “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.” (See Trial Trans., Charge at 15:11-24; Trial Trans., Mot. Hrg., 62:14-15 (the jury “[could] find all of it was not part of the closing, [or] some of it”) (emphasis added).) The discretion left to the jury in determining its award shows that the damages were not a sum certain and were not demandable prior to trial. Therefore, there is no basis for an award of prejudgment interest.

Based on the foregoing, Plaintiff’s Motion for Prejudgment Interest is DENIED.

AND IT IS SO ORDERED.

The Hon. Doyet A. Early, III

_____, 2014

_____, South Carolina

DM: 2162547 V.4

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.

PROOF OF SERVICE

I hereby certify that one copy of Supplemental Record on Appeal in the above-referenced matter was served on the following counsel of record in the manner indicated below, on April 7, 2015:


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April 7, 2015


Caroline Warner