THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Master In Equity

The Honorable Joseph M. Strickland

Appellate Case No. 2019-000297

Mathes Auto Sales, Inc., Respondent/Appellant,

v.

Otis Morris, Jr., Pro Bowl Motors, Inc., Travelers Casualty & Surety Co. of America, Inc., Gerald Scott Dixon, Michael Tyrone Moore, and Dixon's Automotive, LLC, Defendants,

Of Whom Otis Morris, Jr., Pro Bowl Motors, Inc., Gerald Scott Dixon, Michael Tyrone Moore, and Dixon's Automotive, LLC, are the Appellants/Respondents.

INITIAL APPELLANT'S BRIEF OF RESPONDENT/APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUE ON APPEAL

I. DID THE MASTER COMMIT AN ERROR OF LAW BY FAILING TO AWARD DAMAGES UNDER THE DEALERS ACT BASED UPON THE FULL SUM OF ACTUAL DAMAGES FOUND AND SUPPORTED BY EVIDENCE IN THE RECORD?

STATEMENT OF THE CASE

This action was initiated by the filing of a summons and complaint on November 4, 2016. Therein, Mathes Auto Sales, Inc. ("MAS") alleged that its account with NextGear Capital, Inc. ("NextGear") had been inappropriately charged the sum of $35,368.00 for a vehicle purchased in its name, by Otis Morris, Jr. ("Morris") without its consent, from Dixon's Automotive, LLC ("Dixon's Automotive"). MAS further alleged that Morris had previously sold the same vehicle to Ms. Tarica Worthy ("Worthy") and that she was the rightful owner.[1] MAS sought a declaratory judgment that it had no liability to NextGear for any sums advanced to anyone in connection with the fraudulent transaction between Dixon's Automotive and Morris.

On February 1, 2017, MAS filed an Amended Complaint. Therein, MAS added Morris, Pro Bowl Motors, Inc. ("Pro Bowl"), Travelers Casualty & Surety Co. of America, Inc. ("Travelers"), Worthy, S.C. State Credit Union ("State Credit Union"), Dixon's Automotive, Auto-Owners Insurance, Inc. ("Auto-Owners"), and Manheim Remarketing, Inc. ("Manheim Remarketing") as additional Defendants.

In addition to declaratory relief, MAS sought an award of actual, treble, and punitive damages against Morris, Pro Bowl, Dixon's Automotive and their respective statutory sureties, Travelers and Auto-Owners, and against Manheim Remarketing. MAS asserted causes of action for violation of the Unfair Trade Practices Act, the Act Regulating Manufacturers, Distributors and Dealers ("the Dealers Act"), conversion, and negligence.

Morris, Pro Bowl, State Credit Union, Worthy, and Dixon's Automotive all filed answers denying the material allegations of the amended complaint. Thereafter, MAS settled its claims with NextGear and Manheim Remarketing and dismissed its claims against Worthy, State Credit

[1] Although an affidavit submitted by Worthy to NextGear suggested otherwise, Worthy's testimony at trial revealed that she was not a buyer in the ordinary course of business.

Union, and Auto-Owners without prejudice. MAS also agreed to settle its claims against Travelers shortly before trial.

This matter came before the Honorable Joseph M. Strickland for a bench trial on February 8, 2018, pursuant to an order of reference issued by the Honorable L. Casey Manning on October 30, 2017. The trial began on February 8, 2018, recessed for February 9, 2018, and resumed and concluded on February 12, 2018.

On June 20, 2018, an order for judgment was issued. Judgment was entered in favor of MAS against Morris, Pro Bowl, Gerald Scott Dixon ("Dixon"), Michael Tyrone Moore ("Moore"), and Dixon's Automotive for the sum of $70,736.00 in actual damages and the sum of $212,208.00 in punitive damages. On January 28, 2019, the court issued an order on post-trial motions and an order granting motion for attorney's fees and costs.

On February 21, 2019, Dixon, Moore, and Dixon's Automotive served notice of appeal. On February 22, 2019, Morris and Pro Bowl served notice of appeal. On February 26, 2019, MAS served notice of appeal.

STANDARD OF REVIEW

An action brought under the Dealers Act is an action at law. Brown v. Dick Smith Nissan, 414 S.C. 101, 777 S.E.2d 208 (2015).

An appellate court's "scope of review for a case heard by a Master-in Equity who enters a final judgment is the same as that for review of a case heard by a circuit court without a jury." "In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." "[The Court of Appeals] must affirm the Master's factual findings unless there is no evidence reasonably supporting them." Mellen v. Lane, 377 S.C. 261, 659 S.E.2d 236 (Ct.

App. 2008).

In an action at law decided by a Master-in-Equity, "[the Court of Appeals] will correct any error of law." Mellen v. Lane, supra.

FACTS

John Mathes ("Mathes") and Morris[2] have known one another since the early 1990's. They met in Columbia while Mathes was working at TranSouth Financial and Morris was working at Jim Hudson Mitsubishi. Mathes was later hired by Jim Hudson Mitsubishi and the two of them worked at the same dealership for three years.

Mathes and Morris became close friends. They played golf together, visited each other's homes, took their wives out together for dinner, and even went on vacation together.

Mathes was originally from Florence and eventually moved back and opened MAS, a small, buy here/pay here, used car business. MAS dealt in less expensive vehicles priced at $6,000 or less. Although Mathes signed a form in 2006 authorizing Morris to buy vehicles for MAS at auctions, Morris had never done so. (Vol. II, page 50 line 15 – page 51, line 12).

Morris opened Pro Bowl, a used car business in Columbia. Morris was a former football player at the University of South Carolina. Several former football players at USC including John Abraham ("Abraham"), Sterling Sharpe, Harold Green, and Gerald Scott Dixon ("Dixon") were investors in Pro Bowl.

Subsequently, Dixon and a childhood friend, Michael Tyrone Moore ("Moore") opened Dixon's Automotive, a used car business in Rock Hill. Dixon introduced Moore to Morris.

[2] According to his biography, Morris still serves as a commissioner for the South Carolina Education Lottery, serves on the Moore School of Business Advisory Committee, and as a Deacon at Bible Way Church on Atlas Road. https://www.sceducationlottery.com/Lottery/Commission (last visited August 15, 2019).

Thereafter, Pro Bowl and Dixon's Automotive conducted wholesale transactions with one another.

Worthy was an acquaintance of Abraham. Worthy bought cars from Pro Bowl and Abraham bought cars for her from Pro Bowl. All of those cars were purchased while Pro Bowl was located on Broad River Road.

In 2015, Morris and/or Pro Bowl sold the real estate on Broad River Road where Pro Bowl had operated to Jim Hudson ("Hudson"). Hudson purchased the real estate to allow his long time CFO, Don Deese ("Deese"), to operate a used car dealership there under the name of Capital City Rides ("Capital City"). Morris was retained as an employee by Capital City as a part of the transaction.

Shortly thereafter, Deese discovered that Morris had misappropriated over $100,000 from Capital City by presenting bills of sale to Capital City's office manager, representing that he had sold certain vehicles, and needed checks to pay auctions for those vehicles. Morris had previously been discharged by a Hudson dealership over a missing vehicle. Morris was discharged again over the misappropriation of the money from Capital City.

One of the cars that Worthy bought from Pro Bowl was an Audi. The Audi was flooded during a hurricane. Worthy contacted Morris about her interest in a replacement vehicle. Worthy understood that Abraham was no longer associated with Pro Bowl and that Morris had begun working for McDaniels Acura in Northeast Columbia.

Worthy met with Morris at an office on Hampton Street in Columbia, rather than at a car dealership, on May 10, 2016. There were no cars on display for sale.

Worthy executed various documents presented by Morris in connection with her purchase of a 2014 Infiniti QX60 from Pro Bowl for the sum of $36,020. Worthy had only seen images

online of the Infiniti. Morris represented that the car was coming from Florida.

Worthy planned to use the money from her insurance company for the flood damage to her Audi as a down payment on the Infiniti and to finance the balance through State Credit Union. On May 12, 2016, Worthy signed a loan application and a loan and security agreement to borrow the sum of $16,026 from the credit union. On the same day, the credit union issued its check in that amount to Pro Bowl bearing a restrictive endorsement to secure its lien. Morris deposited the check on the following day without honoring the restrictive endorsement.

On May 16, 2016, Worthy met Morris at a McDonald's across from McDaniels Acura. At that time, Worthy wrote a check for $20,000 for the balance of the purchase price and gave it to Morris. Worthy still had not yet seen the car for which she had paid a total of $36,026.

On May 17, 2016, Moore used the line of credit of Dixon's Automotive with NextGear to purchase the Infiniti, which was then located in Tampa, Florida, online through Manheim Tampa's online vehicle exchange or OVE. Manheim's OVE operates much like Ebay but is restricted to dealers.

Moore and Morris had discussed the vehicle before Moore purchased it. Moore knew that Morris was interested in buying the vehicle but had no money to pay for it. Moore believed that it would have been illegal to deliver the vehicle to Morris without payment. Moore also knew that someone like Morris with a retail license could sell a vehicle even without possession of a certificate of title.

Nonetheless, Moore made arrangements to have the car shipped directly to Morris in Columbia. Morris subsequently notified Worthy that her vehicle had arrived and made arrangements to deliver it to her. Morris told Worthy that he would need to get the vehicle back from her to get it serviced and detailed.

After a few days, Worthy returned the vehicle to Morris. Thereafter, on several occasions, Morris told Worthy that he needed to retrieve the vehicle and take it to the DMV to secure a registration card for her. Morris offered to provide her with loaner cars from McDaniels Acura on those occasions. Although Worthy thought the idea was shady since she hadn't purchased a car from McDaniels, she took Morris up on his offer.

During the same period of time, NextGear was sending out auditors to confirm that Dixon's Automotive was in possession of the Infiniti purchased on its line of credit. On some occasions, those inspections took place at Moore's home in Rock Hill, and on other occasions, those inspections took place at Dixon's home in Fort Mill. The vehicle was left in Dixon's driveway on one occasion for two or three weeks. Moore never told NextGear's auditors about delivering the Infiniti to, or retrieving it from, Morris.

On August 15, 2016, Moore listed the Infiniti, that had been sold by Morris to Worthy, on Manheim Darlington's OVE. Morris purchased the vehicle in the name of MAS and used MAS' line of credit with NextGear without Mathes' consent.[3] (Vol. I, page 82, lines 1-6; Vol. II, page 59, lines 9-21; and page 102, lines 10-16). After the sale, Morris arranged to have the vehicle transported from Dixon's home in Fort Mill to Manheim Darlington. Morris then returned the car to Worthy.

In late August, Mathes discovered that $35,368 had been charged against his floorplan with NextGear for the purchase of the Infiniti. In the 20 years that Mathes had been in business, he had never purchased a $30,000 car.

Mathes remembered that Morris had mentioned something about an Infiniti to him in a conversation a week earlier. Morris had not requested and Mathes had not granted permission to

[3] It is permissible for the fact finder to draw an adverse inference in a civil case against a party invoking the Fifth Amendment privilege against self-incrimination. Griffith v. Griffith, 332 S.C. 630, 506 S.E. 2d 526 (Ct. App. 1998).

Morris to buy such a vehicle in his name. (Vol. II, page 59, lines 1-21). When Mathes called Morris about the unauthorized transaction, Morris said that he had made a mistake. (Vol. II, page 59, lines 22-25). Morris indicated that he intended to buy the car in the name of McDaniels Acura and that he would take care of it within a couple of days. (Vol. II, page 60, lines 2-12).

Morris never remedied his mistake. Mathes was unaware that Morris had sold the very same car to Worthy three months earlier. After giving Morris two weeks to remedy his mistake, Mathes became concerned about insurance coverage on the car. When Morris texted a photograph of Worthy's insurance card showing an effective date of August 4, 2016, weeks before Morris' mistake, Mathes suspected that something was wrong. Thereafter, Mathes and Morris exchanged numerous text messages about the status of Morris' transaction with Worthy. Morris continued to mislead Mathes.

On September 8, 2016, Mathes learned that Worthy had purchased the car from Morris in May of 2016, and that Morris' claim of mistake was a lie. Having previously sold the same vehicle to Worthy three months earlier, even if Morris had been authorized to purchase a vehicle in the name of MAS or to access MAS' line of credit with NextGear, Dixon had no car to sell. Worthy's insurance company provided all of the details.

Morris apologized to Mathes and asked for time to get the matter resolved. After September 15, 2016, Morris ceased communicating with Mathes.

Mathes notified both NextGear and Manheim. Both NextGear and Manheim refused to do any further business with Mathes. Mathes could no longer purchase cars using his line of credit with NextGear or purchase cars from Manheim auctions.

Before suit was filed, an email was sent to Morris in an effort to resolve the matter. (Attorney's Fee Affidavit, Exhibit A). At that time, MAS had incurred only $1,700 in attorney's

fees. (Vol. II, page 73, lines 22-25 and page 121, line 12 – page 122, line 6). Morris never made any effort to help Mathes with Manheim or NextGear. (Vol. I, page 65, line 12- page 66, line 7 and Vol. II, page 74, lines 1-3).

It was only after a declaratory judgment action had been initiated to challenge NextGear's demand for payment from MAS for Morris' fraudulent transaction, an investigation was undertaken, numerous subpoenas were issued, requests for information were made to the DMV, numerous telephone calls were placed and emails were exchanged with the parties and/or their attorneys, Morris' deposition was taken, the complaint was amended to add parties and causes of action, and significant attorney's fees and costs were incurred that NextGear agreed to remove the fraudulent charges from MAS' account. (Attorney's Fee Affidavit, Exhibit B). This happened without any assistance whatsoever from Morris and despite Morris' assertion of his rights under the Fifth Amendment.

The Master found that MAS had suffered damages of $670,286.00 including attorney's fees. However, the Master's award of actual and punitive damages under the Dealers Act was based upon only $35,368.00.

ARGUMENT

I. THE MASTER COMMITTED AN ERROR OF LAW BY FAILING TO AWARD DAMAGES UNDER THE DEALERS ACT BASED UPON THE FULL SUM OF ACTUAL DAMAGES FOUND AND SUPPORTED BY EVIDENCE IN THE RECORD.

The Master recognized that MAS' damages were not limited to the unauthorized $35,368.00 charge against its line of credit with NextGear. (Order For Judgment, page 28). Moreover, the Master made a specific finding of fact that MAS suffered damages of $670,286.00 including attorney's fees through January 31, 2018. (Order For Judgment, page 16, paragraph 117). MAS' attorney's fees through January 31, 2018, were $65,943.35. (Attorney's Fee

Affidavit). Thus, MAS's damages excluding attorney's fees were $604,342.65. There is evidence in the record to support the Master's findings.

MAS was unable to operate in the normal course of business from October 2016, until after the dispute with Manheim Darlington and NextGear was settled in May of 2017, because NextGear suspended providing MAS with inventory financing and Manheim Darlington and other Manheim auctions refused to allow MAS to participate. (Vol. II, page 83, lines 2 -10). MAS's inability to replenish its accounts receivable by selling and financing vehicles as contracts with its then current customers terminated caused devastating damage to MAS' business and cash flow. (Vol. II, page 69, line 5 – page 72, line 3 and page 91, lines 7 – 13). Not only could MAS not purchase vehicles on credit with NextGear as it had done for years, it was also prevented from purchasing vehicles from Manheim Darlington and other Manheim auctions for cash. (Vol. II, page 46, lines 18 – 19 and page 67, lines 21 - 23).

MAS' gross receipts, which had been on an upward trajectory since 2014, declined by nearly $25,000.00 in 2016 from 2015, and by nearly $125,000.00 in 2017, from 2016. (Defendant's Exhibits #2, 3, 4, and 5). What started out as a $57,701.96 profit as of August 31, 2016 (Vol. II, page 106, line 1 – 25), evaporated and resulted in a loss of $21,091.00 for the year. (Defendant's Exhibit #4). The following year, 2017, was even more disastrous, a loss of $51,534.00. (Defense Exhibit #5).

In an effort to survive, Mathes was forced to liquidate a lease for a cell tower at a tremendous discount, his wife was forced to cash in her 401K, and Mathes' elderly parents had to sell some of their stock in SCANA and loaned other sums to him to prevent his financial ruin. (Vol. II, page 87, line 22 – page 89, line 8).

Because there is evidence in the record to support the Master's findings, this Court must

affirm those findings. Mellen v. Lane, supra.

Instead of awarding damages to MAS based upon the sum of $604,342.65, the Master ignored everything but the sum of $35,368.00 misappropriated from MAS' line of credit with NextGear. This was an error of law that must be corrected by this Court. The Court of Appeals will correct any error of law. Mellen v. Lane, supra.

S.C. Code Ann. Section 56-15-110(1) provides that any person who shall be injured in his business or property by reason of anything forbidden in Chapter 15, may sue therefor 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. (emphasis added).

Actual damages are properly called compensatory damages, meaning to compensate, to make the injured party whole, to put him in the same position he was in prior to the damages received insofar as this is monetarily possible. Actual damages are awarded to a litigant in compensation for his actual loss or injury. Actual damages are such as will compensate the party for injuries suffered or losses sustained. They are such damages as will simply make good or replace the loss caused by the wrong or injury. Actual damages are damages in satisfaction of, or in recompense for, loss or injury sustained. The goal is to restore the injured party, as nearly as possible through the payment of money, to the same position he was in before the wrongful injury occurred. Mellen v. Lane, supra.

CONCLUSION

Based upon the foregoing, the Master's award of actual damages must be modified to reflect actual damages of $604,342.65 before those damages are doubled as required by the Dealers Act and that sum is trebled as punitive damages as authorized by the Dealers Act.

Respectfully submitted,

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August 22, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Master in Equity

Joseph M. Strickland, Master in Equity

Case No. 2016-CP-40-06794

Mathes Auto Sales, Inc., Respondent/Appellant,

v.

Otis Morris, Jr., Pro Bowl Motors, Inc., Travelers Casualty & Surety Co. of America, Inc., Gerald Scott Dixon, Michael Tyrone Moore, and Dixon's Automotive, LLC, Defendants,

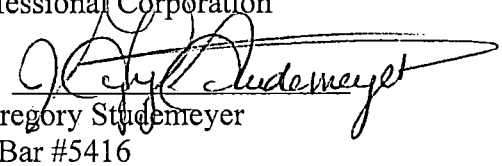
Of Whom Otis Morris, Jr., Pro Bowl Motors, Inc., Gerald Scott Dixon, Michael Tyrone Moore, and Dixon's Automotive, LLC, are the Appellants/Respondents.

PROOF OF SERVICE

I certify that I have served copies of the Initial Appellant's Brief Of Respondent/Appellant and Respondent/Appellant's Designation Of Matter To Be Included In The Record On Appeal on Otis Morris, Jr. and Pro Bowl Motors, Inc., by depositing them in the United States Mail, postage prepaid, on August 15, 2019, addressed to their attorney of record, H. Ronald Stanley, Post Office Box 7722, Columbia, South Carolina 29202.

August 15, 2019

J. GREGORY STUDEMEYER
Professional Corporation

By: 
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