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.

FINAL RESPONDENT'S BRIEF OF RESPONDENT/APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. ARE MORRIS OR PRO BOWL ENTITLED TO ANY SETOFF OR CREDIT FOR THE SETTLEMENT REACHED BETWEEN MAS AND NEXTGEAR?

II. IF MORRIS OR PRO BOWL ARE ENTITLED TO A SETOFF OR CREDIT FOR PAYMENT BY PRO BOWL'S SURETY, SHOULD THAT SETOFF OR CREDIT BE APPLIED BEFORE, OR AFTER, ACTUAL DAMAGES ARE DOUBLED UNDER THE DEALERS ACT?

III. ARE PUNITIVE DAMAGES PROVIDED BY S.C. CODE ANN. SECTION 56-15-110(2) LIMITED TO THREE TIMES ACTUAL DAMAGES?

IV. DID THE MASTER PROPERLY DENY THE MOTION FOR NON-SUIT BY DIXON'S AUTOMOTIVE, LLC?

V. DID THE MASTER PROPERLY GRANT THE PLAINTIFF'S MOTION TO AMEND TO CONFORM TO THE PROOF TO ADD DIXON AND MOORE AS DEFENDANTS?

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 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.

Before taking any testimony, counsel for Dixon's Automotive moved (orally without prior notice) for summary judgment, suggesting that Dixon's Automotive had done nothing wrong. Over the objection of counsel for MAS, the Master agreed to entertain the motion. However, after considering arguments of counsel, the Master determined that the motion was premature and, perhaps, could be presented under Rule 41(b), SCRCP at the appropriate stage of trial.

MAS then presented testimony from Worthy, Daniel Harms ("Harms") a representative of State Credit Union, excerpts of the deposition of Morris, testimony from Donald W. Deese ("Deese"), excerpts of the depositions of Gerald Scott Dixon ("Dixon") and Michael Tyrone Moore ("Moore") (collectively, "the Dixon partners"), and testimony from Investigator C.B. Duckett ("Duckett") of the Columbia Police Department. John Mathes ("Mathes") testified as the final witness and was cross-examined by counsel for Morris and Pro Bowl. Numerous exhibits were admitted, many of which were premarked and admitted without objection.

Before MAS rested its case, its counsel moved to amend to conform to the evidence pursuant to Rule 15(b), SCRCP to add Dixon and Moore as Defendants. The motion was taken under advisement and counsel for MAS and counsel for Dixon's Automotive were directed to brief the issue.

Counsel for Dixon's Automotive then moved for dismissal pursuant to Rule 41(b), SCRCP. It wasn't until counsel for Dixon's Automotive moved for nonsuit that any blame was placed on Morris. (R., p. 327, line 24 and Second App., p.1). Counsel for Morris and Pro Bowl joined in the motion for nonsuit by Dixon's Automotive. (Second App., p. 1). After considering the arguments of counsel, the motion was denied.

Neither Morris nor Dixon nor Moore offered a single word of testimony. The Master specifically asked the Appellants/Respondents if they wished to defend the case. (R. p. 327, lines 16-18). Morris, Dixon, and Moore all chose to remain silent.

On February 16, 2018, MAS filed a supplemental motion to amend to conform to the evidence to add Dixon and Moore as parties. In addition to reiterating the grounds argued before resting at trial, MAS raised an alternative basis for adding Dixon and Moore, ie, both are "dealers" as defined by S.C. Code Ann. Section 56-15-10(h) and "persons" as defined by S.C. Code Ann. Section 56-15-10(n). On February 23, 2018, MAS filed a memorandum in support of its motions.

On June 20, 2018, an order for judgment was issued. Judgment was entered in favor of MAS against Morris, Pro Bowl, Dixon, 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 Master 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

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

[2] According to his biography, Morris still serves as a commissioner for the South Carolina Education Lottery, 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).

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. (R. p. 246, line 15 – p. 247, 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 Dixon were investors in Pro Bowl.

Subsequently, Dixon and a childhood friend, Moore, opened Dixon's Automotive, a used car business in Rock Hill. Dixon introduced Moore to Morris. 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 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.[3] 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.

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[3] According to the credit union, the value of the Infiniti was $32,250.00. See App. p. 48.

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 transported 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.[4] (R. p. 90, lines 1-6; p. 255, lines 9-21; and p. 298, lines 10-16). The price, $34,800.00, exceeded an average range by $5,700.00. (Second App., p. 2). 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 Morris to buy such a vehicle in his name. (R. p. 255, lines 1-21). When Mathes called Morris about the unauthorized transaction, Morris said that he had made a mistake. (R. p. 255, 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. (R. p. 256, 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

[4] 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).

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 who then refused to do any further business with him. 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. (R. p. 443). At that time, MAS had incurred only $1,700 in attorney's fees. (R. p. 269, lines 22-25 and p. 317, line 12 – p. 318, line 6). Morris never made any effort to help Mathes with Manheim or NextGear. (R. p. 73, line 12- p. 74, line 7 and p. 270, 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. (R. p. 444). 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. That discrepancy is the basis of MAS' appeal.

ARGUMENTS

I. NEITHER MORRIS NOR PRO BOWL ARE ENTITLED TO ANY SETOFF OR CREDIT FOR THE SETTLEMENT REACHED BETWEEN MAS AND NEXTGEAR.

Morris, a lottery commissioner, made a huge bet when he sold a car owned by Dixon's Automotive to Worthy that he never purchased, pocketed the purchase price, and never provided Worthy with a certificate of title or a registration card. Morris then doubled down by purporting to purchase the same vehicle with MAS' line of credit, without its consent, three months later to pay Dixon's Automotive. Morris literally robbed Peter (MAS) to pay Paul (Dixon's Automotive). Of course, for his trouble, Morris walked off with State Credit Union's check for $16,026.00 and Worthy's check for $20,000.00.

The Dixon partners also took a huge risk. They bought a car on credit, sight unseen (R. p. 120, lines 15 - 17), that was located in Tampa, Florida, with no buyer. Moore couldn't remember whether he or Dixon purchased the car (R. p. 104, line 19 – p. 105, line 6). They couldn't remember what they paid for it, but it was in excess of $30,000.00. (R. p. 119, line 22 – p. 120, line 2).

They knew that Morris had no money to pay for the car (R. p. 117, line 15 – p. 118, line 4 and p. 119, lines 3 – 10) and they believed that it would have been "illegal" to just turn the car over to him (R. p. 115, line 20 – p. 116, line 14). Notwithstanding their belief, they had the car transported directly from Tampa to Morris in Columbia. (R. p. 122, line 13 – p. 123, line 8).

Between the time of their purchase in May and the time of their sale in August, they never told NextGear during their floorplan audits that its collateral was in the possession of Morris. (R. p. 151, line 23 – p. 153, line 9). Notwithstanding their expectation of taking a loss on the sale of the car after three months of depreciation, miraculously, the sale generated a price that was so

disproportionate, that it triggered an alert issued by Manheim Darlington to numerous Manheim employees. If something seems too good to be true, it usually is.

Of course, Morris' house of cards collapsed. He lost his dealer license when his surety bond was cancelled as a result of claims by Capital City for a previous indiscretion.

Before any litigation was commenced, Mathes contacted Morris. Rather than telling Mathes the truth, Morris contended that he had made a mistake by purchasing the car in the name of MAS. According to Morris, he intended to purchase it in the name of McDaniels Acura. In other words, he intended to steal from his employer rather than from his friend of 30 years.

Also, before any litigation was initiated, Morris was implored to "come clean" and reminded that "the best way to get out of a hole is to stop digging". (R. p. 443). Instead, Morris chose to roll the dice.

MAS reached an agreement with Nextgear without any assistance from Morris whatsoever, and despite his assertion of his Fifth Amendment rights. (R. p. 73, line 12 – p. 74, line 7). From Morris' point of view, NextGear's eventual waiver of claims against MAS, notwithstanding a term in its note holding MAS liable for unauthorized access to its account (R. p. 356, par. 4(t)), was purely fortuitous.

Contrary to Morris' suggestions otherwise, MAS' resolution of the dispute with NextGear came at a hefty price. The settlement with NextGear occurred on May 2, 2017, some nine months after Morris assured his friend, Mathes, that he would take care of his "mistake", some seven months after he was encouraged to "come clean" and "stop digging", and after tens of thousands of dollars in attorney's fees and costs had been incurred by MAS. Now, Morris wants a credit for a benefit secured by MAS for which he made no contribution and, in fact, failed and refused to support. (R. p. 73, line 12 – p. 74, line 7).

The collateral source rule provides 'that compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the damages owed by the wrongdoer.' Patton v. Miller, 420 S.C. 471, 804 S.E.2d 252 (2017). NextGear was a source wholly independent of Morris and Pro Bowl. There is no evidence that Morris or Pro Bowl had any relationship whatsoever with NextGear. Thus, any benefit MAS secured from NextGear does not entitle Morris or Pro Bowl to a setoff or a credit.

II. ANY SETOFF OR CREDIT TO WHICH MORRIS AND/OR PRO BOWL MIGHT BE ENTITLED FROM PAYMENT BY PRO BOWL'S SURETY CAN ONLY BE APPLIED AFTER, NOT BEFORE, ACTUAL DAMAGES ARE DOUBLED UNDER THE DEALERS ACT.

The Master recognized that MAS' damages were not limited to the unauthorized charge against its line of credit. (App. p. 28). Respondent/Appellant seeks modification of the Order For Judgment in its Final Appellant's Brief Of Respondent/Appellant to recover the full sum of actual damages found and supported by evidence in the record which the Master declined to award.

S.C. Code Ann. Section 56-15-110(1) is clear. It provides:

> . . . , any person who shall be injured in his business or property by reason of anything forbidden in this chapter 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).

Morris and Pro Bowl want a credit from a payment by Pro Bowl's surety on the front end rather than on the back end. To do as Morris and Pro Bowl suggest would deprive MAS of a statutory right to double actual damages. The Legislature could not have intended such a result.

By way of analogy, the Supreme Court of the United States has taken the position that claims under the False Claims Act providing for double damages are to be doubled before any subtractions are made for compensatory payments previously received by the Government from

any source. Although there is nothing in the legislative history that specifically bears on the question of how to calculate double damages, past decisions of this Court have reflected a clear understanding that Congress intended the double-damages provision to play an important role in compensating the United States in cases where it has been defrauded. "We think the chief purpose of the (Act's civil penalties) was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole. United States v. Bornstein, 423 U.S. 303, 96 S.Ct. 523, 46 L.Ed.2d 514 (1976) (citing United States ex rel. Marcus v. Hess, 317 U.S. 537, 63 S.Ct. 40, 87 L.Ed. 498).

Any suggestion that the legislative purpose of the double-damages provision of S.C. Code Ann. Section 56-15-110(1) could be accomplished by anything less than a full recovery is not supported by any rule of statutory construction.

III. RESPONDENT/APPELLANT CONCEDES THAT PUNITIVE DAMAGES PROVIDED BY S.C. CODE ANN. SECTION 56-15-110(2) ARE LIMITED TO THREE TIMES ACTUAL DAMAGES.

S.C. Code Ann. Section 56-15-110 entitled, suits for damages, provides in pertinent part:

> (1) . . ., any person who shall be injured in his business or property by reason of anything forbidden in this chapter 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.
>
> * * *
>
> (2) In an action for money damages, if the jury finds that the defendant acted maliciously, the jury may award punitive damages not to exceed three times the actual damages.

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 monetary possible. Actual damages are awarded to a

litigant in compensation for his actual loss or injury. Mellen v. Lane, 377 S.C. 261, 659 S.E. 2d 236 (2008).

In the absence of some other definition in S.C. Code Ann. Section 56-15-110, MAS concedes that actual damages are just that, ie, actual damages and punitive damages available under S.C. Code Ann. Section 56-15-110(2) are limited to three times the actual damages, not three times double the actual damages.

IV. THE MASTER PROPERLY DENIED THE MOTION FOR NON-SUIT BY DIXON'S AUTOMOTIVE.

Rule 41(b) provides in pertinent part:

> After the plaintiff in an action tried by the court without a jury has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.

In deciding whether to grant or deny a motion for involuntary nonsuit, the trial court must view the evidence and all reasonable inferences in the light most favorable to the plaintiff. Bullard v. Ehrhardt, 283 S.C. 557, 324 S.E.2d 61 (1984).

Counsel for Dixon's Automotive suggested that there was no evidence that the Dixon partners had done anything wrong. (R. p. 328, lines 17 – 22). At a bare minimum, the Dixon partners had an obligation to transfer and deliver the Infiniti to MAS. See S.C. Code Ann. Section 36-2-301. They didn't even fulfil that obligation even though they were credited with $35,368.00.

The Dixon partners also warranted that title conveyed would be good, and its transfer rightful. See S.C. Code Ann. Section 36-2-312. The Dixon partners breached their warranty of title.

In Adams v. Grant, 292 S.C. 581, 358 S.E.2d 142 (Ct. App. 1986), the S.C. Court of

Appeals concluded that the jury had properly determined that by failing to honor a warranty, a dealer had engaged in action which was "arbitrary, in bad faith, or unconscionable and which caused damages to the plaintiff under the Dealers Act.

Viewing the evidence and all reasonable inferences in the light most favorable to MAS, the record clearly demonstrates the culpability of Dixon's Automotive and its partners under the Dealers Act.

The Dealers Act prohibits conduct that is unfair or deceptive. S.C. Code Ann. Section 56-15-30. Specifically, it prohibits conduct that is arbitrary, unconscionable, or in bad faith. S.C. Code Ann. Section 56-15-40(1). All three of those terms have been defined by our Supreme Court.

The term "arbitrary" has been defined for purposes of the Dealers Act to include "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, 555, 416 S.E.2d 619, 621 (1992); Estate of Carr v. Circle S Ent., 379 S.C. 31, 664 S.E.2d 83 (Ct. App. 2008).

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. State v. Griffin, 100 S.C. 331, 333, 84 S.E. 876, 877 (1915) (quoting Black's Law Dictionary); Estate of Carr, supra.

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).

Under the Dealers Act, fraud includes, in addition to its normal connotation, a misrepresentation in any manner, whether intentionally false or due to gross negligence, of a material fact; a promise or representation not made honestly and in good faith; and an intentional failure to disclose a material fact. S.C. Code Ann. Section 56-15-10(m).

Fraud may be proved by a number of concurrent or related circumstances... Fraud may be deduced not only from deceptive or false representations, but from facts, incidents, and circumstances which may be trivial in themselves, but decisive in a given case of the fraudulent design. It is a state of mind dependent on intent, which is provable by circumstantial evidence. Cook v. Metropolitan Life Ins. Co., 186 S.C. 77, 194 S.E. 636 (1938).

There is no dispute that Dixon's Automotive was a dealer subject to the Dealers Act. Dixon's Automotive had been in business since 2005, (R. p. 114, lines 2 – 11, p. 223, line 16 – p. 224, line 13, and p. 387), and had operated as a retail dealer for 10 years (R. p. 214, line 20 – p. 215, line 18). Dixon's Automotive began operating as a wholesaler in 2012. (R. p. 103, lines 2 – 15). Dixon's Automotive had sold over 1,000 cars. (R. p. 167, lines 13 – 16).

There is no dispute that the Dixon partners were persons as defined by S.C. Code Ann. Section 56-15-10(n). Both Dixon and Moore described their roles as partners. (R. p. 135, lines 18 – 22 and p. 206, lines 19 -22 and p. 219, lines 2 – 14). Clearly, the Dixon partners were the individual officers, directors, and other persons in active control of the activities of Dixon's Automotive. Morris provided guidance to the Dixon partners when they opened Dixon's Automotive. (R. p. 136, lines 20 -23).

Dixon and Morris were good friends, trusted one another, and did a significant amount of business with one another. (R. p. 231, lines 6 – 14). Dixon introduced Moore to Morris. (R. p. 110, line 11 – p. 111, line 6).

Dixon had been authorized to purchase cars at auctions on behalf of Pro Bowl since 2004. (R. p. 225, line 18 – p. 227, line 8 and p. 383. Moore had been authorized to act on behalf of Dixon's Automotive since 2005. (R. p. 135, lines 10 -17).

Morris was authorized to act on behalf of Dixon's Automotive at auctions. (R. p. 228, line 17 – p. 230, line 9 and p. 386 and p. 135, line 23 – p. 136, line 17). Morris purchased cars on behalf of Dixon's Automotive on a number of occasions and Morris and Dixon's Automotive swapped cars many times. (R. p. 230, line 10 – p. 231, line 5). Over the years, Dixon's Automotive also bought some cars from and sold some cars to Pro Bowl. (R. p. 115, lines 5 – 19).

Dixon's Automotive had never consigned cars to Morris to sell. They thought it would have been illegal to do so. They had been admonished by the DMV not to consign cars to anyone. (R. p. 115, line 20 – p. 116, line 14).

Moore had known Morris for 10 years. (R. p. 110, lines 7 – 10). Moore and Morris spoke on occasion as it was in Moore's interest to build relationships, especially after Dixon's Automotive transitioned from a retailer to a wholesaler. (R. p. 115, lines 8 – 15).

On this occasion, Moore and Morris just happened to be looking at the same car online at the same time that just happened to be in Tampa, Florida. (R. p. 109, lines 2-15). According to Moore, when he told Morris that he was interested in buying the Infiniti, Morris responded, "That's funny, I was looking at that car too" or "looking at a car like this too". "You know, if you get it, I might be interested in buying it from, you know, wholesale". (R. p. 117, line 21 – p. 118, line 2).

What a coincidence! It just happened to be the same year, make, and model bearing the same vehicle identification number as the 2014 Infiniti QX60 sold by Morris to Worthy a week

earlier. (R. p. 64, line 17 – p. 65, line 15; p. 74, lines 12 -14; p. 77, lines 3 – 21; and p. 83, line 21 – p. 84, line 14).

Moore knew that Morris had no ability to pay for the car at the time. Moore knew that Morris' line of credit was exhausted. (R. p. 118, lines 2 – 3; p. 119, lines 8 – 16; p. 123, lines 9 – 22; and p. 154, lines 3 - 11). Moore knew that Morris was still in the retail business at the time but did not know where he was conducting a retail business. (R. p. 118, line 6 – p. 119, line 2).

Dixon's Automotive was not in the business of buying and selling expensive SUV's like a 2014 Infiniti QX60. They bought and sold Hondas and less expensive cars in the $10,000 to $15,000 range. (R. p. 116, line 24 – p. 117, line 3).

Dixon's Automotive had no employees other than Dixon and Moore. (R. page 219, lines 15 – 16). Dixon's Automotive purchased the car on May 17, 2016, online while the car was located in Tampa, Florida. (R. p. 104, lines 16 – 20; p. 106 line 7 – p. 107, line 24 and p. 108, lines 9 – 14; and p. 133, line 1 – 6). Moore could not remember if it was he who purchased the car. (R. p. 104, line 21 – p. 105, line 6). Since Dixon's Automotive had no other employees, if Moore was not the purchaser then it could have only been Dixon.

Moore couldn't remember what Dixon's Automotive paid for the car. (R. p. 119, lines 22 – 24). However, he knew that it was more than $30,000. (p. 119, line 25 – p. 120, line 2).

Dixon's Automotive used its $250,000 line of credit with NextGear to pay for the Infiniti. (R. p. 121, line 9 – p. 122, line 12). Dixon's Automotive began paying interest on the purchase price from the time it purchased the car online. (R. p. 124, lines 2 – 10). No curtailment was due from Dixon's Automotive to NextGear for 90 days. (R. p. 128, lines 16 and p. 138, lines 2 – 20).

The car was transported from Tampa, Florida sometime after May 16 or 17, 2016. (R. p. 122, lines 13 – 19 and p. 133, lines 7 - 12). Morris had made no commitment to buy the car. (R.

p. 133, lines 13 – 17). Even though Moore knew that Morris had no money and Moore had been admonished by the DMV to never consign a vehicle to anyone, he arranged to have the vehicle transported directly to Pro Bowl in Columbia. (R. p. 122, line 17 – p. 123, line 8). That was arbitrary and unreasonable.

Moore had other cars transported to Morris on previous occasions. (R. p. 125, lines 1 – 10). On the previous occasions, if Morris decided to buy the vehicle, he paid for it right away. (R. p. 125, line 25 – p. 126, line 19). Moore knew that someone like Morris with a retail license could sell the vehicle even without possession of the certificate of title. (R. p. 159, line 16 – p. 161, line 9). It was arbitrary and unreasonable to entrust the car to Morris under those circumstances.

Moore claimed that he intended to have a driver pick up the Infiniti after Morris inspected it in Columbia, but never did. (R. p. 123, line 25 – p. 124, line 1). Moore had no idea how long the Infiniti stayed in Columbia because he was not monitoring the situation (R. p. 124, lines 14 – 21 and p. 128, lines 1 – 8), but admitted that Dixon's Automotive owned the car from May 17, 2016, until August 16, 2016, a period of approximately three months. (R. p. 151, line 23 – p. 152, line 1).

The record does not reflect any sense of urgency to recover the car purchased on credit, and on which the Dixon partners were paying interest, in the possession of a merchant who dealt in goods of the kind with the power to transfer to a buyer in the ordinary course of business who just happened to be broke. That was also arbitrary.

Dixon's Automotive was presumed to know the law and was charged with exercising reasonable care to protect its interest. American Legion Post 15 v. Horry County, 381 S.C. 576, 674 S.E.2d 181 (Ct. App. 2009). This included knowledge of the entrustment statute providing

that any entrustment of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in the ordinary course of business. S.C. Code Ann. Section 36-2-403(2).

Moore knew that the Infiniti was not appreciating in value. Moore also knew that as late summer approached and new cars debuted on the market, the price of used cars would depreciate even more. (R. p. 128, line 17 – p. 129, line 9). Moore anticipated losing money on the sale. (R. p. 129, lines 10 -12).

Between the time of purchase and sale by Dixon's Automotive, NextGear sent floorplan auditors out once or twice per month to verify that Dixon's Automotive was in possession of the Infiniti for which NextGear had advanced over $30,000. (R. p. 129, line 13 – p. 131, line 25). During the three month period of time between May 16, 2016, and August 16, 2016, Dixon's Automotive only had possession of the car for a period of two or three weeks while it was parked at Dixon's home in Fort Mill. (R. p. 232, line 4 – p. 235, line 4). The floorplan audits coincided with those episodes when Morris retrieved the vehicle from Worthy purportedly for repairs or registration. (R. p. 32, line 19 – p. 35, line 21). Moore never told anyone from NextGear during the floorplan audits that Morris had possession of the car. (R. p. 153, lines 5 – 9 and p. 154, line 25 – p. 155, line 11). That was deceptive.

Recognizing that it was getting late in the summer, new cars were coming out soon, and the Infiniti was continuing to depreciate, Moore decided to dispose of the car at the auction. (R. p. 129, lines 5 – 9). However, instead of having the car transported from Columbia to Darlington, for some unknown reason, Morris arranged to have a driver bring the car from Columbia to Dixon's home in Fort Mill. (R. p. 139, lines 8 – 16 and p. 140, lines 10 – 17). Moore wanted to have the car in his possession in the event of another floorplan audit. (R. p.

141, line 1 – p. 142, line 1). Dixon knew that Moore was arranging to list the vehicle online to sell it. (R. p. 235, lines 12 – 18).

The car was sold online by Dixon's Automotive through Manheim Darlington OVE (R. p. 148, lines 22 – 24) just in time to pay the curtailment due to NextGear. What a coincidence! Morris was the online purchaser. (R. p. 80, line 18 – p. 86, line 17). Moore monitored the sale. (R. p. 148, line 25 – p. 149, line 1). The price was so disproportionate to the actual value that an alert was triggered and an email was sent to numerous Manheim employees and to Moore. (R. p. 80, line 21 – p. 82, line 14 and p. 175, lines 11 - 13). After the sale, Morris had a driver take the vehicle to Manheim Darlington to be physically checked in. (R. p. 143, line 15 – p. 145, line 22).

The facts of this case could be the basis of a law school exam with the following question: Name 25 things the Defendants did wrong?

While the relative culpability of Morris, Pro Bowl, Dixon, Moore, and Dixon's Automotive may be subject to debate, the facts and circumstances surrounding the acquisition, transport, possession, transfer to Worthy, reacquisition from Worthy on multiple occasions, excuses made to the floor plan auditors, and subsequent sale of the Infiniti on Manheim Darlington's OVE smack of fraud and conspiracy.

Dixon and Moore were complicit in Morris' serial acts of fraud. Moore procured the Infiniti for Pro Bowl's retail sale to Worthy without a retail license in violation of S.C. Code Ann. Section 56-15-310 entitled License required; term of license; fee; scope of license; penalty for violation. Dixon's Automotive had no retail license. Dixon's Automotive had ceased its retail operation in years past and was only licensed as a wholesaler.

It is inconceivable that Moore just randomly happened to purchase the very same Infiniti

in Tampa and have it transported to Columbia to Morris, seven days after Morris had sold it to Worthy. It is obvious that the only reason for doing so was to facilitate the retail sale of the Infiniti.

Moore entrusted the Infiniti to Pro Bowl, a retail licensee at the time, facilitating the fraud practiced by Morris and Pro Bowl upon Worthy. S.C. Code Ann. Section 36-2-403 empowered Pro Bowl to transfer a good title to Worthy even if delivery by Dixon's Automotive of the Infiniti to Pro Bowl was procured through fraud punishable as larcenous under the criminal law.

Moore knew that Morris had no money to pay for the Infiniti when Dixon's Automotive purchased it on Manheim Tampa's OVE. Moore admitted that under the circumstances, it would be illegal to just turn the Infiniti over the Morris to sell, but that's exactly what he did.

Dixon and Moore knew that once the Infiniti was transported from Tampa to Columbia and placed with Morris, a merchant who dealt in goods of that kind, they gave him the power to transfer the Infiniti to someone like Worthy, if she qualified as a buyer in the ordinary course of business.

Dixon's Automotive allowed the exhibition of the Infiniti at an unauthorized place of business in violation of S.C. Code Ann. Sections 56-15-310 and 56-15-315. The only place of business of Dixon's Automotive was in York County. Pro Bowl's place of business was in Richland County.

Dixon and Moore knew that they were prohibited from displaying or selling the Infiniti off-site. They knew that the sale or attempt to sell the Infiniti off-site subjected Dixon's Automotive to a two thousand dollar fine and each of them to a five hundred dollar fine. See S.C. Ann. Section 56-15-315.

Dixon's Automotive failed to execute an assignment and warranty of title to Pro Bowl in

violation of S.C. Code Ann. Section 56-19-360. Regardless of the reason for failing to do so, it did not prevent Morris from selling the Infiniti to Worthy.

Dixon and Moore knew, or should have known, that the longer the Infiniti remained in Morris' possession, the more likely it was that Morris would exercise his power under the entrustment statute. Contrary to Moore's testimony that the Infiniti was only transported to Morris to determine if Morris was interested in purchasing it, they acquiesced in his retention of the Infiniti for approximately 90 days. Moore believed that it was "illegal to just turn the vehicle over to Morris to sell" and he was right. Any such transfer "looking to a sale" was prohibited by S.C. Code Ann. Section 56-15-315. That was arbitrary.

During that 90 day period of time, Moore never told NextGear's floor plan auditors the whole truth about where the Infiniti supposedly was and who supposedly was in possession of it. An intentional failure to disclose a material fact constitutes fraud under S.C. Code Ann. Section 56-15-10(m). That was deceptive.

Neither Dixon nor Moore offered any testimony as to why the Infiniti on which they were paying interest and which was depreciating in value during the summer of 2016 was never offered to any other dealer. Somehow, eventually, after it had been sold to Worthy, it ended up parked in Dixon's driveway for 2 or 3 weeks without any paperwork but with a key in the ignition.

Dixon's Automotive listed the Infiniti, which had already been sold to Worthy, on Manheim Darlington's OVE. Dixon's Automotive had no Infiniti to sell. It had already been sold to Worthy, yet Dixon's Automotive received over $35,000 advanced by NextGear and charged against MAS' account. That was arbitrary.

After Moore placed the Infiniti on Manheim Darlington's OVE without any photographs

or a condition report, miraculously, it sold for more than MMR and more than Dixon's Automotive had paid for it in May, causing Manheim Darlington to issue an "alert" and email it to Moore. If something seems just too good to be true, it usually is. Dixon and Moore knew this. This was unconscionable.

When NextGear discovered the involvement of Dixon's Automotive, NextGear terminated its $250,000.00 line of credit with Dixon and Moore. Neither Dixon, Moore, nor Dixon's Automotive have filed a claim against Pro Bowl's surety bond, sought to prosecute Morris, nor cross-claimed for any damages. In fact, according to Dixon, they haven't even had any harsh words with one another. Unbelievable!

Based upon the facts and the law, and viewing the evidence and all reasonable inferences in a light most favorable to the Plaintiff, the Master properly denied the motion for non-suit by Dixon's Automotive. MAS presented more than enough direct and circumstantial evidence to establish its claim under the Dealers Act.

V. THE MASTER PROPERLY GRANTED THE PLAINTIFF'S MOTION TO AMEND TO CONFORM TO THE PROOF TO ADD DIXON AND MOORE AS DEFENDANTS.

Notwithstanding the Dixon partners' argument to the contrary, the Plaintiff moved to amend to conform to the proof *before* resting its case. (R. p. 320, line 13- p. 328, line 16 and App. p. 3). See also the statement of the case set forth in the Final Brief of Appellants/Respondents Gerald Scott Dixon, Michael Tyrone Moore, and Dixon's Automotive, LLC:

> At the close of Plaintiffs [sic] case Plaintiff moved to amend the pleadings by adding Gerald S. Dixon and Michael T. Moore as individual defendants. Defendants objected and the issue was taken under advisement. Defendants Dixon Automotive, LLC and Gerald Dixon and Michael Moore moved *then* for a non-suit pursuant to Rule 41(b) of the South Carolina Rules of Civil Procedure at the close of Plaintiff's case and it was taken under advisement. (emphasis added).

Any matters stated or alleged in appellant's statement shall be binding on appellant. Rule 208(C), SCACR. Moreover, a motion for non-suit could not be properly made until after the Plaintiff had completed the presentation of [his] evidence. See Rule 41(b), SCRCP.

Notwithstanding their argument, even if MAS had not moved to amend until after resting its case, the amendment would have still been proper. Rule 15(b) provides in pertinent part:

> Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party *at any time*, even after judgment; but failure so to amend does not affect the result of the trial of these issues. (emphasis added).

Dixon's Automotive and the Dixon partners were represented by very capable counsel with 31 years of experience. (R. p. 328, lines 17-18). Counsel for Dixon's Automotive appeared with Dixon and Moore at their respective depositions. Counsel knew that both Dixon and Moore had described themselves as partners.

Excerpts of the depositions of Dixon and Moore were furnished to the Master and all opposing counsel (by page and line number) more than one day prior to offering them in the Plaintiff's case in chief in accordance with Rule 32(a)(5). Opposing counsel knew exactly what would be introduced, including testimony about Dixon and Moore's partnership.

As counsel points out in his brief, the depositions were taken months before trial. There should have been no surprise.

During his unconventional oral motion for summary judgment at the commencement of the trial, counsel for Dixon's Automotive referred to his client(s) on multiple occasions. (R. p. 18, lines 13 – 16; p. 20, lines 13 – 20; p. 21, line 20; and p. 22, lines 9, 16, 20, and 21).

Excerpts of the depositions of Dixon and Moore were offered at trial. No objections pursuant to Rule 32(a)(5), SCRCP were made. Both Dixon and Moore described themselves as partners who shared profits and losses. (R. p. 135, lines 10 – 22 and p. 206, lines 21 – 22 and p.

218, line 13 – p. 219, line 14).

Rule 15(b), SCRCP provides in pertinent part:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

Rule 15(c) provides in pertinent part:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

There can be no doubt that the claim arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading. Nor can there be any doubt that Dixon and Moore had notice of the institution of the action and were not prejudiced in maintaining their respective defenses. Moreover, they knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against them.

Dixon and Moore knew that Morris, an officer and agent of Pro Bowl, had been named as a Defendant along with Pro Bowl. It should not have come as a surprise that MAS would seek to establish liability against the individual officers, directors and other persons in active control of the activities of Dixon's Automotive under S.C. Code Ann. § 56-15-10(n) as it had against the individual officers, directors and other persons in active control of the activities of Pro Bowl.

CONCLUSION

Dixon and Moore could have presented a defense but chose to remain silent. Morris,

Dixon, and Moore approached the trial of this matter as if it were a criminal case. None of them offered a single word of testimony.

Perhaps, the presence of Investigator Duckett in the courtroom throughout the trial had something to do with that. Perhaps, Morris had Dixon and Moore convinced to take his lead once again. After all, Morris joined in their motion for non-suit. When their strategy did not work, the Dixon partners asserted that the Master had erred.

Based upon the foregoing and for any ground appearing on the record as provided by Rule 220(C), judgment against Appellants/Respondents should be affirmed but modified to include a full award of damages supported by the record in accordance with the Final Appellant's Brief of Respondent/Appellant.

Respectfully submitted,

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