IN THE MISSOURI SUPREME COURT

No. SC86287

LANCE SCOTT,
Appellant/Cross-Respondent,

v.

BLUE SPRINGS FORD SALES, INC.,
Cross-Appellant/Respondent,

and

ROBERT C. BALDERSTON,
Respondent.

APPEAL FROM THE
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
THE HONORABLE MARCO A. ROLDAN
DIVISION 16

BRIEF OF CROSS-APPELLANT/RESPONDENT

Kevin D. Case, No. 41491
David J. Roberts, No. 42272
Case & Roberts, P.C.
Two Pershing Square
2300 Main Street, Suite 900
Kansas City, MO 64108
Telephone: (816) 448-3707
Facsimile: (816) 448-3101
ATTORNEYS FOR CROSS-APPELLANT/RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

Plaintiff/appellant/cross-respondent Lance Scott ("Scott") brought this suit against defendant/cross-appellant/respondent Blue Springs Ford Sales, Inc. ("BSF") and defendant/respondent Robert C. Balderston ("Balderston"), individually, asserting various claims including common law fraud, violation of the Missouri Merchandising Practices Act, Section 407.010, RSMo., *et seq*. ("MPA"), violation of the Magnuson-Moss Warranty Act, 15 U.S.C. §2301 *et seq*., conversion, and other theories seeking compensatory damages, punitive damages and injunctive relief arising out of the purchase of a single used motor vehicle. The matter was tried to a jury which returned a verdict in favor of Scott and against BSF assessing compensatory damages of $25,500.00 and awarding punitive damages of $840,000.00. The jury found in favor of Balderston and against Scott on all claims. The trial court issued a judgment dated December 10, 2003, entering judgment on the jury verdict awarding Scott $25,500.00 in compensatory damages for fraud, and violations of the Merchandising Practices Act and the Magnuson-Moss Warranty Act, and $2,099.82 damages for conversion, and punitive damages in the amount of $840,000.00, for a total judgment of $867,099.82.

BSF timely filed post-trial motions for JNOV, for a new trial or in the alternative for remittitur, which the trial court denied. BSF timely appealed the judgment to the Missouri Court of Appeals. On April 14, 2004, the Missouri Court

of Appeals, Western District, dismissed the appeal finding that the judgment was not final.

On June 23, 2004, the court entered an amended judgment correcting the lack of finality of the previous judgment. BSF timely filed its post-trial motions for JNOV, and for a new trial or in the alternative for remittitur, which the trial court denied. BSF timely filed its notice of appeal, appealing the judgment, to the Missouri Court of Appeals, Western District, invoking the court's general appellate jurisdiction under Article V, Section 3 of the Missouri Constitution. BSF's appeal was docketed as Case No. WD64428.

Subsequently, Scott filed his notice of appeal appealing the judgment to this Court, invoking this Court's jurisdiction under Article V, Section 3 of the Missouri Constitution, challenging the validity of a statute or provision of the Constitution of Missouri. Scott's appeal was docketed in this Court as Case No. SC86287.

Upon motion, this Court ordered BSF's appeal pending in the Missouri Court of Appeals, Western District, Case No. WD64428, to be transferred to this Court and consolidated with Case No. SC86287.

STATEMENT OF FACTS

Introduction

Scott brought this action in connection with Scott's purchase of a 1991 Ford Explorer from BSF alleging numerous causes of action against BSF: violation of the Missouri Merchandising Practices Act, §407.010 RSMo., *et seq*. ("MPA"), fraudulent misrepresentation, fraudulent nondisclosure, violation of the Magnuson-Moss Warranty Act, 15 U.S.C. §2301 *et seq*., and conversion. Scott also alleged numerous causes of action against respondent Balderston, individually, the president and sole shareholder of BSF: conspiracy and violation of the MPA, conspiracy and fraud, and conspiracy and conversion. (LF,[1] 4-31). Scott sought compensatory damages, punitive damages, and injunctive relief against both defendants.

BSF appeals from the final judgment entered following a jury verdict awarding Scott $25,500.00 in compensatory damages for his claims of violation of the MPA, fraudulent misrepresentation, and violation of the Magnuson-Moss Warranty Act, $2,099.82 in compensatory damages for conversion[2], and

[1] LF designates the Legal File.

[2] Compensatory damages for conversion was not submitted to the jury, but was awarded by the trial court in the judgment. (Tr., 1657-1658) (Tr. designates the transcript).

$840,000.00 in punitive damages. The jury found in favor of Balderston and against Scott on all claims submitted. The Trial Court denied Scott's requested injunctive relief. (LF, 363-367).

The Parties

At the time of his purchase of the motor vehicle, Scott was a college-educated commercial pilot, having attended his senior year at Central Missouri State University, studying aviation technology. He is a flight instructor. (Tr., 298, 299-300, 302).

BSF is a franchise Ford dealership in Blue Springs, Missouri. It sells approximately 2,400 cars per year – 1,300 new cars and 1,100 used cars. (Tr., 1784).

Balderston is the president and shareholder of BSF. In addition to BSF, Balderston has had an ownership interest in other franchise automobile dealerships for various periods of time: Blue Springs Nissan (1993-1996), Blue Springs Ford Wholesale Outlet, Inc. (1990-2000); Nevada Ford Lincoln Mercury; Warrensburg Chrysler Plymouth; Heartland Chevrolet; Lee's Summit Honda; and Extreme Ford. (Tr., 1365-1367).

The Transaction

On March 7, 1994, Scott purchased a used 1991 Ford Explorer sport utility vehicle ("SUV") from BSF for the purchase price of $14,995.00. (Tr., 298, 319-

320, Exhibit 17). He also purchased an extended service plan ("ESP") for $1,475.00, credit life insurance for $1,633.00. Scott financed the purchase by entering into a 66-month retail installment contract with a total finance charge for the term of the contract of $7,199.00 and was charged an origination fee of $35.00.. (Tr., 298, 320-322, Exhibit 18).

BSF salesman, Harvey Alexander, sold Scott the SUV. Scott alleged that Alexander told him that the SUV was owned by an older couple and that to the best of his knowledge, the car had not been wrecked. (Tr., 314-315). Before purchasing the SUV, Scott drove the SUV home for the night. On the second day when he came back, Scott stated that Alexander told him that the SUV had not been wrecked. (Tr., 315-317). By February 2000, when Scott first notified BSF of his claim, Harvey Alexander was deceased, preventing BSF from obtaining Alexander's side of the story. (Tr., 338-339, 718).

At the time of the sale, the title to the Explorer did not indicate salvaged. Also at the time of the sale, Carfax[3] did not report the car as having a salvage title. (Tr., 298, Exhibits 6 and 12).

The ESP Scott purchased provided a 36-month or 36,000-mile service plan. The ESP would have expired in March 1997 or upon the SUV odometer reaching 84,000 miles, whichever came first. (Tr., 372). Safety inspection records indicate

[3] Carfax is a service which provides vehicle history information.

that the ESP would have expired a little over a year after Scott's purchase, by August 1995, because the Explorer's odometer then metered 108,378 miles. (Tr., 394-395). On March 18, 1994, BSF's warranty clerk attempted to register the ESP on Ford's online system, and received an error code stating: "all warranty canceled except emission; title branded." (Tr., 298, 440-442, Exhibit 38). The ESP was not issued. (Tr., 443). The clerk did not remember the matter and testified from the document. She stated that it would have been her practice to report the situation to the service manager and to the finance department. (Tr., 449).

On August 12, 1994, Scott brought the car back to BSF for some service due to a leaking transmission. The leak was fixed without cost to Scott. BSF again tried to register the ESP on August 12, 1994, and could not. (Tr., 449-450). At that time, BSF rechecked the SUV through Carfax, which reported that the SUV had previously been issued a salvage title. (Tr., 298, Exhibit 5). Apparently, these facts were not discussed with Scott.

During the remainder of the ESP period, Scott never requested any service under the extended service plan. (Tr., 376-377). From March 1994 through October 1999, Scott drove the SUV an additional 186,000 miles with the SUV odometer reading 234,436 on October 18, 1999. (Tr., 389). Scott's expert witness,

Richard Diklich, acknowledged that Scott got "good use" out of the SUV. (Tr., 1199).

During his ownership, the SUV was inspected several times, without incident. The Explorer passed state safety inspections in 1994, when it had 69,433 miles; in August 1995, when it had 108,378 miles; in July 1996, when it had 143,689; in July 1997, when it had 179,314 miles after a tailpipe was repaired; in January of 1999, with 211,318 miles; on July 29, 1999, when it had 225,708 miles after a left lower ball joint and rear brake hose were repaired. (Tr., 394-397).

Scott's Knowledge of Salvage History

Scott drove the Explorer from March 1994 until May 1999, driving over 160,000 miles. He did so without any reason to suspect the SUV had sustained damage before his purchase. In May 1999, Scott was following a gravel truck in the SUV when a rock hit and cracked his windshield. Scott had the windshield replaced at Safe-Lite Auto Glass ("Safe-Lite"). Representatives of Safe-Lite told Scott that it could replace the windshield, but it was not going to warrant the windshield against leaking because the SUV had rust above the top of the windshield. A Safe-Lite technician asked Scott if he had wrecked the SUV. (Tr., 327-329). Scott acknowledged that he had had an accident. In 1997 or 1998, he was traveling on Interstate 70 when he hit some snow, spun out, and hit one of the concrete barriers. Scott had the visible damage to the left fender repaired. (Tr.,

330-331). Shortly after Scott had the windshield replaced, Scott alleges he had a motor vehicle inspection and the inspector showed him some shims where the bumper was offset. (Tr., 332-333).

In October of 1999, the SUV had approximately 234,000 miles on the odometer when Scott took the Explorer to Matt Ford because the transmission was going out. Scott stated that Matt Ford wanted $2,000.00 to fix the transmission, so he investigated getting another vehicle instead of repairing the high mileage, eight year old SUV. While discussing a possible purchase, Matt Ford ran his VIN through Carfax. Carfax reported that the SUV had a salvage title in its history. (Tr., 333-335). This information was not added to the Carfax database and available for reporting until April 22, 1994, well after the BSF sale to Scott. (Tr., 468-469; SLF[4], 27; Deposition of George Bounacos [which was read at trial] at 33). According to Scott, he parked the Explorer in October 1999, and it has been parked since that time. (Tr., 336-337).

On February 3, 2000, at the suggestion of his trial counsel, Scott went to BSF and spoke with Mr. Howe to notify BSF that he had just discovered that the SUV had been wrecked prior to his purchase. Scott wanted to know what BSF would be willing to do. (Tr., 338-339). Scott testified that Howe acted shocked. (Tr., 341). Howe told Scott he would have to talk to Bill Harvey. Scott came back

[4] SLF designates Supplemental Legal File.

the next day and spoke with Harvey. Harvey asked Scott what he wanted. Scott said he just wanted to know what his options were. Harvey said that they would take the SUV back in trade or buy it back for the value it would have had if it did not have a salvage title in its history. Scott testified that Harvey looked surprised, and that he didn't know it had previously been wrecked. (Tr., 341-345, 347, 492). Scott was to contact Harvey and let him know what he wanted to do. Scott did not call back. (Tr., 591-592).

In early May, 2000, after not hearing from Scott, Balderston, on behalf of BSF, sent Scott a letter offering to purchase the SUV back for the amount of $25,400.00, which included the purchase price, the price of the ESP, the price of the credit life, and the finance charges. Balderston stated in the letter that BSF would reimburse Scott this money even if Scott no longer owned the SUV. (Plaintiff's Ex. 1, Tr., 298, 349-412).

Procedural History

On January 2, 2001, almost eight months after BSF offered to refund to Scott the entire purchase price, including incidentals and finance charges without any deduction for his use in driving it 186,000 miles, Scott filed this action, asserting only two claims Count I, civil conspiracy and fraud; and Count II, violation of the Missouri Merchandising Practices Act. (SLF, 2-7.)

On March 7, 2001, two months after suit was filed, BSF served defendant's Offer of Judgment on Scott, offering to allow judgment to be taken against BSF in the amount of $75,000.00, plus reasonable attorney fees incurred to date. (LF 50-51). BSF and Balderston served a Second Offer of Judgment, offering to allow judgment to be taken against BSF in the amount of $125,000.00 plus reasonable attorney fees to be determined by the Court and accrued costs. (LF 67-68).

On April 17, 2001, Scott filed his First Amended Petition asserting the following claims against BSF: Count I, fraud; Count II, violation of the Missouri Merchandising Practices Act; Count III, conversion; Count IV, negligent misrepresentation; Count V, negligence; Count VI, negligent supervision; Count VII, intentional failure to supervise and exercise due care; and Count VIII, breaches of express and implied warranties and the Magnuson-Moss Warranty Act. Also in the Amended Petition, Scott asserted the following claims against defendant Balderston: Count IX, conspiracy and fraud in the sale of the Explorer; Count X, conspiracy and violations of the Missouri Merchandising Practices Act; Count XI, conspiracy and conversion; Count XII, negligent misrepresentation; Count XIII, negligence; Count XIV, negligent supervision; Count XV, intentional failure to supervise and exercise due care; and Count XVI, breaches of express and implied warranties and the Magnuson-Moss Warranty Act. (LF 4-31).

Prior to filing his First Amended Petition, Scott did not give notice of his Magnuson-Moss Warranty Act claim and did not give BSF an opportunity to cure the claimed breach of warranty. (LF, 368, 373; Tr., 1547-1548).

The trial of the matter first commenced in late January, 2003. During that trial, Scott sought to elicit testimony regarding a prior judgment entered against BSF and the separate car dealership, Blue Springs Ford Wholesale Outlet, Inc. ("Wholesale Outlet"), stemming from a 1984 GMC Jimmy sold wholesale by BSF to Wholesale Outlet, which subsequently sold the GMC to Vicki Grabinski. Grabinski purchased the GMC from Wholesale Outlet. She contended Wholesale Outlet told her the GMC had never been wrecked. Over the objection of defendants, the trial court allowed Scott to admit evidence concerning the facts of the *Grabinski* case, but ordered that there would be no mention of any judgment until Scott provided case law. In violation of the court's order, Scott's attorney asked a witness in front of the jury if he was aware of the judgment that was entered against BSF and Wholesale Outlet. BSF and Balderston immediately objected and moved for a mistrial. The court instructed the jury to disregard the question and took the Motion for Mistrial under advisement. The next day, the court granted the mistrial. (Tr., 50-52, 87-88; LF 66).

The re-trial of this matter commenced on August 26, 2003. (Tr., 178; LF 363). During the trial, over the objections of BSF and Balderston, the trial court

permitted Scott to introduce evidence of instances in which Blue Springs Nissan and Blue Springs Ford Wholesale Outlet, Inc. were alleged to have sold previously wrecked automobiles without disclosing the prior repaired damage. Blue Springs Nissan and Blue Springs Ford Wholesale Outlet, Inc. were separate and distinct entities and were not parties to this case. (For cites to the record, see specific additional facts provided under Argument I).

Scott only submitted Count I (fraud), Count II (violation of the Merchandising Practices Act), Count III (conversion), and Count VIII (breach of warranty/violation of the Magnuson-Moss Warranty Act) against BSF and Counts IX (conspiracy and fraud), Count X (conspiracy and violation of Merchandising Practices Act), and Count XI (conspiracy and conversion) against Balderston to the jury. All other counts in Scott's First Amended Petition were dismissed with prejudice. The matter was bifurcated with regard to punitive damages. (LF 363-367).

The jury returned a verdict finding for Scott against BSF on its claims for violation of the Merchandising Practices Act, fraudulent misrepresentation, breach of warranty/violation of the Magnuson-Moss Warranty Act, and conversion. The jury assessed compensatory damages at $25,500.00. The jury was not instructed on the measure of damages for the conversion claim. This amount was assessed by the trial court. (LF, 123-167; Tr., 1657-1658). In addition, the jury found that BSF

was liable for punitive damages. The jury found in favor of BSF on Scott's fraudulent failure to disclose claim. The jury found in favor of Balderston on all claims submitted against Balderston. (LF, 363-367).

Subsequently, the trial resumed on the issue of the amount of punitive damages. Following the presentation of evidence, the jury returned a verdict assessing punitive damages against BSF in the amount of $840,000.00. Following the verdict, the court entered judgment in favor of Scott and against BSF in the amount of $25,500.00 compensatory damages on Scott's claims for violation of the Merchandising Practices Act, fraud, and breach of the Magnuson-Moss Warranty Act, and in the amount of $2,099.82 compensatory damages for conversion, and $840,000.00 in punitive damages for a total judgment of $867,599.82. (LF, 363-367).

Additional facts will be discussed under the applicable argument where appropriate.

POINTS RELIED ON

I. The Trial Court Erred In Admitting Evidence Of Alleged Similar Occurrences Of Sales Of Used Cars By Blue Springs Nissan And Blue Springs Wholesale Outlet, Inc. Because The Sales Were Not Similar, Were By Separate Entities Which Were Not Parties To The Case And The Prejudicial Effect Of Such Evidence Outweighed The Probative Value And Violated Principles Concerning Punitive Damages Set Forth In *State Farm Mut. Ins. Co. v. Campbell,* 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003).

Pierce v. Platte-Clay Electric Cooperative, 769 S.W.2d 769 (Mo. banc 1989)

Brockman v. Regency Financial Corp., 124 S.W.3d 43 (Mo. App. 2004)

Rice v. Lammers, 65 S.W.2d 151 (Mo. App. 1933)

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S. Ct. 1513, 155 L.Ed.2d 585 (2003)

II. The Trial Court Erred In Allowing Scott's Expert To Testify Regarding Safety Issues Of The Repaired Explorer Because Such Expert Testimony Did Not Meet The Standard For Admission Prescribed By RSMo § 490.065 As The Expert Witness Was Not Qualified To Render

Opinions In That Area; The Expert Witness Admitted That He Did Not Perform The Necessary Tests; The Expert Witness' Opinions Were Speculative And Were Not Stated With The Proper Degree Of Reasonable Certainty.

RSMo § 490.065

State Board of Registration for the Healing Arts v. McDonagh, 123 S.W.3d 146 (Mo. banc 2003)

Shackelford v. West Central Electric Cooperative, 674 S.W.2d 58 (Mo. App. 1984)

Abbott v. Haga, 77 S.W.3d 728 (Mo. App. 2002)

III. The Trial Court Erred In Denying BSF's Motion For A New Trial Or, In The Alternative, To Order A Remittitur Of The Compensatory Damages Awarded To Scott Because Such Compensatory Damages In The Total Amount Of $27,599.82 Were Grossly Excessive, Demonstrates Bias, Passion And Prejudice, Are Not Supported By Competent Evidence, And Improperly Allow Recovery Of Expenses Which Would Have Been Incurred Even If The Explorer Had Been As Represented.

Ince v. Money's Building & Development, Inc., 135 S.W.3d 475 (Mo. App. 2004)

Smith v. Tracy, 372 S.W.2d 925 (Mo. 1963)

Bird v. John Chezik Homerun, Inc., 152 F.3d 1014 (8th Cir. 1998)

IV. The Trial Court Erred In Denying BSF's Motion For New Trial Or, In The Alternative, To Order A Remittitur Of The Punitive Damages Awarded In The Amount Of $840,000.00 Because The Award Is So Excessive It Demonstrates Bias, Passion, And Prejudice On The Part Of The Jury And Violates The U.S. Constitution And Principles Concerning Punitive Damages As Set Forth In *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003).

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S. Ct. 1513, 155 L.Ed.2d 585 (2003)

BMW of North America v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L.Ed.2d 809 (1996)

Williams v. ConAgra's Poultry Co., 378 F.3d 790 (8th Cir. 2004)

Conseco Finance Servicing Corp. v. North American Mortgage Co., 381 F.3d 811 (8th Cir. 2004)

V. The Trial Court Erred In Denying BSF's Motions For Directed Verdict and For Judgment Notwithstanding the Verdict On Scott's Magnuson-Moss Warranty Act Claim Because The Evidence At Trial Failed To Demonstrate That Scott Satisfied The Condition Precedent of Giving BSF A Reasonable Opportunity to Cure.

15 U.S.C. §2310(e)

DeLong v. Hilltop Lincoln-Mercury, Inc., 812 S.W.2d 834, 844 (Mo. App. 1991)

Tucker v. Aqua Yacht Harbor Corp., 749 F. Supp. 142 (N.D. Miss. 1990), *aff'd*. 953 F.2d 643 (5th Cir. 1992)

Heller v. Shaw Industries, Inc., 1997 WL 535163 (E.D. Pa. 1997)

ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING PREJUDICIAL EVIDENCE OF ALLEGED SIMILAR OCCURRENCES OF SALES OF USED VEHICLES WITH UNDISCLOSED REPAIRED WRECK DAMAGE BY BLUE SPRINGS NISSAN AND BLUE SPRINGS FORD SALES OUTLET, INC., WHICH WERE SEPARATE ENTITIES AND NOT PARTIES TO THIS ACTION.

A. Standard of Review

"Trial courts have wide discretion on issues of admission of evidence of similar occurrences." *Pierce v. Platte-Clay Electric Cooperative*, 769 S.W.2d 769, 774 (Mo. banc 1989). This Court's "review is limited to a finding that the trial court first satisfied itself that the evidence was relevant to an issue of the case and that the occurrences bore sufficient resemblance to the injury-causing incident, while weighing the possibility of undue prejudice or confusion of the issues." *Id.* An appellate court will grant relief when an erroneous admission of evidence either prejudices the complaining party or adversely affects the jury in reaching its verdict. *Ford v. Gordan*, 990 S.W.2d 83, 87 (Mo. App. 1999). Whether the erroneous admission of evidence has caused prejudice depends largely upon the facts and circumstances of the particular case. *McGuire v. Seltsam*, 138 S.W.3d 718, 722 (Mo. banc 2004). "The appropriate question is whether the erroneously

admitted evidence had any reasonable tendency to influence the verdict of the jury." *Id*.

Generally, evidence of transactions not connected with the transaction involved in the case at issue is not admissible, but the law recognizes an exception to the rule under certain circumstances. *Brockman v. Regency Financial Corp.*, 124 S.W.3d 43, 51-52 (Mo. App. 2004), citing *Rice v. Lammers*, 65 S.W.2d 151, 154 (Mo. App. 1933). *Rice* held that where alleged false and fraudulent representations are at issue in a case, "**other similar transactions of the party accused** of the fraudulent intent" are permitted to be admitted as tending to prove that the false representations were not made by mistake, but were made with the intent to deceive. *Rice*, 65 S.W.2d at 154 (emphasis added). With regard to admitting evidence of similar occurrences, the court must satisfy itself that the evidence was relevant to an issue in the case and that the occurrences were sufficiently similar to the injury causing incident, while weighing the possibility of undue prejudice. *Platte-Clay Elec. Coop., Inc.*, 769 S.W.2d at 774 (Mo. banc 1989), citing *Wadlow v. Linder Homes, Inc.*, 722 S.W.2d 621, 629 (Mo. App. 1986); *Blackwell v. J.J. Newberry Co.*, 156 S.W.2d 14, 20 (Mo. App. 1941). See also *Bird v. John Chezik Homerun, Inc.*, 152 F.3d 1014, 1016 (8th Cir. 1998) (trial court must consider whether the incidents were sufficiently similar to be probative

and weigh the probative value of such evidence against the risk of unfair prejudice or confusion).

Where punitive damages are at issue, due process imposes additional limits on the admission of other occurrences. In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-423, 123 S. Ct. 1513, 1523, 155 L.Ed.2d 585 (2003), the United States Supreme Court instructed:

> "For a more fundamental reason, however, the Utah courts erred in relying upon this and other evidence: The courts awarded punitive damages to punish and deter conduct that were no relation to the Campbells' harm. A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of **other parties' hypothetical claims against a defendant** under the guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here. Even if the

> harm to the Campbells can be appropriately characterized as minimal, the trial court's assessment of the situation is on target: "'The harm is minor to the individual but massive in the aggregate.'" **Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case non-parties are not bound by the judgment some other plaintiffs obtain**." (Emphasis added).

B. Admission of Evidence of Sales by Blue Springs Nissan

Prior to trial, BSF and Balderston filed motions in limine to prohibit the admission of evidence concerning vehicles purchased by individuals under circumstances in which it was alleged that prior repaired damage was not disclosed and/or the history or condition of the vehicle was misrepresented. (SLF, 8-12; LF 69-106, 109-122; LF 58-64; Tr., 90-177). The trial court ruled that Scott would be allowed to introduce evidence of other misconduct involving the sales of other specific vehicles, including the Craig vehicle, the Dover vehicle, and the Brooker vehicle, which were all sold by Blue Springs Nissan, a separate entity, which is not a party to this action, and of the Grabinski vehicle, which was sold by Blue Springs Ford Wholesale Outlet, Inc. ("Wholesale Outlet"), also a separate entity, which is not a party to this action. Defendants objected to the admission of this evidence at

trial. (LF 107-108; Tr., 147-150, 155-166, 184, 524, 637, 906, 971, 1262). The specific evidence admitted and the objections thereto will be discussed below.

The deposition of Michael Craig was read at trial over the objections of BSF and Balderston. (Tr., 184, 906, 1262, 1273). Craig testified that he purchased a used four-wheel drive, extended cab pickup from Blue Springs Nissan. (SLF, 19, Craig Deposition, 19:1-12; 20:8-25). Craig testified that the Blue Springs Nissan salesman told him that the Nissan pickup he bought was "a good one." (SLF, 20, Craig Deposition, 22:17-19). The Blue Springs Nissan salesman also told him that the truck had been a leased vehicle and there was no discussion about whether or not the car had been wrecked or had any flood damage. (SLF, 21, Craig Deposition, 29:17-23). During an inspection, he noticed a big patch weld on each side of the frame. (SLF, 22, Craig Deposition, 33:2-9). He further stated that he began having electrical problems with the headlights and dash lights. (SLF, 22, Craig Deposition, 34:10-35:4). Craig also testified that the truck needed to be completely rewired at a cost of $2,500.00 to $3,000.00 because it had been "under water." (SLF, 25, Craig Deposition, 59:2-23). He further testified that the truck is currently sitting because it makes him nervous just driving it because it is not safe and he believed: "If someone runs into the back of you, you're subject to get hurt much more than you would if it hadn't been wrecked and repaired." (SLF, 25-26, Craig Deposition, 60:20-61:3).

Jennifer Brooker testified at trial concerning a 1991 Ford Taurus that she and her husband purchased from Blue Springs Nissan in December of 1995. (Tr., 92-93). BSF objected to Ms. Brooker's testimony on the grounds that it was improper similar occurrence evidence. (Tr., 184, 906-907, 971). She testified that in response to their inquiry if the vehicle had ever been wrecked before, the Blue Springs Nissan salesman replied no and that it was a one-owner vehicle owned by an older couple and was taken good care of with low mileage. (Tr., 973-974). Ms. Brooker testified that the car had previously been wrecked and was not a one-owner car. (Tr., 975-977). Ms. Brooker learned that the car was previously owned by Roy Hannah. (Tr., 979). She testified that she went back to the dealership, which finally acknowledged that the vehicle had been in a substantial wreck and that Blue Springs Nissan "never did anything to get [her] out of that vehicle." (Tr., 984). On cross-examination by BSF, Ms. Brooker acknowledged that she never had any dealings with anyone at BSF. (Tr., 989). She never testified concerning any dealings with Balderston. (Tr., 972-990).

The deposition of Roy Hannah was also read at trial. (Tr., 1000; Plaintiff's Exhibit 63). BSF and Balderston objected to this evidence on the grounds that the transaction was not similar and the probative value was outweighed by the prejudice. (Tr., 184, 906). Hannah testified that he traded in the 1991 Ford Taurus to Blue Springs Nissan that was later sold to the Brookers on November 18, 1995,

at Blue Springs Nissan. He stated that he disclosed to the salesman who waited on him at Blue Springs Nissan that the car had been wrecked as it had been hit in the rear, and that it had been fixed. (Deposition of Roy Hannah, Plaintiff's Exhibit 61, 4-6). Hannah stated that after the car had been repaired, he could not tell that it had ever been damaged. (*Id*., at 11). Mr. Hannah paid a man $700.00 or $800.00 to fix the car. (*Id*., at 20).

Jerry Dover also testified at trial concerning a car that he bought from Blue Springs Nissan. (Tr., 1223). BSF objected to his testimony on the basis that it constituted improper similar occurrence evidence. (Tr., 184, 906-907). Specifically, Mr. Dover testified that on August 5, 1995, he purchased a 1994 Mercedes C220, used from Blue Springs Nissan. (Tr., 1224). He testified that the salesman he dealt with told him that to their knowledge everything was perfect and that the car had not been in any type of accident. (Tr., 1225). He testified that his wife took the car to Aristocrat Motors, a Mercedes Benz dealer, which would not work on the car under warranty. Upon investigating the history of the vehicle, Dover returned the vehicle to Blue Springs Nissan because it had been previously "totaled." (Tr., 1228-1230). When the sales manager at Blue Springs Nissan asked if there was a vehicle that he could trade for. Dover said no, and wanted to speak with the owner, Mr. Balderston, and the sales manager referred him to Balderston at Blue Springs Ford. (Tr., 1234). He did not speak with Balderston

because Balderston was not at BSF when Hannah went there. Ultimately, he traded in the car at Blue Springs Ford for an Explorer. (Tr., 1235-1237).

In the case at bar, admission of evidence of the sales by Blue Springs Nissan of the Craig vehicle, the Dover vehicle, and the Brooker vehicle, was an abuse of discretion and a violation of BSF's due process rights. First and foremost, these other instances of sales cannot be deemed sufficiently similar because the sales and alleged representations or failure to disclose were made by Blue Springs Nissan, a separate entity who is not a party to this action. The only connection Blue Springs Nissan had with BSF was that they were both owned by defendant Balderston for approximately three years. The jury found in favor of defendant Balderston. Clearly, given the jury's exoneration of Balderston, his common ownership of BSF and Blue Springs Nissan cannot be used to allow the jury to consider the prior bad acts of Blue Springs Nissan as the prior bad acts of BSF. There is absolutely no evidence that Balderston had any knowledge of any of these incidents.

Admission of the Craig, Dover, and Brooker sales was clearly prejudicial as evinced by the grossly excessive compensatory damages that were not supported by the evidence and the grossly excessive, unconstitutional and disproportionate award of punitive damages. The jury's disproportionately huge award of punitive damages -- $840,000.00 for the sale of a vehicle for $14,995.00 – indicates that the jury considered Blue Springs Nissan's prior bad acts in assessing punitive damages

against BSF. The jury was allowed to punish BSF for the acts of another party, Blue Springs Nissan, and to adjudicate the merits of the claims of Craig, Dover and Brooker against such non-party. The trial court clearly erred in admitting such prejudicial evidence. *State Farm Mutual Ins. Co. v. Campbell*, 538 U.S. at 422-423. Therefore, the trial court erred and abused its discretion in admitting the evidence and denying BSF's motion for new trial.

C. Admission of Evidence of the Acts and Representations of Blue Springs Ford Wholesale Outlet, Inc.

Throughout the trial, the court permitted evidence of the Grabinski transaction, and in particular admitted the highly prejudicial testimony of Vicki Grabinski concerning dissimilar acts by Wholesale Outlet. (Tr., 1465-1488). BSF objected to the admission of this evidence. (Tr. 155-166, 184, 524, 762, 1088, 1461-1462). Evidence of the Grabinski transaction should not have been admitted because it was not substantially similar to the acts alleged of BSF and because Wholesale Outlet was a separate and distinct entity which is not a party to this action. Therefore, this evidence was not probative of any issue in the present case. Moreover, the prejudicial effect of the Grabinski evidence outweighed any probative value and violated constitutional principles set forth in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L.Ed.2d 585 (2003).

In early 1993, BSF took a 1984 GMC Jimmy Truck as a trade-in. BSF decided to wholesale the car and sold it to a separate entity, Wholesale Outlet. (Tr., 772-73, 991, 1401, 1454; Exhibit 62). Subsequently, Wholesale Outlet sold the vehicle to Vicki Grabinski. Grabinski talked to Fred Graham, a salesman at Wholesale Outlet, who told her that the nine year old GMC had never been wrecked, was a one-owner vehicle, and was in perfect condition. Thus, all representations to Grabinski were made by a separate entity, Wholesale Outlet. Grabinski later found out that the car had been wrecked. (Tr., 1476). The trial court also allowed evidence that Wholesale Outlet required her to sign a "tow-off agreement," also known as a "junk affidavit," stating that she was purchasing the vehicle for salvage. Grabinski alleged that Wholesale Outlet coerced her into signing the "tow-off agreement" by telling her it was a universal contract used by every dealership, whether you bought new or used, everyone had to sign it. (Tr., 1469, 1473-1474).

The trial court's admission of the above evidence of fraudulent acts of another party, including dissimilar acts involving the "tow-off agreement" was not relevant or probative of any issue in the case because Wholesale Outlet was a separate entity (Tr., 1454), was not a party, and its conduct, motive, and/or intent was not at issue. Therefore, the prejudicial effect of such evidence clearly

outweighs the probative value. BSF's sole involvement in the Grabinski matter was selling the GMC wholesale to Wholesale Outlet.

BSF made no representations to Grabinski that the car had never been wrecked and that it was a one-owner. BSF's sole representation was to Wholesale Outlet stating the vehicle was very nice, driving fine and needed only clean-up and standard servicing. The misrepresentations made to Grabinski were made by Wholesale Outlet, a separate and distinct entity, which is not a party to this action. Moreover, the Court's allowance of evidence concerning the "tow-off agreement" required by Wholesale Outlet was not even remotely similar to any claim in this action. Thus, it was irrelevant, lacked any probative value, and clearly prejudicial because the jury knew that Balderston owned 100% of BSF and at least one-third of Wholesale Outlet.

By improperly allowing this evidence, the trial court essentially permitted the jury to consider the claims of a non-party in this matter. Grabinski sued BSF and Wholesale Outlet, and three employees of Wholesale Outlet, and obtained a judgment against them assessing punitive damages in the amount of $50,000.00 against BSF and $100,000.00 against Wholesale Outlet. Allowing the jury to consider this evidence had the effect of punishing BSF with multiple punitive damages awards for the sale of the GMC to Wholesale Outlet in violation of due process. *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. at 423.

The trial court abused its discretion in allowing the testimony of Vicki Grabinski, such evidence had a reasonable tendency to influence the verdict of the jury. Therefore, it constitutes prejudicial error, requiring a new trial. *McGuire*, 138 S.W.3d at 722.

II. THE TRIAL COURT ERRED IN ADMITTING CRUCIAL, PREJUDICIAL EXPERT TESTIMONY CONCERNING SAFETY ISSUES OF THE EXPLORER.

A. Standard of Review

The trial court is vested with broad discretion in the admission or exclusion of expert testimony. *Yingling v. Hartwig*, 925 S.W.2d 952, 955 (Mo. App. 1996). The trial court's decision on the admission of expert testimony will not be disturbed absent an abusive discretion, which occurs when the ruling is against the logic of the circumstances or is arbitrary and unreasonable. *Bank of Am., N.A. v. Stevens*, 83 S.W.3d 47, 53 (Mo. App. 2002).

"The admission of improper evidence is a basis for reversal when the evidence either prejudices the appellant or adversely affects the jury in reaching its verdict." *Babb v. Pfuehler*, 944 S.W.2d 331, 336 (Mo. App. 1997). Whether the erroneous admission of evidence has caused prejudice depends largely upon the facts and circumstances of the particular case. *McGuire*, 138 S.W.3d at 722. "The

appropriate question is whether the erroneously admitted evidence had any reasonable tendency to influence the verdict of the jury." *Id*.

The standard for admission of expert testimony in civil cases is set forth in RSMo. §490.065. *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 153 (Mo. banc 2003). Section 490.065 provides:

> "1. In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
>
> * * *
>
> 3. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by an expert in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable."

Section 490.065.3 "requires the court to consider whether the facts and data used by the expert are of a type reasonably relied on by experts in the field or if the methodology is otherwise reasonable and reasonably reliable. If not, then the testimony does not meet the statutory standard and is inadmissible." *McDonagh*, 123 S.W.3d at 157. "Section 490.065.3 also imposes an independent duty on the court to determine whether the facts and data relied on is otherwise reasonably reliable." *Id*.

B. Discussion

Richard Diklich, Scott's expert, was permitted to testify regarding "safety concerns" about the Ford Explorer. BSF objected to this testimony. Specifically, defendants filed a motion in limine concerning the scope and extent of Diklich's expert testimony. (SLF, 8-12; Tr., 1075-1077). That motion/objection was renewed at trial during the testimony of Diklich. (Tr., 1114-1115). Specifically, defendants argued and objected to any testimony by Diklich concerning safety issues on the grounds that he was not qualified and that any such testimony was speculative. (Tr., 184, 1075-1077). The court denied the motion. (Tr., 1081). Subsequently, at the time the testimony was elicited, BSF renewed its objections. (Tr., 184, 1114-1115).

Diklich testified concerning his background, experience, qualifications. He is a retired instructor of automotive technology for Longview College in Lee's

Summit. He has a Bachelor's of Science in Automotive Technology from Kansas State College in Pittsburg, Kansas. After he graduated, he went to work for Ford Motor Company in Claycomo, Missouri, from 1966 through 1972 working various jobs in management training programs all the way from driving cars and trucks to doing emissions testing to supervising inspectors on assembly lines. While at Ford Motor Company, he was involved in quality control. He would have inspectors who would check both the dimensional quality of the vehicles to the weld integrity. In the fall of 1972 he started teaching at Longview College in car repair. (Tr., 1043-1047). He held a Missouri wholesale and retail dealer's license for a while and attended wholesale auctions, watching cars sell and value trends. He has performed 3,500 extended service contract inspections to verify that the repair matched the conditions of the contract and to talk about the method of repair. (Tr., 1052-1053).

Diklich testified that he is not an engineer. (Tr., 1057). He specifically stated, "Now, I'm not an engineer so I don't do crashworthiness stuff." (Tr., 1118). Diklich's opinion lacked adequate foundation and was not reliable because it was speculative, based on assumptions, and without adequate testing. Specifically, he testified as follows:

"Q: You reached a conclusion that the nature of the repairs that were done in this area of the windshield left a defect that **could** affect safety?

A: Yes, from a repair standpoint. Now, I'm not an engineer so I don't do crashworthiness stuff. But from the repair standpoint it's well-known in our field that windshield retention is a problematic area when you go to do it.

Q: And this was repaired to the metal – well, for example, the windshield had been replaced at one time while Lance Scott had the vehicle. You were aware of that?

A: Yes.

Q: So you're referring to repairs that were done to the structure of the vehicle prior to that windshield replacement. You're saying that those were defective?

A: Well, that **assumes** that the shop that replaced the windshield didn't go in and do any subsequent or additional repair **but I don't know that one way**

or the other. I would have to speak to whether or not their re-repair would have been adequate. (Tr., Vol. II, 1118-1119). (Emphasis added).

* * *

Q: Okay. And this vehicle was not repaired that way?

A: No. The windshield adhesion I don't **think** was going to be any good in that upper left hand quarter but I haven't quantified it.

Q: You haven't gone out and crash tested it to see what it would do?

A: **No, you would want to crash test it or roll it or do a roof crush test**." (Tr., Vol. II, 1122-1123). (Emphasis added).

In fact, Scott testified that while driving the SUV, he was involved in an accident on Interstate 70, spun out and hit a cement barrier. During that high speed accident, he had no problems with his windshield falling out. (Tr., 329-332). On cross-examination, Diklich testified that the repair of the Explorer would have met minimum standards. (Tr., 1189).

The above testimony demonstrates that Diklich should not have been allowed to render an opinion about his safety concerns of the SUV. First, he was

not an engineer and he admitted that he was not qualified to discuss crashworthiness issues. The whole bases of Diklich's safety concerns were the windshield retention issue and the structural integrity of the roof in the event of a rollover accident. Diklich admitted that crash testing or a roof crush test was necessary, which he did not do. Therefore, Diklich's opinion as to safety concerns did not meet the requirements of RSMo § 490.065.3. Moreover, his testimony was based on mere speculation – making assumptions, and using the speculative terms "could" and "I don't think." (Tr., 1118, 1122). He never stated his opinion within a reasonable degree of certainty or other unequivocal language as required by law. See *Shackelford v. West Central Electric Cooperative*, 674 S.W.2d 58, 62 (Mo. App. 1984) (the opinion of an expert is of no probative value and does not satisfy the purpose for which it is admitted if the opinion of the expert is couched in terms of "might or could."). An expert using "equivocal language" renders his or her opinion inadmissible. *Abbott v. Haga,* 77 S.W.3d 728, 733 (Mo. App. 2002). Moreover, pursuant to Section 490.065.3, the court never considered whether the facts and data used by Diklich are the type reasonably relied upon by experts in the field or if his methodology is otherwise reasonably reliable. See *McDonagh,* 123 S.W.3d at 157. Diklich's own testimony indicates that he did not meet the standard because he testified that one would have to do crash testing, which he did not do. (Tr., 1123).

The admission of this opinion testimony concerning safety was clearly prejudicial and was a basis of the excessive punitive damages award. Therefore, it is reversible error, requiring a new trial. (*Babb*, 944 S.W.2d at 336; *McGuire*, 138 S.W.3d at 727). There can be no doubt that Diklich's testimony concerning safety concerns had a reasonable tendency to affect the jury. *McGuire*, 138 S.W.3d at 727.

Scott's counsel emphasized the safety issue at trial, highlighting Diklich's testimony concerning safety issues at least two times in his closing argument. He alleged that the expert testimony with regard to safety was uncontradicted. (Tr., 1611). Later, while arguing the issue of damages he stated:

> "Mr. Diklich said that there were safety defects in this vehicle and that's uncontradicted. Do Ford Explorers roll over? This one already had. Yes, they roll over and how would you like the windshield coming out and collapsing on you? Real safety defects." (Tr., Vol. III, 1644-1645).

Again, in his closing arguments in the amount of punitive damages phase, he again emphasized the safety issue:

> "And you're willing, you're willing, to let this person drive a salvage rebuilt wreck that may be unsafe. You have no idea how unsafe it may be, but it's a totaled

vehicle and you let them drive down the road in that for years. . . . (Tr., 1799).

It's similar, I would say, it's similar to that there's a problem out there with selling airbags that are fake airbags, to reinstall an airbag, and it's to replace one after a wreck. You'll make one profit out of it if you sell a fake airbag when you repair a car and you let people drive down the road in it. That's really seriously wrong, and we're talking safety. They said safety is a big issue. So if you were just looking at punishing Blue Springs Ford on this car, that's serious business." (Tr., 1800).

The above clearly demonstrates that the trial court erred in permitting Diklich to testify that the SUV may be unsafe. In summary, by his own admission, Diklich was unqualified, and his opinion was based upon assumptions and lacked foundation without the proper testing. Diklich's opinion was speculative being couched in terms of "could" and "I think." His opinion involved a critical issue – safety of the SUV -- and caused prejudice, requiring reversal of the verdicts as to liability, compensatory damages and punitive damages.

III. THE COMPENSATORY DAMAGES AWARDED IN THE AMOUNT OF $27,599.82 ARE GROSSLY EXCESSIVE AND DEMONSTRATES BIAS, PASSION, AND PREJUDICE BY THE JURY, REQUIRING A NEW TRIAL OR, IN THE ALTERNATIVE, A REMITTITUR.

A. Standard of Review

In *Ince v. Money's Building & Development, Inc.*, 135 S.W.3d 475, 478 (Mo. App. 2004), the court succinctly set forth the rules concerning excessive jury verdicts:

> "The assessment of damages is primarily the function of the jury. *Koehler v. Burlington Northern, Inc.*, 573 S.W.2d 938, 946 (Mo. App. 1978). Therefore, we will exercise our power to interfere with and reduce a verdict with caution. *Id*. Further, we will not disturb a trial court's entry of judgment on a jury verdict unless there is an abuse of discretion either by the trial court or by the jury. *Graham v. County Medical Equipment Co., Inc.*, 24 S.W.3d 145, 148 (Mo. App. E.D. 2000).
>
> A jury has a duty to award a sum that will reasonably compensate plaintiff. *Hart v. City of Butler*, 393 S.W.2d 568, 580 (Mo. 1965). A jury's verdict for an amount not

supported by the evidence can be either grossly excessive or merely excessive. *See Worley v. Tucker Nevils, Inc.*, 503 S.W.2d 417, 423 (Mo. banc 1973). A grossly excessive verdict indicates bias and prejudice on the part of the jury, and requires a new trial to be ordered. *Id*. In contrast, a merely excessive verdict occurs when a jury made an honest mistake in weighing the evidence as to the nature and extent of the injury, in fixing the damages, and in subsequently awarding a disproportionate amount of money. *Id.* Such a mistake can be corrected without a new trial by requiring a remittitur of a portion of the amount awarded. *Id.*"[5]

B. The compensatory damages awarded by the jury and entered by the court in the judgment are not supported by the evidence.

The jury returned a verdict against BSF in the amount of $25,500.00 in compensatory damages. The trial court entered judgment in the amount of $25,500.00 for Scott's claims for fraud, violation of the Missouri Merchandising

[5] In *Firestone v. Crown Center Development Corp.*, 693 S.W.2d 99 (1985), the court, *en banc*, abolished the practice of remittitur. Subsequently, RSMo. §537.068 was enacted, reinstituting the practice.

Practices Act, and breach of warranty/violation of the Magnuson-Moss Warranty Act as submitted to the jury in Instruction Nos. 8, 11, and 19, respectively, $2,099.82 in compensatory damages for conversion as submitted in Instruction No. 22, and $840,000.00 in punitive damages, for a total judgment of $867,599.82. (LF, 363-367). This judgment was grossly excessive and against the weight of the evidence, demonstrating bias, passion and prejudice on the part of the jury.

The measure of damages in a case involving misrepresentation was set forth in Instruction No. 6, which was modified from MAI 4.03 and provided:

> "If you find in favor of plaintiff against defendant Blue Springs Ford Sales, Inc., or defendant Robert Balderston, then you must award plaintiff such sum as you believe was the difference between the actual value of the Ford Explorer on the date it was sold to the plaintiff and what its value would have been on that date had the vehicle been as represented by defendant Blue Springs Ford Sales, Inc., plus such sum as you believe will fairly and justly compensate plaintiff for any other damage plaintiff sustained as a direct result of the occurrence submitted in the evidence." (LF 130).

See *Smith v. Tracy*, 372 S.W.2d 925, 938-939 (Mo. 1963) (The measure of damages in a case involving the sale of property that was misrepresented is the difference between the actual value of the property and what its value would have been if it had been as represented). The difference between actual value and the value as represented is referred to as the benefit-of-the-bargain rule. *Sunset Pools v. Schaefer*, 869 S.W.2d 883, 886 (Mo. App. 1994). See also, *Reynolds v. Davis*, 303 Mo. 418, 432, 260 S.W. 994, 997 (1924) (defrauded party may be awarded the difference between actual value and value as represented, allowing party to obtain the benefit of his bargain). A party may recover consequential damages in addition to benefit-of-the-bargain damages, for expenses attributed to the fraud. However, a party may not recover expenses that would have been incurred even if the vehicle had been as represented. *Bird v. John Chezik Homerun, Inc.*, 152 F.3d 1014, 1017 (8th Cir. 1998). Thus, a party defrauded by a dealer on a car purchased is not entitled to recover finance charges and taxes, which the party paid to purchase the car, because the party would have incurred those costs even if the vehicle had been as represented. *Id*.

In the present case, Scott testified that he purchased the Explorer for $14,995.00, purchased an extended service contract for $1,475.00, credit life insurance in the amount of $1,633.00, an origination fee of $35.00, and financed the SUV for 66 months with a total finance charge of $7,199.00. (Tr., 320-322).

Scott specifically testified that the price of $14,995.00 was, in his opinion, fair market value. (Tr., 324).

The only competent evidence presented on the value that the Explorer actually had if the fact that it had previously been salvaged had been disclosed, was presented by Scott's expert, Richard Diklich. Although Scott's counsel attempted to elicit some testimony from Scott, such testimony was clearly incompetent. Specifically, without any foundation as to Scott's qualifications to render an opinion on the value of the SUV if it had been disclosed that the Explorer had been previously salvaged and repaired, Scott stated:

> "Q: What is your opinion as to – give us your best opinion as to what its value would have been with those facts?
>
> A: I wouldn't even say it would half of that, if even. Maybe $5,000.00, $6,000.00. I don't know.
>
> Q: Okay. Something in the neighborhood of five or six thousand?
>
> A: Yes." (Tr., 354).

Subsequently on cross-examination, with regard to the $5,000.00 or $6,000.00 valuation testimony, Scott testified:

> "Like I said, I just threw that out there. I don't really know. I don't appraise cars. I don't know what they're worth or anything. That was just a random number." (Tr., 415).

The above testimony clearly demonstrates that Scott is not qualified to provide his opinion as to the value of the car and that his opinion was speculative.

Diklich testified that in his opinion the value of the SUV if it had never been wrecked and repaired, was $15,500.00, approximately $500.00 more than Scott paid. (Tr., 1129). With regard to the Explorer's value as a repaired salvage vehicle, Diklich testified so long as the Explorer had a transferable title it could be sold at a wholesale auction. (Tr., 1142). He specifically stated there is "always a market if it is America." (Tr., 1143). He testified that at a general wholesale auction with disclosure that it had a previous salvage title, was a rebuilt wreck, had defects that affect safety, and the way that it was repaired, the SUV would have sold for $7,000.00 to $7,500.00 in March 1994. (Tr., 1143-1144). Thus, viewing the evidence in the most favorable light to Scott, the difference between the value as represented and the actual value is $8,500.00 ($15,500.00 - $7,000.00).

In closing argument, Scott asserted that he was entitled to a return of a portion of the finance charge related to the overvaluation (Tr., 1645), i.e., the finance charge for the overvaluation of $6,995.00. ($14,995.00 - $8,500.00 =

$6,995.00). First, this finance charge is not recoverable because Scott would have incurred that expense even if the Explorer had been as represented. *Bird*, 152 F.3d at 1017. Second, even if this finance charge is allowed, the compensatory damages awarded by the jury including the sum are not supported by the evidence. The amount financed was $16,994.99 with total finances charges of $7,199.29 or 42.36% of $16,994.99. (Exhibit 18). Applying this percentage to the overvalue amount of $6,995.00 yields $2,963.08 in excess finance charges. Scott is not entitled to the origination fee of $35.00 because he would have incurred that expense even if the SUV had been as represented. *Id.*

Scott also claims $1,633.11 in credit life insurance. This claimed element of damage is not recoverable because Scott would have incurred that expense even if the Explorer had been as represented. *Id.* Nevertheless, allowing Scott this amount and the finance charge associated with the credit life insurance of $691.79 (42.36% of $1,633.11) still does not support the compensatory damages award.

Scott is entitled to the return of $1,475.00 plus finance charges of $624.82 ($1,475.00 x 42.36%) for a total of $2,099.82 for the conversion of the ESP. This amount was awarded by the court separately and should not have been considered by the jury. Below is a summary of the compensatory damages supported by the evidence using both the *Bird* limitation and erroneously allowing the charges Scott would have incurred even if the Explorer had been as represented.

Compensatory damages supported by the evidence, applying *Bird*:

Difference in value	$ 8,500.00
Damages for Conversion	2,099.82
	$10,599.82

Compensatory damages supported by the evidence allowing costs which would have been incurred even if the SUV had been as represented (i.e., not applying *Bird*):

Difference in value	$ 8,500.00
Finance charges associated with overvalue	2,963.08
Credit life insurance	1,633.11
Finance charges associated with credit life	691.79
Origination fee	35.00
ESP plus finance charges	2,099.82
	$15,922.80

There is evidence of no other consequential damages in the record. Although in his closing argument, Scott requested damages for storing the Explorer, and for inconvenience and hassle there was no evidence from which the jury could assign damages. There was no evidence presented of the value of the storage and no evidence of any recoverable special damages with regard to "hassle and inconvenience." Scott had no suspicion the SUV had been previously wrecked

until May 1999 after he had driven it over 160,000 miles. There was little inconvenience as Scott drove the SUV from March 1994 through October 1999 until the transmission went out, putting 186,000 miles on it. Scott did not allege, and there is no evidence that the transmission problem was related to the salvage history. In fact, Scott's expert stated Scott got "good use" out of the Explorer. (Tr., 1199).

The jury awarded Scott compensatory damages for the fraud, violation of the MPA, and violation of the Magnuson-Moss Warranty Act pursuant to Instruction No. 6 in the amount of $25,500.00. The court entered judgment on the jury verdict in the amount of $27,599.82 ($25,500.00 + $2,099.82) in compensatory damages, $17,000.00 or 160.4% above the actual compensatory damages supported by the evidence ($10,599.82). Even erroneously allowing the amounts Scott claimed which he would have incurred even if the Explorer had been as represented. Scott only submitted evidence to establish $15,992.80 in damages. The judgment entered was $11,607.02 or 72.6% above this inflated compensatory damage amount of $15,992.80. The verdict and judgment are grossly excessive, requiring a new trial rather than a remittitur. Alternatively, this court should exercise its authority to enter a remittitur.

IV. THE JUDGMENT ENTERED ON THE JURY VERDICT OF PUNITIVE DAMAGES IN THE AMOUNT OF $840,000.00 IS GROSSLY EXCESSIVE, DEMONSTRATING THE JURY'S BIAS, PASSION, AND PREJUDICE AND VIOLATES CONSTITUTIONAL PRINCIPLES SET FORTH IN *STATE FARM MUT. INS. CO. v. CAMPBELL*, REQUIRING A NEW TRIAL OR, IN THE ALTERNATIVE, AN ORDER OF REMITTITUR.

A. Standard of Review

The constitutionality of the award of punitive damages presents a question of law subject to *de novo* review. *Williams v. ConAgra's Poultry Co.*, 378 F.3d 790, 796 (8th Cir. 2004). See also *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 418, 123 S. Ct. 1513, 155 L.Ed.2d 585 (2003) (appellate courts are mandated to conduct *de novo* review of application of *BMW of North America v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L.Ed.2d 809 [1996] guideposts).

"The due process clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tort-feasor." *Campbell*, 538 U.S. at 416. "To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Id*., at 417.

In *Campbell*, the United States Supreme Court noted that jury instructions typically leave the jury with wide discretion in choosing amounts of punitive damages and that such vague instructions do little to aid the decision maker in its task. *Id.*, at 417-418. In light of such concerns, in *Gore*, the United States Supreme Court required courts reviewing punitive damage awards to consider three guideposts: "(1) the degree of reprehensibility of a defendant's misconduct; (2) the disparity between the actual potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Campbell*, 538 U.S. at 418, citing *Gore*, 517 U.S. at 575.

Of the three guideposts, "the most important indicium of the reasonableness of a punitive damage award is the degree of reprehensibility of the defendant's conduct." *Gore*, 517 U.S. at 575. In *Campbell*, the Supreme Court stated:

> "A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of **other parties'**

hypothetical claims against the defendant under the guise of reprehensibility analysis . . . ." 538 U.S. at 422-423.

B. Discussion

The ratio of the compensatory damages awarded by the jury of $25,500.00 to the punitive damages awarded of $840,000.00 is 32.94 to 1. As demonstrated above, the compensatory damages supported by the evidence (viewed in the most favorable light to Scott) were only $10,599.82; thus, the jury's award of $840,000.00 for punitive damages was 79.25 times compensatory damages (or 52.52 times compensatory damages using the inflated figure of $15,992.80 for compensatory damages, which does not apply the *Bird* limitation). Application of the *Gore* guideposts demonstrate that the punitive damages award is clearly and grossly excessive requiring a new trial or, in the alternative, a remittitur.

The first *Gore* guidepost is the degree of reprehensibility. The U. S. Supreme Court has instructed courts to determine the reprehensibility of a defendant by considering whether: "[T]he harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery or deceit, or mere accident." *Campbell*, 538 U.S. at 419. The existence of any one of the above factors

weighing in favor of plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. *Id.*

In the present case, the harm caused was purely economic as opposed to physical. Scott suffered no physical injuries. BSF's conduct did not indicate an indifference to or reckless disregard for the health or the safety of others. Although Scott's expert testified that the SUV had safety concerns, such testimony was incompetent and should not have been admitted as demonstrated above. Scott drove the SUV for almost six years, driving approximately 186,000 miles without any safety problems. Moreover, Scott testified that he "spun out" on an interstate and hit a concrete barrier damaging the SUV; no safety concern arose in that incident. Scott did not exhibit particular financial vulnerability. He was an educated, commercial pilot. Moreover, he obtained "good use" out of the SUV. (Tr., 1199).

Although Scott introduced other instances, as noted above, many of these instances involved different parties, Blue Springs Nissan and Blue Springs Ford Wholesale Outlet, Inc. The jury did find against BSF on the intentional misrepresentation claim, thus the final factor of deceit must be deemed present. However, the court should consider that BSF was hampered in its defense of this matter because the salesman who Scott alleged made the misrepresentations died before the case was filed, and BSF did not have the ability to present his side of the

story. Further, there was no direct evidence that BSF knew the car was previously salvaged. The Carfax report did not show the salvage history of the Explorer until after the sale, and the title did not show the SUV was salvaged.

Finally, in February of 2000, when Scott first brought the issue to the attention of BSF, BSF offered Scott full value in a trade as if the car did not have a salvage history. Scott refused. Three months later, on May 11, 2000, Scott was offered a refund of his entire purchase price for everything, including finance charges in the amount of $25,400.00, without any deduction for his extensive use of the SUV. Again, Scott rejected that offer.

Scott incited the jury to award a disproportionate amount in punitive damages because of other incidents of cars sold by BSF, Blue Springs Nissan, and Wholesale Outlet. The trial court's erroneous admission of evidence of other incidents of cars sold by other companies owned by Balderston incited the jury to award a disproportionate and grossly excessive amount of punitive damages. The admission of this non-party evidence as well as the trial court's admission of prior instances by BSF, which had already been adjudicated or settled, violated the warning stated in *Campbell* that due process does not permit the court to adjudicate the merits of **other parties'** hypothetical claims against the defendant under the guise of reprehensibility analysis in determining punitive damages. Such conduct

creates the possibility of multiple punitive damages awards for the same conduct. *Campbell*, 538 U.S. at 423.

That prohibited outcome expressed in *Campbell* is precisely what happened in the present case. In addition to the jury punishing BSF for the conduct of other parties, Blue Springs Nissan and Wholesale Outlet, the jury also punished BSF for claims of other parties, resulting in multiple punitive damages awards. For example, the jury was allowed to consider the *Grabinski* case. BSF was found liable for punitive damages in that matter. *Grabinski v. Blue Springs Ford Outlet, Inc.*, 136 F.3d 565 (8th Cir. 1998). Thus, BSF has been punished with punitive damages twice for the same conduct. Case law is instructive.

In *Pacific Mut. Life Ins. Co. v. Haislip*, 499 U.S. 1, 111 S. Ct. 1032, 113 L.Ed.2d 1 (1991), an agent of Pacific Mutual Life Insurance Company defrauded the plaintiff insureds in group health and life insurance policies by collecting premium payments from the insureds and failing to remit such payments to the insurer, resulting in the policies being canceled. To make matters worse, the defendants did not forward the letters of cancellation to the insureds so the insureds did not know they were uninsured until after medical expenses were incurred and claims were submitted. The entire group, the employees of a municipality, was unknowingly exposed with no health insurance. One of the plaintiffs suffered a judgment entered against her for unpaid medical bills and the resulting damage to

her credit. The defendants' conduct in *Haislip* was clearly reprehensible involving fraud affecting numerous insureds and the court let an award of a little more than four times the amount of compensatory damages stand, but stated that the award might be close to the line of constitutional impropriety. *Haislip*, 499 U.S. at 23-24; *Campbell*, 538 U.S. at 425.

BSF's conduct is not even as bad as the defendants' in *Haislip*. Even though BSF's conduct was found by the jury to have met some of the factors of reprehensibility, the *Haislip* defendants were more reprehensible, affecting the health care of numerous individuals, and the court found an award of four times the compensatory damages was near the constitutional limit. In the present case, the $840,000.00 in punitive damages was 72 times the compensatory damages supported by the evidence and 33 times the amount of compensatory damages awarded by the jury. *Haislip* instructs this punitive damages award is clearly excessive and unconstitutional.

Considering the second *Gore* guidepost, the Supreme Court has been reluctant to identify concrete constitutional limits on the ratio between the harm or potential harm to the plaintiff and the punitive damages award. However, as noted above, the court found that an award of a little more than four times the amount of compensatory damages might be close to the line of constitutional impropriety in *Haislip*. *Campbell* stated:

> "Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Campbell*, 538 U.S. at 525.

Following the discussion of *Haislip*, the *Campbell* Court stated that ratios greater than those previously upheld may comport with due process where a particularly egregious act has resulted in a small amount of economic damages. *Id*. For example, where the jury finds damages of $1.00, a ratio greater than a single digit could be appropriate. The Court also noted that the converse is true that when compensatory damages are substantial and a lesser ratio perhaps one only equal to compensatory damages can reach the outermost limits of due process. *Id*. In concluding its discussion, *Campbell* stated:

> "In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm **to the plaintiff and to the general damages recovered**." 538 U.S. at 426 (emphasis added).

In the present case, as demonstrated above, the compensatory damages proven by Scott were only $10,599.82, which is a 79-to-1 ratio. Using the amount

awarded by the jury of $25,500.00, the ratio is 33-t0-1. Even using the amount of damages entered by the court, $27,599.82, the ratio was 30-to-1. Under the facts of this case with only economic harm and Scott's own expert's words, Scott got "good use" out of the Explorer by driving it six years and 186,000 miles, $840,000.00 in punitive damages is clearly disproportionate to the actual harm caused.

Addressing the third *Gore* guidepost, the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases, the $840,000.00 award is grossly disproportionate. In *Gore*, the court noted that the maximum civil penalty authorized by the Alabama Legislature for a violation of The Deceptive Trade Practices Act was $2,000.00 and noted that other states authorized more severe sanctions with the maximums ranging from $5,000.00 to $10,000.00. *Gore*, 517 U.S. at 584.

In the present case, Missouri does not have a specific civil penalty for a simple violation of the Missouri Merchandising Practices Act by misrepresentation; however, the Act does have some civil penalties which are less than those discussed in *Gore*. For instance, RSMo. §407.030 allows for the Attorney General to accept an assurance of voluntary compliance with respect to an alleged violation of the Act. Subsection 2 of the statute provides that any person who violates the terms in an assurance of voluntary compliance shall forfeit

and pay to the state a civil penalty of not more than $2,000.00 per violation. Similarly, RSMo. §407.100 authorizes a civil penalty of not more than $1,000.00 for any party who violates an injunction preventing a person from violating the Act. Comparing the award of $840,000.00 the above civil penalties of $2,000.00 and $1,000.00 per occurrence demonstrates that the punitive damages award of $840,000.00 is clearly disproportionate to the civil penalties.

Post *Campbell* case law is instructive. In *Williams v. ConAgra's Poultry Co.*, 378 F.3d 790 (8th Cir. 2004), the United States Eighth Court of Appeals found an award of punitive damages excessive that was just 10 times the compensatory damages awarded for racially motivated harassment. In that case, an African-American former employee of ConAgra Poultry Company ("ConAgra") alleged that ConAgra subjected him to a hostile work environment and terminated his employment based on his race. The jury awarded him $927,788.90 in compensatory damages and $6,063,750.00 in punitive damages on his termination claim and $1,001,397.40 in compensatory damages and $$6,063,750.00 in punitive damages on his harassment/hostile work environment claim. The district court remitted the compensatory damages for the termination claim to $173,156 and the punitive damages on that claim to $500,000. On the harassment claim, the district court remitted the compensatory damages to $600,000, but let the punitive damages award stand. The Eight Circuit Court of Appeals relied upon *Gore* and

Campbell to find the $6,063,750 punitive damages award on the harassment claim unconstitutional for three interrelated reasons:

> First, in upholding the award the district court improperly relied on evidence of misconduct by ConAgra unrelated to Mr. Williams's claim. Second, the punitive award is far in excess of what analogous statutes would allow. Finally, the ratio of punitive damages to compensatory damages far exceeds the levels that the Supreme Court has suggested are consistent with due process. 378 F.3d at 796.

The facts of *Williams* are analogous to the facts in the present case. In *Williams,* the district court allowed evidence of harassment by ConAgra that was insufficiently similar to that suffered by Williams. In the present case, the trial court allowed evidence of transactions by separate entities that were non-parties and evidence of the "tow-off agreement," which was not similar to any conduct alleged by BSF. Further, the $840,000 in punitive damages was far in excess of any civil penalty allowed by *analogous* statutes under the MPA. In *Williams,* the ratio of punitive to compensatory damages was 10.1-to-1. In the present case it is at best 30-t0-1 and at worst 79-to-1. Williams testified that he suffered continuous verbal abuse from his

supervisor extending over several years. It is difficult to imagine more reprehensible conduct.

In another post *Campbell* and *Gore* case, the Eight Circuit Court of Appeals, reversed and remitted an award of punitive damages that was just 5.14 times the compensatory damages awarded by the jury. *Conseco Finance Servicing Corp. v. North American Mortgage Company,* 381 F.3d 811 (8th Cir. 2004). In *Conseco*, a financial services company sued a competitor for unfair competition and tortious interference with business relations stemming from former employees' misappropriation of trade secrets. The jury awarded Conseco $3.5 million in compensatory damages and $ 18 million in punitive damages. The Eight Circuit noted that the defendant's conduct was particularly reprehensible:

> We agree with the district court's observation that North American's "reprehensible" actions involved management, and were "widespread and systemic, spanning six or seven offices and involving numerous groups of employees." . . . it elected to use the dual employment as a "model" in other offices. Indeed, the conduct involved repeated actions in multiple offices. North American's actions also involved trickery and

> deceit, and an utter disregard for Conseco and – even more heinously—the privacy of customers. 381 F.3d at 824.

Despite such reprehensible conduct, the Eighth Circuit found the $18 million award violated due process and remitted the punitive damages to $7 million. In the present case, BSF's conduct was clearly not as reprehensible as North American's, which found a 5.14-to-1 ratio of punitive damages to compensatory damages violated due process.

An application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded, i.e., twice the purchase price of the vehicle, when Scott had full "good use" of the SUV for six years and put 186,000 miles on it, demonstrates that an award of $840,000.00 was neither reasonable nor proportionate to the wrong committed, and was an irrational and arbitrary depravation of the property of the defendant and is therefore unconstitutional under the Fourteenth Amendment. *Campbell*, 538 U.S. at 429.

V. THE TRIAL COURT ERRED IN DENYING BSF'S MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON THE MAGNUSON-MOSS WARRANTY ACT CLAIM BECAUSE THE EVIDENCE AT TRAIL FAILED TO ESTABLISH THAT SCOTT SATISFIED THE CONDITION PRECEDENT OF GIVING BSF A REASONABLE OPPORTUNITY TO CURE.

A. Standard of Review

An appellate court's review of the denial of a motion for judgment notwithstanding the verdict is essentially the same as the review of a denial of a motion for directed verdict. The appellate court reviews the record to determine whether the plaintiff made a submissible case. *Daniels v. Board of Curators of Lincoln University*, 51 S.W.3d 1, *5 (Mo. App. 2001). A case may not be submitted unless every fact essential to liability is predicated upon legal and substantial evidence. In determining if the evidence was sufficient to support the verdict, the court views the evidence in the light most favorable to support the verdict, giving the plaintiff all reasonable inferences and disregarding evidence and inferences which conflict with the verdict. *Id*.

B. Discussion

At the close of the evidence, BSF made a motion for directed verdict, on the Magnuson-Moss Warranty Act, asserting that Scott did not give BSF a reasonable opportunity to cure any defect. (Tr., 1547-1548). Following the entry of judgment, BSF filed its motion for judgment notwithstanding the verdict, making the same arguments. (LF., 368-374).

The Magnuson-Moss Warranty Act, requires a defendant to be given an opportunity to cure before a party may bring a private right of action for violation of the Act. 15 U.S.C. §2310(e); *DeLong v. Hilltop Lincoln-Mercury, Inc.*, 812 S.W.2d 834, 844 (Mo. App. 1991). Such opportunity to cure is a condition precedent to the right to bring a cause of action under the Magnuson-Moss Warranty Act. *Tucker v. Aqua Yacht Harbor Corp.*, 749 F. Supp. 142 (N.D. Miss. 1990), *aff'd*. 953 F.2d 643 (5th Cir. 1992). Pursuant to such opportunity to cure, if the defendant seller took appropriate curative measures, a party may not maintain an action of the Magnuson-Moss Warranty Act. See *Heller v. Shaw Industries, Inc.*, 1997 WL 535163 (E.D. Pa. 1997) (where defendant seller made full refund to plaintiff, defendant is entitled to judgment on plaintiff's Magnuson-Moss Warranty Act claim).

In the present case, immediately upon Scott notifying BSF that the car he had purchased almost six years prior and driving 186,000 miles had previously

been wrecked, BSF offered to purchase the vehicle from him or trade it, giving him the value the vehicle would have had if the car had never had a salvage title in its history. After BSF made that offer, it waited for Scott to get back to it. Three months later on March 11, 2000, after Scott failed to let BSF know what he wanted to do, BSF offered to make a complete refund to Scott in the full amount of his purchase price, plus the cost of the ESP, the cost of creditors life, and the finance charges, in the amount of $25,400.00. BSF even offered this remedy if Scott no longer owned the vehicle; the offer was unconditional. Because BSF offered to make a complete refund to Scott in effect to cure the alleged breach of warranty, and this fact was not disputed, BSF was entitled to a directed verdict and to judgment notwithstanding the verdict.

CONCLUSION

As demonstrated above, the trial court erred in admitting prejudicial evidence of alleged similar occurrences of used cars sold by separate entities who were not parties, Blue Springs Nissan and Blue Springs Ford Sales Outlet. Such evidence was prejudicial, requiring the matter be reversed and remanded for a new trial. Moreover, the trial court erred in admitting prejudicial expert testimony concerning the safety of the Explorer. Such expert testimony was not admissible under the required standards of RSMo. §490.065 because the expert was not qualified, did not do necessary testing, and his opinion was speculative. The trial

court's error in the admission of the above evidence led to excessive jury verdict as to compensatory damages and punitive damages. The amount awarded for compensatory damages was excessive and not supported by the evidence. The award of punitive damages of $846,000.00 was so excessive as to constitute a denial of due process pursuant to *State Farm Mutual Ins. Co. v. Campbell*. Finally, the trial court erred in failing to grant a directed verdict and in denying BSF's motion for judgment notwithstanding the verdict on plaintiff's claim of violation of the Magnuson-Moss Warranty Act because Scott did not give BSF a reasonable opportunity to cure as he rejected BSF's unconditional offer to refund the entire purchase price, plus finance charges. This refund was substantially more than Scott was entitled to because BSF did not request to deduct anything for the substantial use which Scott made of the vehicle – driving the vehicle 186,000 miles.

For all of the above reasons, the jury verdict must be reversed and the case remanded for a new trial.

Respectfully submitted,

Case & Roberts, P.C.

Kevin D. Case, No. 41491
David J. Roberts, No. 42272
Two Pershing Square
2300 Main Street, Suite 900
Kansas City, MO 64108
Telephone: (816) 448-3707
Facsimile: (816) 448-3101
kevin.case@caseroberts.com
david.roberts@caseroberts.com
Attorneys for Cross-Appellant/Respondent
Blue Springs Ford Sales, Inc.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief contains the information required by Rule 55.03 and complies with the limitations of Rule 84.06(b). Relying upon the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 14,145, excluding the parts of the brief exempted, has been prepared using Microsoft Word 2002 in 14 pt, Times New Roman font, and includes a 3.5" floppy disk, which has been scanned for viruses by the Norton anti-virus program and has been found to be virus free.

_____

David J. Roberts

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2005, a copy of the Brief of Cross-Appellant/Respondent was served by depositing one copy in the U.S. Mail, first class postage prepaid, addressed to:

Bernard Brown
3100 Broadway, Suite 223
Kansas City, MO 64111
Attorney for Lance Scott

J. R. Hobbs
Marilyn B. Keller
1101 Walnut, Suite 1300
Kansas City, MO 64106
Attorney for Robert Balderston

Larry J. Tyrl
Tyrl, Bogdan & Bollard
903 East 104th Street, Suite 320
Kansas City, MO 64131

_____
David J. Roberts

APPENDIX

1. Amended Judgment

2. RSMo. §490.065

3. 15 U.S.C. §2310