IN THE MISSOURI SUPREME COURT

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No. SC86287

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LANCE SCOTT,
Appellant/Cross-Respondent,

V.

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

and

ROBERT C. BALDERSTON,
Respondent.

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

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# BRIEF OF APPELLANT/CROSS RESPONDENT

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## JURISDICTIONAL STATEMENT

Defendant/cross-appellant/respondent Blue Springs Ford Sales, Inc. ("BSF") and Plaintiff/appellant/cross-respondent Lance Scott ("Scott") both appeal from the Amended Judgment of the Jackson County Circuit Court entered on June 23, 2004, which finally disposed of all claims against all parties. Scott contends in his appeal that the trial court violated his rights under the Missouri Constitution by denying him trial by jury on his claims for punitive damages under § 407.025(1) RSMo of the Missouri Merchandising Practices Act, based on the trial court's interpretation of that statute to reserve for "the court" (and not a jury) the assessment of punitive damages. Scott contends that the provision of that section denying the right to trial by jury on claims for punitive damages is invalid because it is in contravention of the right to trial by jury afforded by article I, § 22(a) of the Missouri Constitution. This case therefore involves the question of the validity of a statute of this state, so that this Court has exclusive appellate jurisdiction under art. V, § 3 of the Missouri Constitution.

## STATEMENT OF FACTS

Scott is submitting his statement of facts because he is "dissatisfied with the accuracy and completeness" of the statement of facts of Cross-appellant/respondent Blue Springs Ford Sales, Inc. ("BSF"), and in support of his own appeal. This statement of facts will be detailed, particularly because of the issues concerning injunctive relief and punitive damages.

### A. THE CLAIMS AND DEFENSES AT ISSUE IN THE TRIAL

#### 1. Scott's Claims

Key allegations stated in the First Amended Petition (filed April 17, 2001 – L.F. 4-30), which outlined a large portion of the detailed evidence introduced at trial as described in this Statement of Facts, include:

In early March, 1994, BSF sold Scott a 1991 Ford Explorer that had previously been a salvage vehicle, but was represented not to have been wrecked. Within days of the sale, BSF was notified by Ford Motor Company that the "ESP" extended service contract he had purchased was rejected, because of a previous salvage title on the Explorer. But BSF, rather than informing Scott, concealed these facts and simply kept the money for the service contract. BSF and Balderston engaged over the next several years in a continuing conspiracy and coverup of BSF's knowledge of that salvage history and ESP rejection. The coverup culminated with a letter of May 11, 2000 from Balderston to Scott – when Scott was listed as a witness in another rebuilt wreck case – denying previous knowledge of the salvage title history, omitting to mention that the ESP contract

had been rejected, and offering to pay Scott $25,400, the amount he had paid for the vehicle and all related charges, regardless of whether he returned the vehicle. All of this conduct was only one example of numerous similar fraudulent rebuilt wreck car sales (alleged in April of 2001 to have continued through at least 2000) that flowed from long-standing business practices of Balderston and BSF encouraging, tolerating, and reaping financial benefit from these sales. These practices continued unchanged despite BSF's and Balderston's acute awareness of the safety concerns at stake in the handling of rebuilt wrecked vehicles, despite their knowledge of the widespread nature of the rebuilt wreck problem in the used car industry, and despite warnings from many sources, such as:

a 60 Minutes piece by Mike Wallace, called "Totaled", on the resale of salvage cars, filmed at Balderston's companion Blue Springs Nissan dealership in 1993;

extensive and continued warnings from industry sources about the widespread industry problem of the resale of rebuilt wrecked cars without disclosure;

a suit filed by a Vicki Grabinski in December of 1993 claiming the sale of a totaled rebuilt wreck by BSF and its companion dealership Blue Springs Ford Wholesale Outlet shortly after the 60 Minutes piece;

the litigation of the Grabinski case through the discovery process and to a jury verdict for fraud and punitive damages in October of 1994, all while the concealment of the Scott vehicle salvage history and ESP rejection was continuing;

a lawsuit filed in 1998 by a Tom Looney over the sale by BSF twice – in 1992 and again in 1994 – of a salvage Ford Mustang that was brought in to BSF, rebuilt by its

service manager, and sold off the lot with the personal participation of Balderston as "never wrecked" and having been driven only by the "owner's wife"; and

numerous additional complaints extending through at least 2000 regarding other rebuilt wrecked cars sold and returned by purchasers.

2. The Defenses

Beginning with their opening statements, BSF and Balderston asserted that:

BSF had sold other wrecked vehicles "unbeknownst to them", and "they try to stop it from happening" (Tr. 281-2);

nobody at BSF was aware of the damage to the Scott Explorer at the time of the sale (Tr. 283);

Balderston's people from BSF have procedures in place to try and stop this and catch it, from the used car managers looking for evidence of damage when they appraise cars, to technicians inspecting and looking for repaired wreck damage (Tr. 281-2);

things have changed over the years, they have seen that perhaps the policies and procedures are not as good as they should have been, and so have tried to make improvements to catch these; and used car technicians have had training at the body shop, and there has been training of salespeople to make sure they don't sell wrecks with undisclosed damage (Tr. 282);

there are ongoing efforts to make the review and inspection and detection of wrecked vehicles better, it has evolved and is designed to make better and better disclosures and get better training and better education (Tr. 294);

Balderston wrote the May 11, 2000 letter to Scott and made the offer to Scott to pay him $25,400 because he felt it was "the right thing to do" (Tr. 280);

Balderston was "trying to do and act in good faith" (Tr. 295);

Balderston worked at BSF and his next-door dealership Blue Springs Nissan, "trying to do his job" (Tr. 284-5).

**B. THE TRUE HISTORY OF THE EXPLORER**

The 1991 Ford Explorer had been in a rollover wreck, and had a Georgia salvage title issued for it on an insurance claim loss in December of 1991. (Tr. 955; 2nd SLF 8-12 Buxton depo p. 7-11)[1]; Ex. 2, p. 25-6). It was transferred to a Gant Motors, then to a Quality Auto Brokers, then to one Ernest Buxton. (Ex. 2, p. 25-6). Buxton saw the Explorer in wrecked condition, and described its appearance: "it was pretty beat up. The top was all busted in, the windows were all busted out, the hood was all beat up and the fenders, of course, were beat up too and pretty much everything on the vehicle had dings and dents in it." He was told "it had rolled one time down a hill, and a lot of the damage came when it hit – had one roll and hit the ditch." It took four to five weeks to rebuild. (2nd SLF 8-12).

Buxton paid $8,000 or $9,000 for the Explorer in 1992 after it was rebuilt, writing two checks totaling $8,091 for the vehicle. (2nd SLF 15, 21).

From the time he purchased the Explorer Buxton could "never keep the front end in line". He put on brand new tires. He took it in for alignment and then had it back three different times for alignments. The alignment shop could not figure out what the

problem was. (2nd SLF 15-17). The vehicle was constantly "bouncing around on the road . . . it would be one way or the other all the time . . . it would pull real bad". Asked if it gave him concern, he said "very much so . . . it was very concerting – disconcerting to me because it would just pull one way, it would go one way and then the other, just swerve left and right." (Id.)

Buxton traded the vehicle in to Molle Nissan a few months later, in August of 1992. From there it went to Molle Chevrolet, then to one Christopher Parks, and then to BSF. (Ex. 2, pages 14-15).

When Scott was investigating the history of the vehicle, much later, he contacted Parks, who sounded to be about Scott's age. (Tr. 353).

**C. LANCE SCOTT, AND HIS PURCHASE OF THE 1991 EXPLORER**

Lance Scott was 23 years old when he purchased the 1991 Ford Explorer from Blue Springs Ford on March 5, 1994. (Tr. 298, Ex. 28; Ex. 2, pages 4 and 7). Scott attended Central Missouri State University studying aviation technology, and at the time of the purchase lived at home with his mother and stepfather. (Tr. 299; Ex. 28). He was employed by his mother's house-cleaning service as a laborer, making $20,000 per year. (Ex. 28; Tr. 306-7). In the years between the purchase of the Explorer and the trial of this case in 2003 he worked in several jobs as a commercial pilot or flight instructor based in locations from Arkansas to Ohio, and as a laborer for his mother's business; the events of September 11, 2001, had a negative effect on his job possibilities. (Tr. 303-6). He has no training as a mechanic, or any experience with body work, and had no knowledge as of

[1] "2nd SLF" is used as the abbreviation for "Second Supplemental Legal File".

the time of the purchase as to how to spot, for example, if a car had been painted. (Tr. 307).

Scott first saw the Explorer, featured in a prominent location at BSF, while driving by BSF. (Tr. 309-10). In his first visit he met BSF salesman Harvey Alexander. (Tr. 310-11). Scott thought the vehicle looked pretty good and pretty clean, but he noticed a gap where he thought the front bumper was "sitting out slightly", "offset". (Tr. 311-2.) He asked Alexander if the vehicle had been wrecked. (Tr. 313). His parents had suggested to him questions that he should ask about used vehicles, including whether they had been wrecked. (Tr. 313-4). Alexander replied that it had not been wrecked to the best of his knowledge. (Tr. 314) He told Scott he "could find out". (Tr. 314). He told Scott that the Explorer had been owned by an older couple. (Tr. 315).

Scott test drove the Explorer and found it to drive "all right". (Tr. 316). He returned to BSF the next day and talked again with Alexander. He asked Alexander if he had found out about whether the Explorer had been wrecked. Alexander said that no, it had not been wrecked. (Tr. 316-7). Scott believed Alexander; he trusted him, and relied on the things Alexander said and the appearance of the dealership. (Tr. 317-8). He saw BSF as a big dealership, that looked reputable; those appearances played a big role in forming his opinion. (Tr. 317-8). Scott had avoided buying a car from a small dealership because he didn't want to take a chance on buying "a piece of junk", and because "you hear a lot of stories about buying cars from smaller places and not knowing the history of the cars". (Tr. 318).

Scott continued dealings with Alexander and a manager Alexander consulted in another office, settling on a purchase price of $14,995. (Tr. 319-20; Ex. 17 and 18). He then dealt with a finance manager in concluding the deal, who persuaded him to buy a Ford Motor Company "ESP" extended service contract for $1,475. (Tr. 320-1, Ex. 18). Multiple additional charges brought the total contract price to $25,400.40. (Ex. 17 and 18).

From the beginning of his ownership the Explorer pulled to the left. Scott had it aligned several times while he owned it, but it always pulled to the left. (Tr. 325). From the beginning it had water leaks. It leaked water inside down the driver's side where the visor folds down. When it would rain hard it would get saturated and drip down to his seat. He carried a towel inside the car so that he could sit on the folded towel to keep from getting wet. (Tr. 325-6) It also leaked water toward the back seat, and from windows in the back of the vehicle. He often saw water spots there. It would stink inside after rains. It mildewed underneath the carpet in the back of the vehicle and smelled badly. (Tr. 326-7). He and his mother tried putting sealant on leaks to stop them, unsuccessfully. He tried better sealants and lessened the leaking, but he still had water leaks right above him. (Tr. 327).

## D. INSIDE BSF AT THE TIME OF SCOTT'S PURCHASE – REJECTION OF THE ESP DUE TO A PREVIOUS SALVAGE TITLE

### 1. Ford Motor's Salvage Report/ESP Rejection - Widespread Awareness Of It Within BSF

On March 18, 1994, warranty administrator Marnette Grace in the BSF service department attempted to register the ESP service contract for the Explorer with Ford Motor Company, but the registration was rejected with a report from Ford indicating that the Explorer had a previous salvage title. (Tr. 431, 436, 440-1, 455; Ex. 38). She testified it was a notable thing when a service contract was rejected because of a salvage title. (Tr. 445) Service manager Tony Vargas testified that it would have been a "big deal". (Tr. 844).

Ms. Grace testified she would have given that report to the service manager, To ny Vargas; it was not her job to notify the customer. (Tr. 444, 456). Vargas testified that Ms. Grace would have gone to the finance department first, and then to Vargas or general manager Mark Talbott. (Tr. 844). He assumes that the used car department also would be informed about it. (Tr. 845). If it was not straightened out, Vargas would not notify the customer; he would notify Talbott and the used car department. (Id.)

Vargas testified that the rejection of an ESP because of a previous salvage title was a management concern. (Tr. 854). Balderston wanted to know if there were bad problems like this with cars sold. (Id.) Vargas testified he complied with Balderston's desire to be informed. (Tr. 855). Talbott also testified that if a service contract were rejected by Ford because of a salvage title, his managers knew and had been instructed

that they were to tell Balderston about it, and Balderston kept a hand on what was going on at the dealership with his managers generally. (Tr. 750-1). Balderston testified that he was at BSF 20 days a month during the 1990s, attended meetings of all managers once a month, and dealt with his managers on a daily basis; his managers knew they were to tell him if there were any significant problems with particular vehicles, and there was every reason why they would have informed him and no reason why not. (Tr. 1369-73).

Balderston testified that the money for this ESP contract was simply kept by BSF. (Tr. 1437, 1443).

Balderston testified that some people at BSF "covered up" from Scott the facts that this vehicle had a salvage title, that the ESP had not been issued, and that the money for the ESP had just been kept by BSF. (Tr. 1443-4).

Vargas said he could not say if any policy was violated when BSF did not notify Scott; and there were no changes in BSF practices throughout the 1990s as to informing customers if their ESPs were rejected. (Tr. 850-3).

Balderston testified that if he wanted to know if there were other service contracts for which BSF simply kept the money, looking at BSF's files on other vehicles could show that; but he has not had anyone go through the files to look. (Tr. 1438-40).

**2. The Ongoing Grabinski Litigation: BSF's/Balderston's Awareness and Continued "Coverup"**

At the time of the sale of the Explorer to Scott, a lawsuit filed by a Vicki Grabinski was pending, claiming the fraudulent resale of another rebuilt salvage vehicle

by BSF; Balderston testified that he handles a lawsuit of this kind and was aware of it and of the allegations in it. (Tr. 1419-20).

Balderston testified that in April of 1994 he signed answers to interrogatories from Grabinski. (Tr. 1428-31). One asked that BSF identify each and every vehicle sold by BSF at any time after January 1, 1988, about which BSF had received information at any time subsequent to the sale indicating that the vehicle may have had undisclosed wreck damage. (Id.) BSF's answer, signed by Balderston, indicated there was no such vehicle. (Id.) Balderston testified that he was required to consult with his managers to answer that question, and was asking them in April of 1994 if there were any such vehicles. (Id.) His managers have been forthright with him. (Id.)

## E. SCOTT'S RETURN TO BSF WITH THE EXPLORER IN AUGUST OF 1994 – MORE OF THE "COVERUP"

### 1. Scott's Return to BSF

On August 12, 1994 Scott returned to BSF to have a transmission leak repaired. (Tr. 363, 375). The transmission was repaired at no cost to Scott, and he was under the impression that it was covered under the ESP. (Tr. 375; 423-4). On that same occasion Scott noticed that another Explorer in the service department had a battery box that was missing in his Explorer; he called this to the attention of BSF, and that box was replaced as part of the service, again with no cost to Scott. (Tr. 323-4; 374-5).

**2. Inside BSF at the Time of Scott's Return: More Discussions and "Coverup"**

Just before Scott's return in August, on July 1, Balderston gave a deposition in the Grabinski case. (Tr. 1429-30). Balderston's managers also gave depositions in the Grabinski case that summer. (Id.; Tr. 991). Balderston testified that the question of rebuilt wrecks was a "hot topic" that summer, both because of these depositions, and because of the 1993 "60 Minutes" piece on rebuilt wrecks filmed right next door at the Blue Springs Nissan dealership he was buying when the "60 Minutes" piece was being filmed. (Tr. 1365, 1377-8, 1429, 1432). During that summer Balderston instructed his managers that it was particularly important for them to be informing him about any vehicles known to them that were previously wrecked but sold without disclosure. (Tr. 1432).

On August 12, when Scott returned to BSF to have his transmission leak repaired, BSF's service department once again obtained a report from Ford indicating that the Explorer was a previous salvage vehicle. Marnette Grace marked the salvage codes on that report with a highlighter. (Tr. 445-9; Ex. 39). Ms. Grace also hand-wrote a notation, "ESP cannot be entered – see finance". (Id.) The matter would have gone again to service manager Vargas and also to the finance department. (Id.) Ms. Grace testified about a service ticket related to the work done on August 12, Ex. 44. (Tr. 450-3). That service ticket has large cross-outs in red writing on it; the writer apparently thought at first that the repairs would be covered by the ESP, but then those notations were crossed

out and "normally" that was because the ESP did not apply. (Id.) The used car department paid for the repairs instead. (Id.)

Vargas testified that if a vehicle with a rejected ESP came back in, the service writers "wouldn't tell the customer until they made sure what the situation was". (Tr. 848). They would talk to assistant managers, used car managers, the general manager (Talbott at that time), and to Vargas. (Id.)

**3. Running Carfax Reports at the Same Time: More Awareness, "Coverup", and Watching the Explorer**

BSF ran its first Carfax[2] on this Explorer on April 1, 1994. (Ex. 6; SLF 28, 31-33, Bounacos Carfax deposition pages 1, 16-17, 21; Ex. 51). That Carfax did not show a previous salvage title. (Id.)

But when Scott returned to BSF on August 12, 1994, BSF ran another Carfax, and that Carfax did show a previous salvage title, issued for the vehicle by the state of Georgia. (Ex. 5; SLF 28, 31-33; Ex. 51).

The testimony of Bounacos and the Carfax records, in short, indicate someone called them about the discrepancy. (Id.; SLF 36-7, Bounacos deposition pages 22-3, 36-7). The reason for the discrepancy between the April and August Carfax reports was explained by Carfax witness Bounacos: when BSF ran its first Carfax report in April, Carfax had data only from "approximately 13" states; it added more states, including Georgia, only after April 1. (SLF 29, 34-35, Ex. 53).

In addition, a handwritten unsigned note in BSFs car file, stapled to the April 1 Carfax, states:

Lance Scott

12 states

July 42 states

(Ex. 6).

Also, on September 2, 1994, BSF used car manager Gary Springston gave a deposition in the Grabinski case (read into evidence at trial). (Tr. 991; 2nd SLF 25). When asked a general question about Carfax reports, he said:

> The car fax is certainly not a very good tool if you're trying to determine the history of a car, because obviously instances this year where we've sold cars – I've pulled car faxes on a car, the title's clean, three months later you pull a car fax and the title is not clean.

(2nd SLF 31).

BSF ran yet another Carfax on the Explorer on October 26, 1994. (SLF 33, Bounacos depo. page 21; Ex. 51). Balderston had no explanation for why that was done. (Tr. 1434-5). Nor did Lance Scott, who had no dealings with BSF after August 12, 1994, until 2000. (Tr. 363).

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[2] "Carfax" is a commercial database that provides immediate reports, by fax or computer inquiry, on certain information in the history of vehicles. See generally the Bounacos deposition.

Scott made an offer of proof to bring in evidence, through Balderston, that the Grabinski case was tried to a jury verdict in October of 1994, resulting in a fraud and punitive damages award against BSF; the offer was refused. (Tr. 1459-1462).

Carfax ran yet another internal Carfax report on the Explorer in December of 1994. (SLF 33, Bounacos depo. page, 21; Ex. 51).

Southtown Ford, another Balderston dealership, ran yet another Carfax on the Explorer on October 23, 1996. (Tr. 1434-5; SLF 33; Ex. 51). Again Balderston had no explanation for why that Carfax report was run. (Tr. 1434-5). Scott was never at Southtown Ford with the Explorer. (Tr. 363-4).

Throughout that summer of 1994, and until 2000, Balderston/BSF never made any disclosure about the wreck history of the Scott vehicle. (Tr. 1431).

## F. SCOTT'S DISCOVERY OF THE WRECK DAMAGE

Scott had no idea that the vehicle may have been damaged until 1999. (Tr. 332-3). Scott drove the vehicle extensively because it was his only mode of transportation, and he was relying on it for safe transportation. (Tr. 327, 331). He took other people, family and friends, in the vehicle "all the time". (Tr. 331).

Scott first received information suggesting that the Explorer may have previously been wrecked in 1999, when he had vehicle in for repair of a crack in windshield. (Tr. 332-3). The technician showed him the Explorer with the windshield out, asked if the Explorer had been wrecked, and showed him rust in the channel from the back of the hood up to the top of the vehicle. He showed Scott where pieces had been welded back together in that channel, and refused to warranty the windshield repair because of these

problems. (Tr. 328-9). Scott had not had any accident in the vehicle, except for one occasion when he spun in snow and had a "piece of rebar" punch a "quarter-sized" hole through the left quarterpanel (at the rear of the vehicle). (Tr. 329-31). After the discussion with the windshield technician Scott was wondering what was going on. (Tr. 332). Not long after that, a technician doing a Missouri "MVI" inspection also asked Scott if the Explorer had been wrecked, calling Scott's attention to "welding that was coming loose" underneath the vehicle, to shims where the bumper was "offset", and to places underneath the vehicle where it "just didn't fit right". (Tr. 333-4).

A few months later Scott, having more transmission problems, took the Explorer to a Ford dealer and discussed possibly trading it in. The Ford dealer ran a "Carfax" report and told Scott that it showed that the vehicle had previously been "salvage". (Tr. 334-6).

Scott was "real mad", and upset. He immediately asked himself what would have happened if he had gotten into an accident driving the Explorer, and thought that he or someone else could have gotten killed. (Tr. 336). He considered himself "very lucky that nothing ever happened." (Tr. 422). Because he couldn't continue to drive it, he parked the Explorer, where it remained stored through the trial. He was responsible for the storage through the trial, which he understood to be necessary to keep from destroying evidence. (Tr. 356-7). Scott's parents bought him a car to drive. (Tr. 336-7).

## G. SCOTT'S RETURN TO BSF IN FEBRUARY OF 2000 – NO DISCLOSURE BY BSF OF ITS PREVIOUS KNOWLEDGE, OR OF THE ESP REJECTION, OR OF THE CRITICAL FILE DOCUMENTS

Scott went in to BSF on February 3, 2000, spoke with a manager Paul Howe, told him that he had found out that the vehicle was wrecked, and asked him what BSF was willing to do about this problem. He also asked to see the BSF documents on the vehicle. (Tr. 338-9).

Howe gave Scott copies of four or five documents, all purchase documents that Scott had signed, and said that they "couldn't find" the original folder on the vehicle and would have to get back with Scott about it. Howe said that there had not been a vehicle coming back like this in five years. He said Scott would have to come back and talk with another manager, Billy Harvey. (Tr. 339-40, 347; Ex. 50).

Scott returned on February 4 and spoke with Harvey. (Tr. 342). Harvey paced back and forth throughout the conversation, appeared "nervous", and asked how Scott had learned that the vehicle had been wrecked. (Tr. 342-3, 345, 347). Neither Harvey nor anyone else revealed that BSF knew in 1994 that the vehicle had been wrecked, and that the ESP contract had never been issued. (Tr. 343-4; 355-6). Harvey also did not give Scott any additional documents as Scott had requested. (Tr. 342-4).

Harvey asked what Scott wanted, and made a comment about possibly trading Scott out of the vehicle at its current book value. (Tr. 343-5). No one at BSF questioned Mr. Scott's statement that the vehicle was wrecked, or asked to look at the vehicle. (Tr. 347-8). Harvey promised to call Scott after the discussion, but never did. (Tr. 345, 348).

**Behind the Scenes at BSF**

Harvey had met with general manager Carl Young – both reported to Balderston – and Young had directed Harvey to meet with Scott. (Tr. 476-7; 558). Young testified he

would have pulled the deal file on the vehicle, and seen the Carfax run in 1994 showing that the vehicle was salvage. (Tr. 584-5). Harvey testified that he did not tell Scott that BSF knew back in 1994 that the vehicle was salvage, and that he gave Scott only copies of documents from the car file that Scott had signed. (Tr. 483; 486). Young testified that at the time Scott came back in Young was concerned that Scott could bring a claim that was "pretty serious" because of what had gone on in 1994. (Tr. 623). Young testified that he wanted Scott to trust them. (Tr. 707).

Young testified that he was "not uncomfortable" with not telling Scott that BAF knew in 1994 that the vehicle had been salvage. (Tr. 627).

Harvey testified that he spoke with "either Balderston or Young" about Scott's visits. (Tr. 500-1).

## H. THE MAY 11, 2000 LETTER FROM BALDERSTON/BSF TO SCOTT – FALSE STATEMENTS ABOUT BSF'S PRIOR KNOWLEDGE, AND NO DISCLOSURE OF THE ESP REJECTION

Scott was listed that spring to be a witness in another rebuilt wrecked car case against BSF, the "Looney" case. (Tr. 348-9; 1445-6). (There will be more about Looney, below.) Trial was scheduled to begin (and did begin) on May 15, 2000. (Tr. 489).

On May 11, 2000, Balderston sent a letter to Scott offering to repurchase the Explorer for $25,400.40, or to simply pay Scott $25,400.40 even if Scott did not own the

vehicle. (Scott App. 1; Ex. 1; Tr. 349).[3] The letter included statements that "we learned last Friday that the 1991 Ford Explorer . . . had a salvage title", and that "Blue Springs Ford was not aware the vehicle had a salvage title at the time of your purchase." (Id.). At the time Scott received the letter he had no information that BSF had known back in 1994 that the Explorer had a salvage title, and he knew nothing indicating the statements in the letter to be false. (Tr. 349-51). Scott's testimony indicated that he thought about taking the money, but refrained, thinking it seemed "fishy". (Tr. 365).

Scott first learned that BSF knew in 1994 that the Explorer had been wrecked when he first got to see BSF's car file for the vehicle, which was not until his deposition was taken on May 19, 2000, during the Looney trial. (Tr. 355-6). That was also when he first learned that the ESP service contract had never been issued. (Tr. 355-6). The BSF deal file and service file (Ex. 3-36 and Ex. 37-44 respectively) had not been requested from BSF by anyone until subpoenaed by plaintiff Looney in the Looney case after May 15, 2000; those files were not produced to anyone by BSF until May 19, 2000, at Scott's deposition. (Tr. 1445).

**Behind the Scenes at BSF**

Balderston testified that he knew at the time of writing the May 11 letter that Scott had been named as a witness in the upcoming Looney trial. (Tr. 1437-48).

Balderston had pulled the deal and service files on the Scott vehicle, both of which show the Explorer's salvage history, prior to writing the letter; he knew when writing the

[3] "Scott App." is used as the abbreviation for "Scott Appendix", which is at the end of this brief.

letter that BSF had known in 1994 that the vehicle was a salvage vehicle, and that the ESP had been rejected, and that BSF had just kept the money for the ESP. (Id.). He had met with Young and Harvey and gone over the files and the Scott matter with them. (Id.). He knew that Scott had not seen the car or service files, and knew that the files had not at that time been requested. (Id.). He was concerned about Scott's upcoming testimony. (Id.). He hoped that the offer in the letter would get Scott to resolve his differences with BSF. (Id.). He envisioned Scott taking the letter, coming in to BSF, talking with Balderston, and taking a check. (Id.). He thought that this would make Scott more favorably disposed toward BSF if he testified. (Id.).

After the direct examination of Balderston by Scott's counsel, the defendants' counsel asked Balderston no questions; Balderston gave no testimony explaining the statements made in the May 11 letter. (Tr. 1363-1557).

Scott made an offer of proof to bring in through Balderston that at the time he sent the May 11 letter BSF was offering Looney in the hundreds of thousands of dollars to settle his rebuilt wreck case, and that Balderston knew there had been a jury verdict in October of 1994 and judgment in the Grabinski rebuilt wreck fraud case against BSF itself for $50,000 in punitive damages. The offers were denied. (Tr. 1459-63).

In closing arguments Balderston and BSF focused on assertions that the motive for Balderston's offer of $25,400 to Scott was "to make it right"; that Balderston was "not motivated" in a bad way; and that he was being attacked by Scott because he "tried to be fair". (Tr. 1682-5; 1690-1708).

## I. BSF'S/BALDERSTON'S KNOWLEDGE AND PRACTICES REGARDING USED CARS

Balderston has been the sole boss at BSF since 1977. (Tr. 1369). He has owned several other Kansas City-area dealerships, including Blue Springs Nissan, Blue Springs Ford Wholesale Outlet (the "Wholesale Outlet"), and Extreme Ford/Southtown Ford. (Tr. 1363-6). He shuttled among his dealerships, keeping in touch with his managers by cell phone and phone, making his main office at BSF. (Tr. 1369-72). He set policy, and his managers knew what he wanted and made every effort to do what he wanted. (Tr. 1369). Balderston kept a hand on what was going on with his managers. (Tr. 753) If a customer complained about buying a rebuilt wrecked car, Balderston would handle any settlement of that complaint. (Tr. 642).

Balderston testified that he knows the car industry well. (Tr. 1367). He could go on for a long time describing the things that car people can look for to detect if a vehicle has had previous damage; he knows from being in the business, and could teach people what to look for. (Tr. 1396). The sale of cars with undisclosed previous wreck damage has been a significant problem in the industry since the early 1980s, and it became a big problem by the beginning of the 1990s. (Tr. 1372-4). Unibody construction and sophistication of repairs has increased the problem. (Id.)

Carl Young testified that safety was "at the top of issues" with rebuilt wrecks. (Tr. 669-72).

BSF received weekly bulletins from the Missouri Auto Dealers Association; Balderston reviewed those bulletins and passed them on to his managers at BSF and at

his other dealerships to review. (Tr. 1367-9). In the late 1980s and in the 1990s the MADA bulletins had statistics about "a lot" of cars that were being titled in Missouri but had previous salvage titles, and the number of these vehicles was growing. (Tr. 1375-6).

Balderston testified that he knows that there is every reason to suppose that any car that comes in to BSF, and his other dealerships, may have damage of any kind, wreck damage or other. (Tr. 1377). He testified that 50% to 75% of cars have had some previous damage, from scratches to wreck damage and being totaled. (Tr. 1376).

Throughout the 1990s BSF used car managers did appraisal inspections on incoming vehicles; used car technicians would subsequently inspect the vehicles, but only after the vehicles had already been accepted by BSF. (Tr. 657-8; 968; 2nd SLF 50).

Balderston testified that BSF would not ask consumers from whom vehicles were received whether they had been previously wrecked, "because they wouldn't tell you the truth anyway". (Tr. 1385-6).

BSF had two "used car" technicians who did all the inspections of incoming used cars through the 1990s. (Tr. 730-1; 737). Their conduct of these inspections remained unchanged throughout the 1990s. (Id.) Technician Wynn testified that he would see previous wreck damage "all the time", but he would report the damage to the used car managers and service manager Vargas, and after that what was done with the cars was out of his hands. (Id.) He was not instructed to look for previous wreck damage, was not trained in body repair or how to spot damage, and if asked to look for improperly-repaired damage "I wouldn't have knowed what I was looking for" (Tr. 732-9). Technician Shackleton testified that if he sees wreck damage that has been repaired, if the

car handles right in his test drive then he "almost has to" assume that any frame damage has been repaired correctly, and would not call such damage to the attention of a manager. (Tr. 968; 2nd SLF 66-7). Scott Barrelman, BSF's body shop manager or assistant manager throughout the 1990s, testified that the used car technicians were not trained in body repair or discovering damage; that people in the body shop were much more capable of detecting previous damage; that the body shop personnel did not share knowledge with Wynn or Shackleton; and that there was no reason for that. (Tr. 1001-3; 1017-23).

Young testified that throughout the 1990s a great many consumers would ask if a vehicle offered for sale had previous wreck damage, it was important to them, and they wanted to know if the cars had been checked out for wreck damage. (Tr. 690-7). BSF would tell them that the cars had been checked out. (Id.). But the technicians were not checking them out for wreck damage. (Id.).

Under examination by BSF's counsel Young testified that there was never a policy to conceal previous wreck damage throughout his years at BSF. (Tr. 710). He also testified that if someone complained about buying a wrecked vehicle, it was their practice at BSF to offer that person all of his/her purchase money back. (Tr. 594-6).

BSF also bought 20 to 75 cars/month from distant wholesale auctions, despite knowing that they have a reputation for selling a large number of cars with wreck damage or rolled-back odometers (Tr. 660-7); Balderston approved of this practice. (Tr. 688-9).

**1. Pretrial Proceedings Relating To Evidence Of Specific Similar Wreck Vehicle Sales**

Long before trial BSF and Balderston filed motions in limine regarding evidence of similar rebuilt wreck vehicle sales (LF 69-94); Scott filed his response briefing (LF 58-64) and his synopsis of 23 similar vehicles on which he intended to offer evidence at trial (LF. 101-106; Ex. 2000); and the trial Court after a hearing (Tr. 90-178) entered an order barring Scott from producing evidence of all five of the rebuilt wreck sales occurring in 2000-2002, permitting evidence on only 12 cars. (LF 107-8).

**2. The Looney Mustang – the First Sale, July 1992**

The 1991 "Looney Mustang" was sold new by BSF in the fall of 1991 for over $21,000, and then was brought back in to BSF a few months in wrecked condition, totaled out, on a flatbed truck. (Tr. 941-2; 812; 815; 965-6; Ex. 54 pages 20-6). The estimate for the cost of repair by the BSF body shop was between $16,000 and $16,500. (Id.) The wrecked vehicle was purchased in December of 1991 in the name of Vargas, the BSF service manager, for $5,000. (Tr. 815).

The vehicle was rebuilt with at least some of the work done at BSF. (Tr. 816). It was then offered for sale by BSF off the retail lot, with an agreement that Vargas would get part of the sale proceeds, and BSF would keep any additional amount from the sale. (Tr. 821-6). Vargas testified that his conduct conformed with Balderston's policies. (Tr. 834-5; 839). He testified that if a vehicle had $10,000 in damage that was repaired in the BSF shop it was permitted to sell the vehicle off the lot. (Id.).

Vargas testified that Balderston and Talbott knew of and approved the purchase and resale of the Mustang. (Id.) The vehicle, a red convertible, was conspicuous, and Vargas made no secret of it being on the BSF lot. (Id.)

The vehicle was sold by BSF off its retail lot to a Vickie L. Johnson on July 28, 1992, for $15,500. (Tr. 1418; Ex. 54 p. 15; the deal file, Ex. 64). Nate Johnson, her husband, testified that when they were first looking at the Mustang on BSF's retail lot he noticed writing on the underside of the Mustang, of a kind he recognized as similar to what would be seen on a salvage part or ordered part. (Tr. 1026-7). He asked the salesman if the Mustang had been wrecked, and the salesman said not to his knowledge, but he could find out. (Tr. 1028).

The salesman said that the Mustang had not previously been titled except through Ford, and that the owner of BSF, Mr. Balderston, had ordered the Mustang for his wife to drive. (Tr. 1028-30).

Johnson pressed the issue of the lettering on the underside of the vehicle with the salesman, asking to make sure that the Mustang had not been wrecked. (Id.) The salesman reported that he had talked with the service manager (Vargas) who said he didn't think that the Mustang had been wrecked. (Id.) Johnson testified that he was then introduced to Balderston. (Tr. 1030).

Johnson identified Balderston in the courtroom. (Id.)

Johnson testified that he asked Balderston if the Mustang had been wrecked, and Balderston said no. (Id.) Johnson testified that he asked Balderston why his wife had quit driving the Mustang, and Balderston said that she "didn't like the five speed" it had, and having to shift it was hard for her. (Id.)

Johnson testified that within a couple of months after the sale the front tires on the Mustang were "wearing so bad the cords were showing on it like it was real bad out of

alignment". (Tr. 1033). He took the Mustang back to BSF, informed Vargas in the service department of the problem, and BSF put new tires on the Mustang and aligned the front end with no charge, "no questions asked". (Tr. 1034).

Balderston testified that the handling of the Looney Mustang was "wrong", that it should not have been sold without disclosure. (Tr. 1435).

**3. The 60 Minutes "Totaled" Story, February 21, 1993**

In December of 1992 Mike Wallace of 60 Minutes filmed next door to BSF, at Blue Springs Nissan ("BSN"), doing a story about totaled rebuilt wrecked cars sold at retail to unsuspecting customers. (Tr. 1419; 1377-9). Balderston testified that he paid close attention to the piece. (Id.)

Balderston was in the process of buying BSN when the "Totaled" piece aired on February 21, 1993. (Tr. 1365; 773-6). (He owned BSN until 1996. Tr. 1365.) The piece featured a rebuilt wrecked car that had been sold by BSN. (Tr. 1379).

Balderston went on local TV at that time, talking about the 60 Minutes piece. (Tr. 1378-9). Balderston had a banner put up at BSN for the occasion, saying "under new management". (Id.) Balderston told the press that he didn't sell this kind of vehicle. (Id.) He knew this was of great importance to his customers. (Id.)

Balderston testified that the 60 Minutes piece heightened the awareness he already had regarding the problem of rebuilt wrecks in the industry. (Id.)

**4. The Grabinski Vehicle, sold February 26, 1993**

On February 26, 1993, Vicki Grabinski was sold a 1984 GMC Jimmy by Blue Springs Ford Wholesale Outlet (the "Wholesale Outlet") that had been traded in at BSF.

(Tr. 1466; Ex. 96; Tr. 991). She first contacted BSF, and was directed to the Wholesale Outlet. (Tr. 1487).

The Jimmy had previously been totaled in a rollover accident. (Tr. 1481-2). When it was traded in at BSF it was inspected by used car manager Steve Lotspeich, whose inspection included looking for wreck damage. (Tr. 1401-4). Plaintiff's expert Richard Diklich testified that the fact that the Jimmy had previous wreck damage would have been obvious to a used car manager. (Tr. 1152-3). After the Jimmy was transferred to the Wholesale Outlet, it was sold to Ms. Grabinski as a "perfect condition, one-owner, never wrecked" vehicle. (Tr. 1471-7).

The Wholesale Outlet was owned 1/3 by Balderston, 1/3 by Mark Talbott, and 1/3 by Tom Ridings; Balderston had hiring and firing authority over Talbott and Ridings, and finally bought them out and became sole owner of the Wholesale Outlet in the late 1990s. (Tr. 1366) Balderston was the top decisionmaker on policy at the Wholesale Outlet. (Tr. 747-8). Talbott kept Balderston informed about vehicles and things going on at the Wholesale Outlet. (Tr. 748) The Wholesale Outlet was given first refusal on BSF cars. (Tr. 773).

In selling the Jimmy to Ms. Grabinski the Wholesale Outlet used a "junk affidavit", requiring her to sign that she was buying the vehicle for salvage, rebuilding or junk. (Ex. 96; Tr. 1469-77). Balderston knew that the junk affidavits were being used by the Wholesale Outlet. (Tr. 1392). It was improper to use them, MADA bulletins had said so, and Talbott acknowledged knowing that it was improper. (Tr. 1393; 757-60).

But Balderston knew that they were continuing to use them at the time his deposition was taken in Grabinski, in July of 1994. (Tr. 1392).

When Ms. Grabinski returned to the Wholesale Outlet to complain about having bought a salvage vehicle, she was told that they would not buy the vehicle back, and that if it was wrecked then BSF had "screwed" them because it had given them the vehicle without disclosing that. (Tr. 1484-5).

Wholesale Outlet manager Robert Dudley was involved in the Grabinski matter, and neither he nor anyone else was ever disciplined for matters at BSF or the Wholesale Outlet relating to the Grabinski case; Dudley was later made overall manager of the Wholesale Outlet. (Tr. 748-54; 1412). Mr. Talbott recalled no changes at the Wholesale Outlet because of the Grabinski case. (Tr. 754).

The filing of the Grabinski case "didn't change a thing" in how business was conducted at BSF. (Tr. 1420; 841).

**5. The Craig Vehicle, sold November 1993**

In November Michael Craig bought a 1991 Nissan extended-cab pickup truck from BSN. (SLF 19, Craig depo. p. 20; Tr. 1153-4). It was described to him by the salesman as a "good one"; nothing was said about it having been wrecked. (SLF 20, Craig depo. p. 22-3).

In October of 1995, while watching the vehicle being inspected on a lift, Mr. Craig noticed a "big patch" welded on both sides of the frame of the truck, in the area where the frame passes over the rear axle. (SLF 21-2, Craig depo. p. 32-3).

Scott's expert Richard Diklich testified that the pickup had accident damage and a "big fish plate" repair to the frame, and that this was obvious from just looking at the truck over the top of the rear wheel. (Tr. 1153-4).

**6. The Looney Mustang – the Second Sale, January 1994**

The Looney Mustang was traded back in to BSF in December of 1993. (Ex. 54, p. 14). It was sold a second time by BSF on January 13, 1994, for $11,500, to a Danny Bishop, a clock repairman who worked as BSF salesman for a 5 month period; he had no background in cars. (Id.) Bishop saw the red convertible on the lot and approached used car manager Steve Lotspeich about buying the vehicle. (Id.) He was not told that the Mustang had previously been wrecked. (Id.)

At the time of purchase Bishop had difficulty getting the rag top to line up right, and took the Mustang in to the service department. (Id.) He was then told by used car technician Tom Wynn that the Mustang had previously been totaled and brought in to BSF on a flatbed truck, and that the top could not be lined up. (Id.)

Bishop then approached Lotspeich to inquire if this was correct. (Id.)

Lotspeich, who had worked in the BSF used car department since 1990, said that Wynn didn't know what he was talking about, and "should keep his mouth shut". (Id.; Tr. 766-8) Lotspeich then pulled a Carfax report, which didn't show any previous wreck damage. (Id.) He showed the report to Bishop, and said that this showed that Wynn was wrong. (Id.) Bishop believed Lotspeich, and proceeded with the purchase; he sold the Mustang that spring to another Ford dealership, and the Mustang some time subsequently ended up being purchased by Tom Looney. (Id.)

Lotspeich testified that if an individual owns a damaged vehicle and does not get a salvage title, it will not show up in Carfax. (Tr. 789).

Looney filed suit against BSF in August of 1998. (Tr. 1448). Balderston then "investigated" what went on in the Looney matter and related conclusions to then-general manager Young. (Tr. 1435-6; Tr. 640-2; Tr. 722-5). Some conduct of Vargas relating to the Looney Mustang was determined by Balderston to have been "flat-out dishonest"; but not the sale of the Mustang without disclosure, or the rebuilding of the Mustang. (Tr. 722-5; 1435). However, Balderston testified that the handling of the Mustang was "wrong", and that it should not have been sold without disclosure either time. (Tr. 1435-6). Vargas worked for Balderston into the summer of 2000, and was never disciplined for selling the vehicle without disclosure; no one was. (Id.).

Balderston testified that throughout the 1990s and through the time of trial he has never disciplined anyone "that I know of" with respect to selling rebuilt wrecks without disclosure. (Tr. 1450).

**7. The Dover/Bredeman vehicle, sold August 1995, returned and resold March 1996**

Jerry Dover, a hospital CEO, testified that he purchased a 1994 Mercedes for between $24,000 and $27,000 from BSN on August 5, 1995. (Tr. 1224- 1226, 1233). The vehicle was represented by a BSN manager as having no previous wreck damage and being in perfect condition, still under factory warranty, and traded in by the previous owner only because he had back problems and the car was too small. (Id.) After purchasing the vehicle Dover had "inordinate" problems with the heating/defrost

mechanism and wind noise coming from the driver's side door, along with air conditioning problems. (Tr. 1226-8) His wife took the vehicle to a Mercedes dealership, and the dealer took one look at the vehicle, and informed her that the problems could not be resolved and would not be covered under warranty. (Tr. 1227-33). Dover learned that the vehicle had previously been totaled, and he was shown overspray, repainting, and windshield indicators of previous wreck damage that were easy for him to see once they were pointed out. (Id.)

Dover testified that he confronted BSN with his findings, telling two people there, including the manager, that he had learned that the vehicle was totaled, and that he wanted out of the vehicle. (Tr. 1230-4, 1236-40). No one disputed that the vehicle was a totaled wreck, or asked to look at the vehicle. (Tr. 1230-1, 1238-9). No one offered any explanation as to why he had been told that the vehicle was not previously wrecked and was in excellent condition. (Tr. 1238). BSN personnel asked to discuss trading him out of the Mercedes, but he refused. (Tr. 1234).

The BSN management informed him that they "did not have any authority to make that decision", and that they had to refer him to BSF; which they did. (Tr. 1230, 1234-5). He went to BSF and dealt with a manager there. (Tr. 1234-7). He asked to speak with Balderston, but was informed that Balderston "was not there". (Id.) He was informed that he had no other recourse except to trade the Mercedes in on another vehicle, despite the fact that he did not want any Nissan or Ford product that he wanted. (Id.). They did not offer him his money back. (Id.). He then resolved the matter by transferring the Mercedes to BSF and purchasing a Ford Explorer, having to pay extra to do so. (Id.). He

transferred the Mercedes to BSF on February 15, 1996. (Tr. 1237-8; Ex. 89, the title history on the Mercedes, pages 9-10).

The day after Dover transferred the Mercedes to BSF, February 16, 1996, it was transferred from BSF to BSN. (Ex. 89, pages 9-10).

BSN then sold the Dover Mercedes to Cyndy Shorten (f.k.a. Bredeman), for $27,767, on March 16, 1996. (Tr. 1346-1348, Ex. 94, the Bredeman deal file). She testified that she was told that the vehicle had some minor front end damage that had been repaired, "nothing serious"; she was not told that the vehicle had previously been totaled in a wreck, nor that it had been returned by the previous owner because it had been previously totaled and that fact had not been disclosed. (Id.). She had the same problems with the vehicle as those recited by Dover. (Tr. 1348-9).

**8. The Brooker vehicle, sold December 1995**

Jenny Brooker, a stay-at-home mother with two children, testified that she and her husband purchased a 1991 Ford Taurus from BSN in December of 1995, pursuant to representations that the vehicle was a one-owner, traded in by an older couple that had taken real good care of it, and had never been wrecked. (Tr. 972 -974). The Brookers later found out that the vehicle had been in a substantial wreck and was a two-owner vehicle, one of which was a rental car company. (Tr. 977-8; 983-4). They had numerous problems with the vehicle, from incurable alignment/pulling problems and severe tire wear, to doors not shutting right, to water leaks, to paint fading, to bondo popping out from the body. (Tr. 975-7, 983-7). Ms. Brooker testified to visible signs of damage that became apparent to her, including overspray inside the vehicle and in the wheel wells,

waviness down the side of the car from bondo popping out, paint fading differently, and (once the vehicle was put on a lift) that the trunk was bolted together underneath. (Tr. 975, 984-7).

The Brookers went back to BSN and talked with personnel there, including managers, "more than 15" times about the wreck problems. (Tr. 975-84). They talked to the used car manager, a man identified as the general manager or co-owner, and the salesman. (Tr. 976-80, 983-4). The BSN personnel claimed that they had been told that the vehicle had not been wrecked. (Tr. 977). Ultimately the Brookers were given no assistance, and were told there was "not a whole lot we can do". (Tr. 984).

Roy Hannah testified that he owned the 1991 Ford Taurus prior to the Brookers and that he traded it into BSN on November 18, 1995. (Ex. 63, Hannah deposition, pages 4-11). Hannah testified that the salesman, while looking at the rear of the vehicle, asked him if it had been wrecked. (Id.) Hannah told him that it had been hit in the rear; he testified that the vehicle was struck in the rear and struck hard, injuring Hannah. (Id)

**9. The Garrison vehicle, sold April 1996**

Todd Garrison, an inventory clerk at Safeway, testified that he purchased a 1995 Ford F-150 from BSF on April 8, 1996, for $21,100. (Tr. 921-2; Ex. 59, Garrison Missouri title history). When he purchased the vehicle it was night time; he dealt with a manager and a salesman, and no one told him that the vehicle had been wrecked. (Tr. 924-5). After the purchase, in looking at the truck in the daylight, he and his wife noticed obvious wreck damage to the hood, "like the hood had been slammed above the cowl and had engraved itself, like a front-end collision of some sort", and paint repair indications

over the entire vehicle. (Tr. 926-8). It looked "horrible". (Id.) Garrison testified that he made several attempts to reach the manager who had sold the truck to him, wanting to get out of the vehicle because of the damage. (Id.) He testified that his attempts to reach the manager had "no result", and he finally went to BSF and talked with him personally. (Id.) Garrison testified that he showed the damage to the manager; and that the manager did not deny the damage, saying, "yeah I can see it", but "wanted to push me off like I was nobody . . . I had done signed the paperwork so it was like a 'go on' kind of an attitude". (Id.) The manager was unresponsive to Garrison's requests for assistance. (Id).

**10. The Simpson vehicle, sold May 1998**

Kevin Simpson, who was 24 years old at the time of trial in September, 2003, testified that in May of 1998 he purchased a 1994 Ford Ranger from BSF, for $12,400, pursuant to verbal representations that it had not been wrecked and had been traded in by a couple on a new car. (Tr. 1503-8; Ex. 92, the Simpson car deal file). He noticed signs of paint repair, and was told that there had been some repair to hail damage to the vehicle. (Id.) He was given a written disclosure of the hail damage repair, and discussed that with the salesman, who said the truck had "a little bit of hail damage". (Tr. 1516-8). But he did not understand the disclosure to suggest frame damage or a totaled vehicle, commenting "I have never seen hail, you know, bend a frame, personally." (Id.)

Simpson testified that after the purchase the vehicle sat for several months because he couldn't afford to license it. (Tr. 1506). When he did get ready to use it, he pulled the bed liner out and, while he is "by no means a trained expert", he saw that the bed sat

"kind of tilted", and there were signs of frame and body damage to the vehicle. (Tr. 1506-8). He had the vehicle examined at three body shops and learned that it had "pretty much been totaled", that the frame had been twisted, there were indications of a frame machine having been used, and "plugs of Bondo" were found throughout. (Id.).

Simpson went back to BSF, and confronted the general manager, Carl Young, in the showroom, saying loudly that "he sold me a wrecked truck". (Tr. 1508-10). Simpson was "pretty mad". (Id.). Young "rushed me outside real quick", and had the BSF body shop look at the vehicle. (Id.). The body shop technician put the vehicle on a lift, confirmed all the things the other body shops had said about the vehicle, and said the vehicle "should never have been sold, much less driven". (Id.). Simpson told Young that BSF needed to take the truck back. (Tr. 1512).

Young responded by accusing Simpson of wrecking and fixing the vehicle himself. (Tr. 1511).

Simpson pressed Young in discussions over two days, and Young refused to help Simpson. (Tr. 1508-12).

After these meetings Simpson went back to BSF and met with Balderston. (Tr. 1512-5). He restated his complaint about being sold a totaled wreck, and Balderston asked what Simpson wanted him to do about it. (Id.). Simpson said that he wanted a new truck, and Balderston said "you might as well get hell – pardon my French – but get the hell out of here". (Id.). Simpson told Balderston that he thought Balderston would come back with some kind of counteroffer, but "there was nothing". (Id.).

Simpson testified that during their meeting Balderston spoke with a "sarcastic tone", and "kind of had a grin on his face when he said . . . get out of here". (Id.).

**11. The Morrison vehicle, sold August 1998**

Mike Morrison, a grocery manager, testified that he and his wife, Misty, bought a 1996 Chevrolet Monte Carlo for approximately $21,000 from BSF on August 28, 1998. (Tr. 900-03). They were told by the salesman that to his knowledge the car had not been wrecked, but he could check with his used car manager; after checking, he stated that the vehicle had never been wrecked. (Id.). Morrison testified that two days later he discovered prior wreck damage in the trunk area of the vehicle. (Tr. 903).

He went back to BSF and complained, speaking with the used car manager and the salesman. (Tr. 903-5). He told them, "you guys told me this car was never wrecked"; they responded by saying "we never told you it hasn't been wrecked". (Id.). He told them, "don't you lie . . . because I'll pop you in the mouth". (Id.). They argued back and forth, and the BSF manager and salesman said "the deal's already made", that there was nothing they could do about it. (Id.). Morrison asked to speak with Balderston, and their response was "they, of course, you know, he wasn't there and all that". (Id.).

Morrison and his wife returned to BSF the next day and spoke with general manager Carl Young, pointing out that they bought a wrecked vehicle they were told was never wrecked, and Young responded by saying "the deal's already made and there's nothing I'm going to do about it". (Tr. 906-8). Morrison threatened to "make signs and stand across your dealership with signs and tell people how you just screwed me". (Id.). They returned to BSF three or four times, and finally contacted an attorney. (Tr. 911-4).

They informed Young that they had spoken with an attorney, and Balderston came out of his office and asked what was going on. (Id.). At that point the Morrisons had been "raising a lot of cain . . . in the dealership", "cussing, and, you know, telling people that they were screwing me around". (Id.). At that point BSF took the vehicle back on trade for another vehicle. (Id.).

At no point in these discussions did BSF deny that the vehicle had been wrecked. (Tr. 914).

Steven Woods owned the Morrison vehicle prior to Morrison (Tr. 918-20; Ex. 60, Morrison title history, page 19). He testified that the vehicle sustained rear end damage during his ownership. (Id.). When Woods traded the vehicle in to BSF, he dealt with sales and finance staff in the process, and fully disclosed the wreck damage by showing the repairs to BSF, and completing a disclosure form describing the damage. (Id.).

**12. The Snell/Freitag vehicle, sold January 1999, returned and resold May 1999**

Peter Snell purchased a 1996 Ford Taurus from BSF on January 23, 1999. (Tr. 1243-6, 2nd SLF 70-2; Ex. 90, the Snell car deal file, Retail Buyers Order). At the time of purchase he was told that the vehicle had not been wrecked, and he asked "are you sure?" (2nd SLF 72-5). The salesman said "we don't sell cars that are wrecked, but I'll double-check with my manager to make sure". (Id.). The sales manager then assured Snell that it had not been wrecked. (Id.). Snell believed the salesman, because the salesman was a friend, and because the salesman knew Bob Balderston. (Id.). Snell himself had met Balderston at Balderston's home. (Id.).

Some time after the purchase Snell started noticing paint lines in door jams, underneath the hood, and in the trunk, and called the salesman. (2nd SLF 77-8). In a series of conversations Snell informed BSF that he wanted out of the vehicle. (2nd SLF 79-80). BSF examined the vehicle in its body shop, and confirmed that the vehicle "had definitely been painted on the hood and on the roof". (Id.).

The BSF personnel "swore up and down" to Snell that BSF did not know that the vehicle had been wrecked when it sold the vehicle to Snell. (2nd SLF 83-4). BSF then took the vehicle back, selling Snell another vehicle. (2nd SLF 80, 86).

Snell's deposition was taken during the trial of the Scott case, on September 2, 2003. (Tr. 1243-6, 2nd SLF 69). During the deposition Snell was informed that an auction sales invoice in the BSF deal file on his car, Ex. 90, showed that when the vehicle was originally purchased by BSF there had been a disclosure to BSF that it had previous repairs to the front end, and that the core support had been replaced. (2nd SLF 84-7). His reaction was "Wow." (Id.). He testified that he had not known that that information was in the BSF file until he was told during his deposition. (Id.). When asked if he knew that BSF had this document in its file at the time it was negotiating the resolution of his problem, he responded, "Well, heck, no", and that BSF was actually telling him that they did not know of the damage. (Id.). Snell testified that his negotiations with BSF would have been different if he had known of that disclosure in the BSF file. (Id.).

After taking the 1996 Taurus back from Snell, BSF sold it to James Todd Freitag and Betty Freitag on July 5, 1999. (Tr. 1247-9; Ex. 99, the Snell/Freitag title history, pages 7-8; Ex. 91, the Freitag car deal file, Retail Buyers Order). The Freitags were

given a disclosure document by BSF (in Ex. 91) indicating that the vehicle was sold with no disclosed damage; that disclosure was important to the Freitags, as they would not have purchased the Taurus if they had known of prior damage. (Tr. 1248-9; Ex. 91)

Within a week of purchasing the Taurus the Freitags experienced front end problems with the Taurus, noticing a "loud popping sound underneath the driver's side floorboard". (Tr. 1249). They returned with the vehicle to BSF, where the problem was diagnosed as a broken or cracked strut, which was repaired, which seemed at first to cure the problem. (Tr. 1249-50). But within a short time afterward the problem reappeared, and attempts to solve it failed. (Id.). The car went through tires in a short period of time. (Id.).

Two and a half years after buying the car (which would be early 2002), the Freitags were turned down for auto insurance on the Taurus because the insurance company had information showing two prior accident damage claims on the vehicle. (Tr. 1251).

Todd Freitag put in two or three calls for general manager Carl Young at BSF, and eventually reached Young; he told Young about the problem, and then did not get a call back from Young. (Id.). About a month later Freitag went to BSF and found Young there. (Tr. 1251-3). Freitag explained the facts he had been told about the previous damage claims to the Taurus, and Young "denied that the vehicle had ever been wrecked and immediately went and pulled up a Carfax and showed me the Carfax and the Carfax showed it hadn't been". (Id.). However, Freitag knew from speaking with his insurance agent that Carfax does not have the same type of database as the insurance company, and

that those particular claims were not in the Carfax database. (Id.). Young did not ask to have the vehicle examined, but stood by his assertion that the Taurus had not been wrecked. (Id.).

The Freitags did not at that time have any information available to them at that time showing that BSF already knew that the vehicle had been wrecked. (Id.).

The Freitags gave Young an 800 number to call the insurance company to confirm the damage, and the company confirmed what the Freitags had been told about the previous wrecks. (Id.). Young still "stood by his word that the vehicle had not been wrecked." (Id.). Young refused to do anything further regarding the vehicle. (Id.). The Freitags did not hear back further from Young. (Tr. 1253-4).

Some time later, the Freitags were contacted by a legal assistant from the office of Scott's counsel in this case. (Tr. 1254-6). She gave the Freitags information about what was in the BSF file on this vehicle. (Id.).

Todd Freitag then called for Young again. (Id.). Freitag asked Young about the problem again, and Young again stated that he stood by his word that the vehicle had not been damaged. (Id.).

Freitag then asked Young where the deal file for the sale of the Taurus was. (Id.). Young said "I'll have to call you right back". (Id.). In a matter of five minutes Young called back, and again Freitag asked where the deal file was. (Id.). Young said "it is in our office". (Id.). Freitag said "no, sir, it is not. It's sitting in an attorney's office in Kansas City, Missouri". (Id.). At that point, Young's attitude had "a sudden change". (Id.).

The Freitags were then able to put pressure on BSF, there were no further denials by BSF about the vehicle having been wrecked; BSF then traded the Freitags into another vehicle. (Tr. 1258-60).

**13. Other similar rebuilt wreck sales by BSF**

Balderston testified that there were "several" cars with previous salvage titles that BSF bought back during the 1990s. (Tr. 1374).

Balderston acknowledged that the car and service files on the Scott vehicle both show previous salvage, and that it is possible that BSF has dozens or hundreds of files on vehicles with similar documentation showing that those vehicles were rebuilt wrecks sold without disclosure. (Tr. 1440-3.) He testified that if he wanted to find out if there were other rebuilt wrecks sold like those shown in the evidence he could have someone look at the files on their vehicles; but he has not done so, for any time period. (Id.).

## J. EXPERT RICHARD DIKLICH'S TESTIMONY

Richard Diklich's testimony extends over more than 140 pages of transcript, covering many points in detail. (Tr. 1043-1072, 1092-1156, 1162-1219).

Mr. Diklich testified that he is a recently retired instructor of over thirty years' experience teaching automotive technology for Longview College in Lee's Summit, with a B.S. in Automotive Technology. (Tr. 1043-4). His professional experience began with 6 years working for Ford Motor Company at the Claycomo assembly plant with work in quality control, examining the welding integrity and body fit of vehicles being assembled. (Tr. 1047-8). His teaching relating to steering and structural alignment has covered determining if a vehicle has structural damage, and has entailed his study and learning

with respect to body and frame issues. (Tr. 1047-59). He has written a curriculum and developed a two-year program where the body training is provided for that. (Id.) He has had "I-CAR" training relating to vehicle collision repair. (Id.) I-CAR provides procedures and industry standards for collision repairs. (Id.) Mr. Diklich has been familiar with I-CAR and manufacturer standards and procedures relating to collision repairs through the years. (Id.)

He had a Missouri wholesale and retail dealer's license from 1978 to 1982, began attending wholesale car auctions then, and has attended such auctions fairly regularly and been a close observer of what goes on at auctions through the present. (Id.) He has been in a lot of car dealerships in the process of doing vehicle inspections on extended service contract issues, having done probably 3,500 of those, mostly in dealerships. (Id.) With each of those inspections he was checking for prior collision damage because a lot of warranty companies won't pay on components that may have been damaged in a collision – which often happens. (Id.)

Mr. Diklich helped to start and then taught in a GM training program for seven or eight years training GM technicians, and taught in a similar Toyota program. (Id.) Part of his job was going to dealerships where technicians worked, going to their work areas, often working on alignment issues on vehicles that had come in from the dealerships' body shops. (Id.)

He is experienced and familiar with the process of car dealer appraisals of vehicles. (Id.)

He works closely with engineers in accident reconstruction and with product liability cases. (Id.) He has done trainings of law enforcement personnel for forensic exams, for I-CAR methodology in repairs and the propriety of various repairs. (Id.) He has been consulted by national media, including 60 Minutes and others, relating to collision repair issues. (Id.) He regularly does consulting work for both plaintiffs and defendants, and such consultation takes less than half of his working time. (Tr. 1167).

Mr. Diklich's examination of Scott's vehicle indicated that it would have been obvious to an experienced used car person doing an appraisal at the time BSF handled the Explorer that it had previously been wrecked. (Tr. 1059-72; 1093-6; 1164). He testified to numerous indications of previous repaired damage what would , including such things as the front bumper being misaligned, paint mask lines, frame clamp marks, gaps and misfits in body part alignments, paint sags and runs, and non-factory welds. (Id.) He also testified that the frame of the Explorer was twisted, which he described as not uncommon in a rollover accident. (Tr. 1128-9).

He testified that the nature of the repairs that had been done to the Explorer left defects that related to vehicle safety, particularly in the event that the vehicle was in a rollover accident or frontal crash where the windshield would need to protect the occupants. (Tr. 1115-29; 1164-5). He testified that the repairs of the structure of the area around the windshield near the driver did not meet industry and manufacturer standards, and that the windshield retention in that area of the windshield was "not going to be any good". (Id..) He testified that it was well-known in the repair industry that windshield retention is an issue in terms of safety, that windshields can fail to adhere to the pillars of

the structure in the event of accidents, and he described having seen even instances of windshields coming out in vehicles driving down the road. (Id.) He testified that the rocker panel area also showed an issue related to safety. (Id..) The rocker panel repair on this vehicle was also proceeding toward a complete failure of the welds in the lower rocker area, a matter of advancing deterioration over time due partly to lack of corrosion protection in the repairs, raising questions about the ability of the vehicle to hold together safely. (Id.; Tr. 1164-5; 1146-7). This related to whether the lock pillar of the vehicle would support the vehicle in a rollover, in that the rocker will affect the support given to the bottom of the B pillar and whether the door latch can hold. (Id.) Mr. Diklich avoided "quantifying" these safety problems, confining his testimony to the quality of the problems and how they were related to safety. (Id.)

Mr. Diklich testified that the problem of the sale of rebuilt wrecks was a matter of common knowledge in the used car industry in the 1980s and 1990s, and that these wrecks were known to affect both safety and value. (Tr. 1147-8). He testified that from all of his experience and knowledge, approximately 85% of the vehicles that have had previous structural major repairs have not been repaired properly, and that the improper repairs range from "medium bad to terrible". (Tr. 1149-51). He testified that the problem is worse particularly as vehicles age, noting that vehicles are now on the road an average of 8 ½ years. (Tr. 1216-8). He testified, "you don't get to pick the time you have your wreck." (Id.)

He testified that the fair market value of the Explorer in March of 1994 if the vehicle had not previously been wrecked would have been approximately $15,500. (Tr.

1129). Mr. Diklich testified that the vehicle, previously wrecked and improperly repaired and with safety issues, was not fit for retail sale. (Tr. 1140).

Mr. Diklich testified that if the vehicle were offered for sale in the wholesale dealer market with disclosure of these facts, the market prices paid by the buyers would have been based on their expectations that they were not going to disclose the problems upon resale. (Tr. 1143-6).

He testified to having examined the Grabinski, Craig and Brooker vehicles, and that all had major previous damage that would have been obvious to a used car manager or appraiser. (Tr. 1152-5).

## K. ADDITIONAL FACTS RELATED PRIMARILY TO DAMAGES

### 1. Related to Actual Damages

By prior agreement of the parties the court entered a calculated amount of damages based on the jury's conversion verdict. (Tr. 1657-8).

Scott paid state and local taxes of $401.63 when he registered the vehicle. (Ex. 2, p. 4; Tr. 356).

With respect to the true value of the vehicle, Scott testified that to give the vehicle any value at all, he would have had to be able to honorably sell it. (Tr. 354-5). He would not have felt comfortable selling the vehicle to ordinary people for ordinary use given that he knew that it was a rebuilt salvage vehicle, and lacked detailed knowledge of its exact internal condition. He did not think he could sleep if someone bought it and got hurt in it, and he would have been concerned that that would have come back on him. (Id.).

Scott testified to considerable "inconvenience", "embarrassment", and "other things" stemming from his discovery that the Explorer was a salvage vehicle, including needing to rely on his parents to get another vehicle to use, being "stuck with" and storing the Explorer, and making phone calls (including his call to Parks) and engaging in discussions with his parents and others trying to sort out what to do. (Tr. 356-8).

**2. Related to Punitive damages**

a. Profit on the sale of the Explorer: Carl Young testified, and the "F & I recap sheet" on the Explorer shows, that BSF made $8,500 in profit on the sale price of the Explorer, $1,989 on the financing of the Explorer, $653 on the credit life insurance, and should have made $630 on the ESP contract, for a total of $11,772 in profits relating to the sale of the Explorer to Scott. (Tr. 575-8; Ex. 31). But that figure is before adjusting for the fact that BSF actually kept the full amount of the sale price of the service contract, $1,475 (leaving an actual profit total for BSF related to the Explorer of $12,617). (Id.). Normal profit on the selling price of a used car was $1,000 to $1,200; normal profit on the financing, service contracts, credit life, etc., was $600 to $700 per car. (Tr. 579).

b. Business booming despite the Grabinski case: From March of 1997 to the beginning of 2003 BSF rose from being 9$^{th}$ to 2$^{nd}$ place in the city in vehicle sales; it ranked up at the top of used cars sales, at 1,600 per year. (Tr. 568, 571, 659). Through the 1990s BSF has grown. (Tr. 1451). Balderston testified that the Grabinski case had no effect on BSF. (Tr. 1453-4).

c. Lack of law enforcement, difficulty of discovery, difficulty for victims obtaining attorneys

Leo Grothaus is a special agent with the Missouri Department of Revenue who worked in policing dealers under their dealer licenses for 20 years, handling complaints against dealers for various kinds of misconduct including failure to disclose pertinent facts. (Tr. 1302-4). He testified that there is a "large number of vehicles out there" that are purchased by the public that they don't know are previous salvage vehicles, and that unless they find out by some accident or some other way, they don't know about this history until it is presented to them. (Id.) He testified that the undisclosed major wreck problem is common knowledge in the industry. (Id.)

Between the 1980s and the present he knows of no instance where his Department has suspended or revoked a franchise dealer's license, or taken any action against a franchise dealer, for deceiving a consumer. (Tr. 1307; 1317). That is a frustration to him. (Id.)

It is his experience that ordinarily such consumers have difficulty getting an attorney at all. (Tr. 1317-8).

Balderston testified that he heard all the testimony during the trial of the people who had bought rebuilt wrecks from BSF, but that he has no fear of any law enforcement problems for his dealership. (Tr. 1453-4).

d. BSF's financial condition

Balderston testified that BSF has gross sales in the $90 million dollar range; he testified that BSF sells approximately 2,400 cars per year, priced typically around $15,000 for used cars and $21,000 for new cars. (Tr. 1784-6).

## L. ADDITIONAL FACTS RELATING TO SCOTT'S APPEAL

After the Amended Judgment was entered June 23 or June 28, 2004, Scott's post-judgment motion filed July 23, 2004, raised the multiple points asserted on his appeal, and the motion was overruled. (L.F. 363-7, 402-6; 2nd SLF 92-3).

### 1. Scott's Additional Refused Offers Of Proof – Wrecks Sold While This Suit Was Pending, Other Wrecks, The Grabinski Judgment, And The Balderston Interrogatory Answer

During the trial there were at least 3 BSF managers who made volunteered statements – unresponsive to questions asked – that asserted that BSF had after the 1990s improved its practices to prevent selling rebuilt wrecks: Carl Young at pages 653-4 and again at p. 657 (process improved "drastically"); Scott Barrelman at p. 1017; and Balderston at p. 1396.

Scott made an extensive offer of proof after all of this testimony, concerning additional wrecked cars knowingly sold by BSF in 2000 and later without disclosure. (Tr. 1519, 1537-1547). The offer included, inter alia, three wrecked vehicles sold in 2001 and 2002 without disclosure and with false representations by BSF (after the filing of this case in January of 2001); a wrecked vehicle sold by BSF without disclosure in November of 2000; a wrecked vehicle sold by BSF without disclosure on April 14, 2000; evidence showing BSF's knowledge of the damage; and a wide range of discussions by these consumers with managers and other personnel – including Balderston – relating to these vehicles. (Id.) This refused evidence was actually received in evidence by the trial

Court in the later proceedings on injunctive relief: see Ex. 100, and Ex. 103-107, and the discussion on injunctive relief, below.

Scott made offers of proof, additional to the offer previously mentioned, to bring in the substance of the Grabinski judgment (Tr. 760-1, 801).

Scott made offers of proof to bring in Ex. 93, the redacted version of Balderston's signed answer to the interrogatory in the Grabinski case regarding other rebuilt wrecks. (Tr. 1424-8; 1457-63).

**2. The refusal of Scott's claim for injunctive relief**

On November 21, 2003, the Court held additional proceedings on Scott's claims for equitable relief, which had been bifurcated for determination by the Court. (Tr. 1829-1907). Scott presented extensive additional evidence; for the convenience of the parties and the Court and witnesses who were present, it was agreed that the exhibits offered at the hearing (Ex. 100-102) and in a post-hearing submission (Ex. 103-107), and the extended statements of counsel in the hearing, would be received as evidence, in lieu of testimony of live witnesses, as if the witnesses themselves had testified accordingly. (Tr. 1863-5; L.F. 354, the certificate of submission of Ex. 103-107).

The evidence received by the Court focused on the continuing sales by BSF of rebuilt wrecked cars without disclosure after March of 2000 and after the filing of this case (described in detail in the statements/testimony by Scott's counsel, and in a short synopsis in Exhibit 100, and in BSF car file records on the five additional vehicles, Tr. 103-107), and on the lack of law enforcement against such conduct by car dealers. (Tr. 1863-1900; Ex. 100-107). Scott recommends a review of the two-page Ex. 100, and for

brevity he will not repeat its contents here. A statement admitted into evidence from the Missouri Attorney General's office indicated, inter alia, that there were 777 complaints to that office of Missouri dealers selling cars with undisclosed wreck or salvage history between 1990 and 2003, and only ten suits filed against dealers in that time frame, with zero suits filed against dealers after 1995.

**3. The denial of jury trial on punitive damages on Chapter 407 claims**

After in-chambers discussion with the Court, Scott made a formal request on the record that the trial Court submit to the jury the issue of punitive damages against BSF and Balderston for violations of Missouri's Merchandising Practices Act, citing the Diehl case (State ex rel. Diehl v. O'Malley, 95 S.W.3d 82 (Mo.2003)) and tendering punitives instructions for that purpose; the Court refused the instructions. (Tr. 1575; 1601-2; L.F. 161-2, tendered instructions D and E).

**4. The denial of attorney's fees**

Scott filed his motion for attorney's fees under Chapter 407 and the Magnuson-Moss Warranty Act on November 21, 2003, supported by extensive suggestions, detailed time entries, and multiple affidavits, prior to the entry of judgment (L.F. 208; 273-333); the Amended Judgment denied his request for fees, stating only that:

> IT IS FURTHER ORDERED, on Plaintiff's claims for Attorney's fees pursuant to Magnuson-Moss Warranty Act and pursuant to the Missouri Merchandising Practices Act, the Court taking into consideration the damages of Plaintiff, the verdict for compensatory

> damages and punitive damages, judgment is entered in favor of Defendant Blue Springs Ford and against Plaintiff . . .

(L.F. 365).

# ARGUMENT

## I. RESPONSE TO BSF'S FIRST CLAIM OF ERROR: THE TRIAL COURT'S ADMISSION OF EVIDENCE CONCERNING THE GRABINSKI, DOVER, CRAIG AND BROOKER VEHICLES WAS ENTIRELY PROPER

### A. Standard of Review

To the cases cited by BSF on standard of review Scott would Newman v. Ford Motor Co., 975 S.W.2d 147, 151 (Mo.banc 1998) (holding that trial courts "have wide discretion on issues of admission of evidence of similar occurrences" (cite omitted); and Goede v. Aerojet General Corp., 143 S.W.3d 14, 19 (Mo.App. 2004) (on showing prejudice).

### B. Argument

BSF's "point on appeal" is not clear. As Scott understands it, BSF contends 1) that evidence regarding the Dover, Craig, Brooker and Grabinski vehicles was covered by the general rule barring evidence of "other" transactions; 2) the "exception" for evidence of "similar" transactions did not apply to the Dover, Craig and Brooker transactions for the sole reason that BSN was a corporation separate from BSF; 3) the "exception" did not apply to the Grabinski transactions because the Wholesale Outlet was a separate corporation, and the evidence regarding the "tow-off affidavit" in the Grabinski sale was not "similar". BSF's only argument that "prejudice" is shown is that the compensatory and punitive damages verdicts were "grossly excessive".

Three preliminary points should be made: 1) BSF's motion for new trial did not raise the issue of the Grabinski vehicle evidence, so that the issue of evidence concerning the Grabinski vehicle was not preserved for appeal. See BSF's motion for new trial and suggestions in support, LF 375-381 and 382-400. 2) BSF makes no claim of error regarding the admission of evidence on multiple other specific vehicle sales; nor does it challenge the veritable mountain of other evidence demonstrating fraud in the handling of Scott's Explorer and practices at BSF that almost certainly caused many other rebuilt wrecks to be sold without disclosure. 3) The trial court engaged in extensive consideration of BSF's motion in limine (Tr. 90-178), in fact barring the majority of the "other" specific wrecked car sales evidence offered by Scott.

Turn now to[4] BSF's argument that the Dover, Craig and Brooker transactions were not "similar" to the Scott transaction solely because BSN was separate from BSF. First, BSF disregards the fact that this case was being tried against two defendants, Balderston and BSF. BSN was no more separate from Balderston than was BSF; as the conduct of BSF was relevant as showing Balderston's own practices, knowledge, culpability, and

[4] It deserves mention that BSF's entire argument that the "general rule" barring evidence of "other" misconduct by a party applies here to bar this evidence is clearly incorrect: the general rule does not apply when the "other" misconduct is by persons other than the defendant. State v. Gilmore, 681 S.W.2d 934, 942 (Mo. 1984). But Scott submits that in fact BSN and the Wholesale Outlet operated practically as appendages of Balderston and BSF, so he confines this comment to a footnote.

absence of mistake, etc., so the conduct of BSN (and the Wholesale Outlet) was relevant to showing his practices, knowledge, culpability, absence of mistake, etc. BSF does make a remark, at page 32 of its brief, apparently suggesting that the jury's verdicts in favor of Balderston change whether this evidence was admissible in the first place; but that is an obvious non sequitur.

Moreover, Missouri courts already have approved use of evidence of "other" similar transactions where the conduct involved was by corporate entities other than (but related to) the defendant. See Blakely v. Bradley, 281 S.W.2d 835, 839 (Mo. 1955) (other related corporate entity involved in pattern misconduct partly owned by the defendant); Osterberger v. Hites Construction Company, 599 S.W.2d 221, 229-30 (Mo.App. 1980) (corporate entity involved in misconduct controlled by defendant, the president of the corporation). See also Jannotta v. Subway Sandwich Shops, Inc., 125 F.3d 503, 517 (7th Cir. 1997) (similar conduct by multiple companies owned by the defendant corporation held to be "highly probative" of the defendant's intent). This is entirely consistent with the general principles of evidence applicable to a case of this kind, which will now be reviewed.

"It is well established that where false and fraudulent representations constitute an issue in a case, the evidence should be allowed to take a wide range". Rice v. Lammers, 65 S.W.2d 151,154 (Mo.App. 1933). And as stated in Allison v. Mildred, 307 S.W. 2d 447, 453 (Mo. 1957): "fraud is seldom capable of direct proof, but for the most part has to be established by a number and variety of circumstances, which, although apparently trivial and unimportant, when considered singly, afford, when combined together, the

most irrefragable and convincing proof of a fraudulent design". Accord, State v. Inscore, 592 S.W.2d 809, 811 (Mo.1980). The same rule permitting admission of a wide range of "similar acts" evidence applies to proof of malice in support of claims for punitive damages. Brockman v. Regency Financial Corp., 124 S.W.3d 43, 50-51 (Mo.App. 2004). And a trend toward more reception of similar misconduct evidence has been noted by commentators: "[M]ore recent decisions indicate that as in criminal cases, the civil courts are more receptive to uncharged misconduct evidence". E. Imwinkelreid, Uncharged Misconduct Evidence § 7.12 (2004).

The proper starting point in considering whether "other" misconduct evidence is admissible is whether the evidence is relevant to any issue in the case. "Evidence is considered relevant if it tends to prove or disprove a fact at issue." Ford v. Gordon, 990 S.W.2d 83, 85 (Mo.App. 1999). "The acid test is logical relevance, and a logically relevant act is admissible even when the finding of logical relevance requires a long chain of intervening inferences." E. Imwinkelreid, Uncharged Misconduct Evidence § 2.18 (2004). There are innumerable purposes for which such evidence may be relevant: a partial laundry list is found in Rule 404(b) of the Federal Rules of Evidence ("proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"); others include impeachment, and rebuttal of a "defendant's sweeping assertions of innocence" (see Wright and Graham, Federal Practice & Procedure: Evidence § 5240). The most common purposes for such evidence relate in one way or another to proving intent, and the foremost logical basis used is referred to as the "doctrine of chances" – that the more often bad similar actions occurred, the less likely

the conduct at issue in the case was innocent, and the more likely it flowed from guilty knowledge and intent. Id., § 5242; 2 Wigmore, Evidence § 302 (3rd Ed.). See State v. Inscore, supra, at 811: ". . . it may be fairly inferred from the pattern of behavior that no mischance could reasonably explain all the failures of performance".

BSN was wholly owned by Balderston throughout the time in question, as noted in BSF's brief. It was right next door to BSF. (Tr. 1419; 1377-9). Balderston set policy at his dealerships, "shuttled among his dealerships", and kept in touch by cell and regular phone with his managers. (Tr. 1363-66, 1369-72; 753). Balderston passed MADA bulletins on to his managers at all his dealerships (Tr. 1367-9); Balderston's managers knew what he wanted and made every effort to do what he wanted, and knew that he was to be kept informed of any problem vehicles (such as returning rebuilt wrecks), and there was every reason why they would have kept him informed, and no reason why not. (Tr.854-5, 750-1; 1369-73).

In addition, Balderston himself had a banner put up at BSN when the 60 Minutes piece aired, advertising to the public that BSN was "under new management", and specifically telling the press that he (referring to BSN, the dealership shown in the 60 Minutes piece) didn't sell these wrecked vehicles. (Tr. 1378-9; 773-6).

Moreover, the story of the Dover/Bredeman vehicle by itself demonstrates how much BSN was in fact merely an arm of Balderston and BSF. After Dover returned to BSN with the totaled Mercedes he had bought there, the BSN manager said that he "didn't have authority" to handle this matter, and that Dover would have to talk with BSF management. (Tr. 1230, 1234-5). Dover then did deal with BSF management, ultimately

got an unhappy resolution of the matter, and was required to trade the Mercedes in to BSF. (Tr. 1234-8; Ex. 89 p. 9-10). And the vehicle was then immediately transferred by BSF back to BSN, and sold again (for more money!) with fraudulent misrepresentations falsely describing the damage as "nothing serious". (Ex. 89, pages 9-10; 1346-1348, Ex. 94, the Bredeman deal file). (It should be recalled that only Balderston had authority to decide on settlements involving returned rebuilt wrecks, as testified to by Carl Young. (Tr. 642).)

BSF makes no claim of error in the reception of the evidence on the Dover, Craig, Brooker and Grabinski vehicles except for its argument based on the different corporate identities. That evidence, as summarized in Scott's Statement of Facts, shows that the Dover, Craig, Brooker and Grabinski vehicles all had severe wreck damage that would have been obvious in an inspection by a knowledgeable car person, and were all fraudulently sold with false disclosures or no disclosures concerning wreck damage. Moreover, BSF and Balderston called no witnesses and offered no evidence disputing any of Scott's evidence on these "similar misconduct" sales. As stated in Chesus v. Watts, 967 S.W.2d 97, 113 (Mo.App. 1998): "much can be inferred from the lack of a defendant's case where plaintiffs have already made a submissible case."

So Scott submits that this challenged evidence regarding "BSN" cars was highly relevant to numerous issues in the case, including: showing the intent, method, and plan of the conduct of BSF and Balderston; to rebutting their defenses, and demonstrating the absence of mistake; to showing their knowledge; to showing exceptional calculation (witness the Dover/Bredeman vehicle); to impeachment of Balderston in particular (both

of his trial testimony claiming innocence, and by way of contradicting his public pronouncements that he "didn't sell" these rebuilt wrecks); and to showing the continued nature of all of this conduct, even while the Scott "coverup" continued, and after the Grabinski case had been tried.

The facts concerning the Grabinski vehicle are perhaps even more probative, relevant to even more issues, and more inextricably intertwined with the evidence on Scott's claims, than the facts on the "BSN" vehicles. Scott suggests that a review here of the two Grabinski decisions, at 136 F.3d 565 and 203 F.3d 1024, is instructive.

Balderston's control over the Wholesale Outlet was complete, and Talbott, the BSF general manager, also had control over the Wholesale Outlet. (Tr. 1366, 747-8). Balderston decided on policy, was kept informed on vehicles and things going on at the Wholesale Outlet, and arranged that it got the right of first refusal on BSF cars. (Tr. 747-8, 773). Balderston knew that the Wholesale Outlet was using junk affidavits in its retail sales, knew that it was improper to use them (as the MADA bulletins informed him), and yet knew that the junk affidavits were still being used at the time of his deposition in the summer of 1994 in the Grabinski case. (Ex. 96; Tr. 1469-77, 1392-3, 757-60). The purpose of using those junk affidavits appears obvious: to saddle unknowing purchasers of rebuilt wrecks with these disclaimers, thus to fend off the purchasers if they came back with complaints.

Vicki Grabinski went first to BSF, which referred her to the Wholesale Outlet to buy a vehicle. (Tr. 1487). BSF sold the vehicle to the Wholesale Outlet, pursuant to representations finally determined in the Grabinski cases to be fraudulent and outrageous.

(See the Grabinski decisions). When Ms. Grabinski discovered the fraud and filed suit, Balderston and BSF did nothing whatsoever to change things at BSF or at the Wholesale Outlet, or even discipline any of the individuals centrally involved at BSF or at the Wholesale Outlet – not then, not ever. (Tr. 748-54; 841; 1412; 1420). In fact, Dudley, against whom Ms. Grabinski won a personal judgment, was promoted. (Id.). And the very sale to Ms. Grabinski was – amazingly – within a week after the 60 Minutes piece aired. (Tr. 1365; 1466; 773-6; Ex. 96). One can only say that the entire Grabinski matter was remarkable for the outrageous misconduct of all persons involved – certainly including Balderston – on the BSF/Wholesale Outlet side.

The Grabinski misconduct, and the follow-up conduct by Balderston and his managers at BSF and the Wholesale Outlet (including all of the discovery misconduct during the run-up to the Grabinski trial, concealing the Scott vehicle), was highly probative of the same issues as the "BSN" vehicles, and more.

On the subject of Balderston's control and use of his various dealerships, Scott will pause to comment on one more thing: the Carfax run by Southtown Ford on Scott's Explorer in October of 1996. (Tr. 1434-5; SLF 33, Bounacos depo. page 21; Ex. 51). There can be only one explanation for that Carfax: Balderston/BSF were paying close attention to that Explorer, knowing what a hot potato it was for them, and they were following the path of its ownership; and Balderston was using another of his dealerships to do it.

Finally, BSF trots out State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003), and asserts that State Farm prohibited the reception of the "BSN" and Grabinski

vehicles evidence. To the contrary, Scott submits that the discussion above shows that this conduct was highly similar to the conduct in the sale of the Scott vehicle, and that it was relevant to innumerable issues in the case – including the claims for punitive damages. Nothing in State Farm would suggest that this evidence should have been barred from the trial, let alone ignored in consideration of punitive damages. Also, incidentally, even if there were had been an issue about reception of this evidence only for certain purposes, and not for others, it would have been incumbent on the defendants to request a limiting instruction. Barnett v. Turbomeca, 963 S.W.2d 639, 651-2 (Mo.App. 1997).

Scott respectfully submits that BSF's first point on appeal is entirely without merit.

## II. RESPONSE TO BSF'S SECOND CLAIM OF ERROR: THE TRIAL COURT PROPERLY ADMITTED EXPERT DIKLICH'S TESTIMONY ON SAFETY ISSUES

### A. Standard of review

Scott would add McGuire v. Seltsam, 138 S.W.3d 718, 720 (Mo. 2004):

> Generally, it is within the trial court's sound discretion to admit or exclude an expert's testimony. A trial court will be found to have abused its discretion when a ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. [citations omitted]

### B. Argument

BSF attacks the testimony of plaintiff's expert witness, Richard Diklich, contending he was not qualified to discuss safety concerns raised by the Explorer's rebuild job and that his opinions on safety lacked certainty. In a nutshell, BSF's position would be like saying that a highly-trained auto mechanic of many years' experience could not testify that loose lugnuts on a wheel raise safety questions, and that if he did testify he would have to crash-test the vehicle and give mathematically precise testimony about when the wheel would come off. Mr. Diklich's qualifications are ample for his testimony (considerably more substantial than BSF described), his testimony was

exceptionally scrupulous and well-founded, and the qualifications he stated in his remarks had to be mischaracterized by BSF in order to seem negative at all.[5]

Mr. Diklich's qualifications are quite extensive, and summarized in the Statement of Facts; for brevity they will not be repeated here. Similarly, his testimony about safety defects is summarized there, and for brevity will not be repeated here.

BSF's first attack is a red herring, crowing that Mr. Diklich acknowledged he is not an engineer, without bothering to say why this is significant. BSF cites no case holding that it takes an engineer to conclude an improperly-repaired rebuilt wreck raises safety concerns or lack of corrosion protection can result in structural failure or inadequate windshield retention. That Mr. Diklich is not an engineer is of no more significance than that the medical technician in State v. Candela, 929 S.W.2d 852, 870 (Mo.App.1996), was not a doctor, or that the zoning commission employee in State ex rel. Missouri Highway and Transp. Com'n v. Christ**e**, 890 S.W.2d 1, 4 (Mo.App. 1994), was not a real estate appraiser. Mr. Diklich's scrupulous distinctions between quantitative "crashworthiness" analysis that could be done by engineers using crash tests or roof crush tests– putting numbers to exactly when and how failure would have occurred – and the qualitative "safety issues" conclusions to which he could testify marks only careful and convincing testimony, not inadequate testimony. Under any circumstance, whether he performed tests to support his conclusions would go to the

[5] Mr. Diklich has been widely recognized as an automotive expert, as a quick Westlaw search for his name reflects.

weight, rather than the admissibility, of his testimony. Sanders v. Hartville Milling Co., 14 S.W.3d 188, 208 (Mo.App.S.D. 2000). And contrary to BSF's misleading characterization of his testimony, he never stated that such testing was necessary to determine whether safety defects existed.

BSF, unable or unwilling to present any expert testimony refuting that of Diklich, attempts to discredit his conclusions in the weakest way, resorting to exaggeration on the one hand and half-factual statements on the other.

For instance, BSF seeks to dismiss Diklich's safety concerns about the structure around the windshield by proclaiming that the windshield did not fall out when plaintiff had a "high speed accident" on I-70 with the Explorer. (Appellant's Brief, p. 42) There is nothing in the record at all about speed (Tr. 329-30); in fact, this was a minor impact to the back left fender, through which a piece of rebar punched a hole the size of a quarter, a hole that Dents 'R Us, or some such, puttied over, sanded and repainted. (Tr. 330-1) It was not what the windshield would do in this kind of accident, but what could happen in a rollover or frontal crash that prompted Diklich's safety concerns. (Tr. 1164-5)

BSF exhibits similar sleight of hand in saying Diklich testified that the Explorer's repair met minimum standards. (Appellant's Brief, p. 42) He did not. Referring only to the welding itself – not the overall repair – he said the welding "was within the bottom end of industry standards" and that the welds "were borderline adequate diameter," but stressed the lack of corrosion protection as being "much more of a problem" (Tr. 1189), a fact he re-emphasized on cross-examination by counsel for BSF:

Q. Your biggest concern about it was the lack of corrosion protection?

A. Yes, frankly. That's been my biggest problem with that unit all along with respect to the repair process.

(Tr. 1190) He considered long-term deterioration, in particular, a safety defect. (Tr. 1164) As he more fully explained:

The areas, the two areas I saw that gave me rise to safety concerns were in the left hand A pillar and the rough header area, that's where the windshield goes in up in the at upper left hand corner. Right in the sun visor, where the sun visor attaches on the interior behind that. And the rocker panel areas where the welds had corroded away and the rockers where the exterior skin wasn't adhered well to the rocker and the rocker itself had started to rot away for lack of a better term. That will show up in my digital photos. So those two areas that I had concerns about interior occupancy or the ability for the vehicle to hold together type safety.

(Tr. 1115) He went on to expand on the problems with the structure around the windshield and the inherent safety problems due to the corrosion in that area. (Tr. 1116-1124). He specifically referred to the Federal Motor Vehicle Safety Standards (FMVSS), with which he was familiar from his work experience, and testified that the repairs to the

area around the windshield did not meet Standard 212. Id.[6] He also went into more detail about the rocker panel area, in response a question about other safety defects with the vehicle. (Tr. 1124-1126).

BSF cites inapposite cases concerning what it takes by way of expert testimony for submissibility regarding causation of injury or damage. Fortunately for Scott and BSF, this is not a wrongful death case in which Diklich was being asked to give his opinion to a reasonable degree of certainty as to what caused the Explorer to crash, killing Scott and his passengers. His testimony was offered to show that the Explorer was less likely to afford its occupants the protection of an ordinary vehicle, given the rebuild job revealed by his inspection, illustrating shortcuts in repairs that raised safety concerns.

Moreover, courts recognize that the fraudulent sale of a rebuilt wreck on its face evidences a clear and disturbing disregard for the purchaser's safety. As stated in Parrott v. Carr Chevrolet, Inc., 17 P.3d 473, 561-2 (Or. 2001) (upholding $1,000,000 in punitive damages in a similar car fraud case): "defendant's failure to disclose that the Suburban previously had been damaged also implicated its overall safety and evinced an indifference not only to plaintiff's health and safety, but also to the health and safety of

[6] BSF's attack on his scrupulous testimony noting that he was assuming that there were no subsequent repairs to the windshield area in question (Appellant's Brief, pp.40-1), is rebutted by Scott's testimony that he had no other wrecks and that the windshield repair people refused to warrant their repair because of the prior improperly-repaired area around the windshield. (Tr. 328-31)

the general public that would share the road with a potentially unsafe vehicle." See also Grabinski v. Blue Springs Ford Sales, Inc., 203 F.3d 102,4 1027 (8th Cir. 2000) (the sale of an undisclosed rebuilt wreck "demonstrated a clear and disturbing disregard for Ms. Grabinski's safety"); Chong v. Parker,361 F.3d 455, 458 (8th Cir. 2004)."[7] In short, it simply does not take an expert to know that a rebuilt wreck is not as safe as an ordinary car. Mr. Diklich through his testimony supported with specifics what courts and jurors – indeed what BSF itself – correctly fear in rebuilt wrecked totaled vehicles: safety defects.

The trial court was well within its considerable discretion in allowing Mr. Diklich's testimony. He was eminently qualified to render his opinion that the Explorer's repair presented safety issues. BSF's contention to the contrary should be rejected.

[7] As one court has recently noted, it is within the realm of the jurors' common sense – and not requiring expert testimony – that a rebuilt wreck presents safety concerns. Werremeyer v. K.C. Auto Salvage Co., Inc., 2003 WL 21487311 (Mo.App.W.D. 2003), aff'd & rev'd in part on oth. grnds., 134 S.W.2d 633 (Mo. banc 2004). Scott realizes this Court's opinion superseded that of the court of appeals in Werremeyer, but suggests the latter's note on this point was well-reasoned, persuasive and in accord with common sense.

## III. THE COMPENSATORY DAMAGES ARE NOT EXCESSIVE AND THE AMOUNT THE JURY AWARDED WAS REASONABLE UNDER THE EVIDENCE

**Standard of Review**

As stated in Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852, 871 (Mo. banc 1993), "[o]n appeal, a jury's determination of damages will not be disturbed unless the amount is so grossly excessive that it 'shocks the conscience of the court.'" The evidence is reviewed in the light most favorable to the verdict. Gomez v. Constr. Design, Inc., 126 S.W.3d 366, 375-6 (Mo.banc 2004). If an award of damages is within the range of evidence, a jury's verdict is not erroneous although it does not find an amount precisely in accordance with the evidence of either of the parties. DeLong v. Hilltop Lincoln-Mercury, Inc., 812 S.W.2d 834, 841 (Mo.App. 1991).

**Argument**

Although defendant BSF contends in this Court that the jury's actual damages verdict resulted from bias, passion and prejudice, that is plainly not so. A more accurate assessment of the jury's award was made by BSF itself at trial. In arguing against an award of punitive damages, BSF told the jury:

> We, you know, acknowledge your verdict on the actual damages. That $25,000 that Mr. Balderston offered several years ago was a very reasonable offer, and we thought that then, and you've agreed in terms of what you awarded.

(Tr. 1807:20-24). Mr. Balderston's letter offering plaintiff $25,400.40 was in evidence as plaintiff's Exhibit 1. The amount awarded by the jury for compensatory damages was commensurate with the defendants' own suggestion. The award thus shows obvious fairness, rather than bias or prejudice.

BSF parses the evidence and figures things to a fine mathematical certainty to reduce the actual damages below the jury's award. BSF makes no attempt to analyze the evidence in the light most favorable to the verdict, and it avoids important applicable law.

BSF starts by correctly noting that Scott was entitled to the "benefit of his bargain" plus additional damages flowing from BSF's misconduct. In calculating "benefit of the bargain" damages it acknowledges that the Explorer should have been worth $15,500 had it been as represented. But in addressing the true value of the Explorer at the time of purchase, BSF simply ignores Scott's unrebutted testimony that for the vehicle to have any value at all he would have had to be able to honorably sell it; and given its condition he could not do so, and would have feared someone being hurt in it and exposure to liability should that have happened. "An owner of property may testify as to its value." Delong, supra, 812 S.W.2d, at 841.

Indeed, people who find out that they are driving totaled rebuilt wrecks should as a matter of public policy be discouraged from selling such wrecks for anything other than salvage, absent clear proof that the vehicles are in fact safe or will be made safe. Obviously, such proof would ordinarily be most difficult to obtain: what expert is going to sign off on a statement that a totaled rebuilt wreck is and will remain over time as safe as an unwrecked vehicle? Even BSF's own general manager testified that safety

concerns are “at the top of issues” with rebuilt wrecks; Richard Diklich also gave unrebutted testimony that these vehicles raise safety concerns. Mr. Diklich’s unrebutted testimony also showed that the great majority of vehicles that have had major structural damage are not properly repaired, with repairs ranging “from medium bad to terrible”. And Mr. Diklich’s testimony exposed a basic reason for being especially doubtful about these salvage vehicles: since they were “total” losses – damaged so badly that they were not economically repairable – then the “repairs” that were done in rebuilding them must ordinarily have cut corners. The Explorer itself was shown in fact to have safety defects, worsening over time; nothing but complete disassembly could show all possible safety defects in such a vehicle. So it was appropriate, and well within the evidence, should the jury have found that the Explorer had no fair market value at the time of its purchase by Scott.

Mr. Diklich’s testimony also briefly described a wholesale car industry in which dealers would buy rebuilt wrecks intending to pass them on without disclosure to unsuspecting buyers. (Tr. 1144-6). A rule of law giving these rebuilt salvage cars an inappropriately high value would force consumers to choose between selling these wrecks for the highest possible amount (putting them back into the wholesaler/retailer pipeline, and leading inevitably to more fraud and threats to safety) and keeping the wrecks, with no prospect of adequate compensation obtainable through legal action.

BSF makes arguments that appear on the edge of suggesting that Scott’s “good use” of the Explorer changes the analysis of the Explorer’s value at the time of his purchase. That would be clearly incorrect, as difference in value damages are fixed at the

time of sale. Delong, supra, 812 S.W.2d, at 841-2; Baker v. Atkins, 258 S.W.2d 16, 19-20 (Mo.App. 1953). Moreover, that "good use" was a matter of driving a vehicle that, unbeknownst to the driver, was the equivalent of a ticking time bomb, getting more likely to blow up as time passed. Scott would never have bought it or driven it in the first place had BSF not "covered up" these facts from him over all those years; it is only a matter of good fortune that no one was hurt or killed by this vehicle, and that this case is not being presented to the Court as a wrongful death case.

The evidence also showed finance charges of several kinds and purchase of credit insurance by Scott that would never have occurred had he known the true condition of the vehicle, along with several hundred dollars in taxes and licensing fees. Particularly where the purchaser received nothing of value, he may recover charges of this kind, and all "incidental losses and expenses suffered as a result of the seller's misrepresentations". Salmon v. Brookshire, 301 S.W.2d 48, 54 (Mo.App. 1957). See also car fraud cases Grabinski v. Blue Springs Ford Sales, Inc., 136 F.3d 565, 570 (8th Cir. 1998) (interest related to purchase included in award of $7,835 on vehicle purchased for $5,500); Antle v. Reynolds, 15 S.W.3d 762, 764, 768 (Mo.App. 2000) (supporting claim for finance charges); Oettinger v. Lakeview Motors, Inc., 675 F.Supp. 1488 (E.D. Va. 1988) (supporting recovery of taxes and insurance); Goeman v. Keating, 498 F.Supp. 700 (D.S.D. 1980) (supporting recovery of finance charges); Lone Star Ford, Inc. v. McGlashan, 681 S.W.2d 720, 725 (Tx.App. 1984) (vehicle not discovered to be salvage until two years after purchase, found to be "entirely unfit" and lacking appropriate title, full purchase prices and finance charges awarded); see also Fuller v. Sight 'N Sound

Appliance Centers, Inc., 982 P.2d 528, 533 (Ok.App. 1999) (used merchandise sold as new, "loss of time, inconvenience, travel and telephone expenses, ruined food" all compensable); Jersild v. Aker, 775 F.Supp. 1198, 1206-7 (E.D. Wi. 1991) (money borrowed to purchase worthless stock; full finance charge on the loan awarded in damages).

BSF rather tentatively cites Bird v. John Chezik Homerun, Inc., 152 F.3d 1014, 1017 (8th Cir. 1998) to oppose recovery of any finance charges. BSF does this "tentatively", as well it should: BSF itself agreed during the trial that the plaintiff could seek to recover the portion of finance charges relating to the difference in value of the vehicle. BSF brought this issue up immediately before closing argument (at Tr. 1603-7), citing Bird. Scott asserted that he could argue for finance charges relating to the difference in value of the vehicle, and BSF's counsel withdrew his objection, saying (at Tr. 1607), "That's probably OK."

Scott submits that BSF was correct to acknowledge that Scott could seek such finance charges as damages. Bird is anomalous on that point, and appears in direct conflict with Grabinski; perhaps the Bird decision was influenced by the unappetizing prospect of reversing the jury verdict and ordering a whole new trial over only a discrepancy involving a small portion of the actual damages, while the plaintiff was already winning actual and punitive damages and attorney's fees on both ends of the appeal. At any rate, given the clear precedent in Missouri caselaw for awarding finance charges incurred when the item purchased is worthless, it would be illogical and unjust to hold that a victim of fraud could not at least recover finance charges attributable to the

difference in value lost because of the fraud. If a consumer buying a $20,000 car that was totally worthless could recover all of his/her finance charges, but could not recover any such finance charges if the car were worth $50, that would be an incoherent rule. And since the evidence supported a finding that the Explorer was worthless, it was within the evidence for the jury to find that all of the charges to Scott in addition to the purchase price were actual damages.

The evidence also showed "inconvenience" and other incidental and consequential damages that were compensable. Even in a mere breach of warranty case, "when . . . inconvenience is coupled with a compensable element of damage, the inconvenience occasioned by the breach may be compensated". Crank v. Firestone Tire & Rubber Co., 692 S.W.2d 397, 403 (Mo. App. 1985). Scott proved other compensable damages, and outright fraud. Scott's evidence showed he was "stuck with" the Explorer once he learned of its true history; that he had to store it for over three years; that he had to rely on his parents to buy a substitute vehicle to use; that he was "embarrassed" by these events; and that he spent time and trouble spent worrying over this problem, sorting out what to do, and investigating the situation with the Explorer. As to the problem of quantifying such damages, guidance is found in McGrady v. Chrysler Motors Corporation, 360 N.E.2d 818, 822 (Il.App. 1977) (a case relied upon in Crank):

> [W]e hold that the trier of fact, the jury, can assess damages for inconvenience, aggravation and loss of use, notwithstanding the want of mathematical specifics so long as such assessment is reasonable and not punitive. An award based upon a bona fide effort

> to compensate for the consequences of the defects that establish the breach of warranty is a remedy that the Commercial Code seeks to afford.

Similarly, "Where the value of services is a matter of common knowledge, the [jury] may determine value from its own knowledge." Hughes v. Estes, 793 S.W.2d 206, 210 (Mo. App. 1990), quoting Matter of Estate of Enger, 616 S.W.2d 137, 138 (Mo.App.1981). See also Grabinski, supra, at 570 (supporting, inter alia, an award of damages for "lost time from work . . . and other costs relating to 'problems arising from the fraudulent transaction'"; quoting Hughes v. Box, 814 F.2d 498, 503 (8th Cir.1987) (time spent coping with problems supported actual damages award).

Scott also submits that where a defendant's conduct is intentionally wrongful, and where a remedial consumer-protection statute is being applied, compensatory damages should if anything be more liberally allowed.

Scott submits that the evidence would have supported a jury finding of actual damages of well over $30,000, so that the award of $25,500 was easily within the range supported by the evidence.

As to damages for conversion, the parties stipulated that the jury would determine whether there had been a conversion, and the Court would then enter damages on a formula agreed upon by the parties. (Tr. 1657-8) That was done; BSF has no cause to complain.

Scott submits that this point is without merit.

## IV. RESPONSE TO BSF'S FOURTH POINT OF ERROR: THE PUNITIVE DAMAGES AWARD IS NOT GROSSLY EXCESSIVE UNDER THE CONSTITUTIONAL PRINCIPLES SET FORTH IN STATE FARM MUT. AUTO. INS. CO. V. CAMPBELL

### A. Standard of Review

The review of whether a punitive damages award is grossly excessive in violation of the U.S. Constitution is de novo. Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 436 (2001). However, the Court in Cooper expressly adopted the reasoning stated in an "analogous" case, United States v. Bajakajian, 524 U.S. 321, 324 (1998), and repeated the following quote: "The factual findings made by the district courts in conducting the excessiveness inquiry, of course, must be accepted unless clearly erroneous.... But the question whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context de novo review of that question is appropriate." Cooper, at 434.

### B. Argument

When all the evidence is reviewed, it is clear that this is an extreme consumer fraud case, showing conduct that stands as an abject example of the need – the necessity – for high-ratio punitive damages in appropriate cases.

Under Missouri law, punitive damages are awarded for three purposes: to punish a wrongdoer, to deter the wrongdoer from similar misconduct, and to deter others from similar misconduct. M.A.I. 10.01; Burnett v. Griffith, 769 S.W.2d 780, 787 (Mo.banc

1989). The jury in this case found BSF engaged in fraud, conversion, breaches of the Merchandising Practices Act, and breaches of warranty/Magnuson-Moss, and it found, by clear and convincing evidence, that BSF's conduct relating to the fraud and conversion was "outrageous" because of BSF's "evil motive or conscious disregard for the safety of others or reckless indifference to the rights of others". The jury obviously deliberated carefully and showed no bias at all: it found in favor of BSF on the fraudulent nondisclosure claim (after asking a question showing confusion about a confusing part of the instruction on that claim), it found in favor of Balderston on all claims against him, it entered punitive damages at a figure that showed thoughtful calculation rather than undue passion, it chose to deliberate on a Friday and a Monday (Tr. 1725, 1732, 1747). The trial court conducted a lengthy post-verdict hearing; BSF was assisted by multiple able counsel; Scott's closing arguments were scrupulously fair (unlike some of Balderston's and BSF's arguments) and within State Farm guidelines. BSF had very full and fair consideration of its side of this case by the jury and by the trial judge. It now turns to this Court to challenge the punitive damages as unconstitutionally excessive.

BSF recites the three BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) guideposts. Of these, the most important is "reprehensibility". Gore, at 575. State Farm Mut. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003), repeats five factors from Gore that help elaborate on the "reprehensibility" requirement: whether 1) the harm caused was physical as opposed to economic; 2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; 3) the target of the conduct had financial vulnerability; 4) the conduct involved repeated actions or was an isolated

incident; and 5) the harm was the result of intentional malice, trickery, or deceit, or mere accident.

All of these guideposts and factors, however, are placed within a context: the underlying purposes of punitive damages. Punishment is but one of these purposes. Deterrence, of both the culpable defendant and of others, is perhaps even more widely emphasized in the caselaw. See, for example, State Farm, at 416 (quoting Gore, that "punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition"); Kemp v. American Telephone & Telegraph Company, 393 F.3d 1354, 1363-5 (11th Cir. 2004) (A T & T billed customer for improper charges disguised as long distance charges, as part of a wide practice; upholding award of $115.05 actual damages, $250,000 punitive damages, 2,172-to-1, because a lesser punitives award "would utterly fail to serve the traditional purposes underlying an award of punitive damages, which are to punish and deter"); Johansen v. Combustion Engineering, Inc., 170 F.3d 1320, 1339 (11th Cir.1999) (upholding a punitive award of $4.35 million dollars, which was approximately 100 times the amount of actual damages awarded by the jury, as "justified by the need to deter this and other large organizations from a 'pollute and pay' environmental policy"); Mathias v. Accor Economy Lodging, Inc., 347 F.3d 672 (7th Cir. 2003) (suit in negligence against Motel 6 franchise for renting and re-renting rooms known to be infested with bedbugs, causing "painful and unsightly" but not dangerous bites; upholding $5,000 in actual damages, and $186,000 in punitive damages, 37-to-1, with a long State Farm analysis emphasizing deterrence as well as other factors); Parrott v. Carr Chevrolet, Inc., 17 P.3d

473, 487 (Or. 2001) (used vehicle with undisclosed damage and other defects; upholding $11,496 in actual damages, $1,000,000 in punitive damages, saying “we focus our attention on the scope of Oregon's legitimate interests in punishing defendant and deterring it from future misconduct”.)

And as these listed guideposts and factors from State Farm and Gore must be understood within the context of the purposes of punitive damages, so they are also only a partial list of factors to be considered. For example, “the potential harm that might result from the defendant's conduct” is embraced as a factor supporting high punitive damages in TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 460 (1993). TXO, which upheld actual damages of $19,000 and punitive damages of $10,000,000, 526-to-1, quotes from another opinion illustrating this concept:

> "For instance, a man wildly fires a gun into a crowd. By sheer chance, no one is injured and the only damage is to a $10 pair of glasses. A jury reasonably could find only $10 in compensatory damages, but thousands of dollars in punitive damages to teach a duty of care. We would allow a jury to impose substantial punitive damages in order to discourage future bad acts."

TXO, at 459-60. Other factors too numerous to list here can be found recited in the caselaw; Scott submits that these innumerable factors turning up in post-Gore and State Farm cases show the wisdom of the traditional analysis of punitive awards under the “totality of the circumstances”. At any rate, Scott turns now to examining the facts of this case under the constitutional standards.

**1. Reprehensibility**

a.. The harm caused was physical as opposed to economic: this factor does not apply in this case.

b. The tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others: This factor is particularly applicable here; the conduct was considerably worse than the conduct found in Grabinski v. Blue Springs Ford Sales, Inc., 203 F.3d 1024, 1027 (8th Cir. 2000), to be "egregious and . . . [demonstrating] a clear and disturbing disregard for Ms. Grabinski's safety and her economic interests".

BSF itself admits the grave safety threat posed by rebuilt wrecked cars. (Tr. 669-72). The scope of the rebuilt wreck problem was uniformly acknowledged to be severe. The unrebutted expert testimony of Richard Diklich showed the Explorer in fact to have major safety defects. The fact that this misconduct began and then continued despite extraordinary warning after extraordinary warning, right up through and after the filing of this suit, adds greatly to this factor, as does BSF's specific concealment over the course of almost six years of the truth concerning this vehicle from Mr. Scott.

It is ironic that BSF points to Scott having driven this vehicle for five years by way of arguing that there was not a safety threat; BSF managers, in the most calculating and deliberate cover-up, kept Scott from knowing he was driving a rebuilt wreck, knowing full well that any mile he drove the vehicle could well have resulted in injury or death to him and to others. The length of time of that cover-up, every mile Scott unwittingly drove the Explorer, and the deliberateness of the cover-up, adds heavily to this factor.

c. The target of the conduct had financial vulnerability: Scott was making $20,000/yr as a 23-yr-old laborer at the time he purchased this Explorer. As in Kemp, supra, at 1363, BSF's conduct "could be deemed by a jury to be designed to exploit customers who were unsophisticated and economically vulnerable".

d. The conduct involved repeated actions or was an isolated incident: It is obviously at the heart of this case that BSF's conduct was part of a long-running, continuing pattern of fraudulent sales of rebuilt wrecks without disclosure. For that matter, there were also multiple, long-running and continuing instances of misconduct by BSF directly relating to Scott alone.

Given the requirement of brevity, Scott will point to his Statement of Facts and urge careful review of those facts on this subject – the more closely reviewed and considered, the more egregious BSF's and Balderston's conduct is shown to be.

It is important to note, too, that the unrebutted evidence includes admission by Balderston that there were "several" other salvage cars sold and bought back by BSF in the 1990s; and the evidence indicates that BSF may well have sold untold numbers of other rebuilt wrecks without disclosure, not to mention selling unknown numbers of other service contracts where it simply kept the money.

BSF argues that evidence of other dissimilar conduct was used impermissibly in this case, as occurred in State Farm; to the contrary, the "other" conduct at issue in this case was all extraordinarily similar to that inflicted on Scott, the conduct was all in-state, and this "recidivist" misconduct satisfies exactly this State Farm criterion for enhancing punitive damages. Also, Scott notes that his closing argument urged the jury to consider

these other sales in deciding what it would take to deter BSF from similar misconduct (not to punish BSF for these sales as such) – exactly the use of such evidence approved by State Farm with respect to punitive damages.

e. The harm was the result of intentional malice, trickery, or deceit, or mere accident: Even BSF acknowledges (at p. 57 of its brief) that this factor is present. Balderston himself admitted the cover-up of the salvage history and the ESP denial. The ESP money was simply kept – for all practical purposes, simply stolen. Management cooperation was extensive – the only adequate word certainly is "conspiracy". The only way that all of the evidence taken together can be understood is if BSF's conduct is recognized for what it is – consistent rogue conduct.

Consider 1994, and then consider 2000: Given brevity requirements, Scott will only say that the closer the conduct of BSF and Balderston in those years is examined, the worse it is. Consider also, as just one example of the value of close analysis of BSF's conduct, that by flagrantly lying in its discovery answer in Grabinski, BSF not only kept Scott driving this Explorer; it concealed from Judge Sachs and the jury and the Eighth Circuit in the Grabinski case this explosive story of the Scott vehicle (and the Looney Mustang, and who knows how many others). Had this information surfaced, the award in Grabinski in all likelihood would have been far higher than the 99-to-1 punitives that were awarded.

**2. The disparity between the harm and the punitive award**

The punitives award here is 30.4 times the actual damages award of $27,599.82. State Farm, while expressly declining to impose "a bright-line ratio", gives a "single-digit

ratio" as something of a normal limit. But State Farm itself immediately repeats some of the additional factors identified in Gore that support higher ratios: where "a particularly egregious act has resulted in only a small amount of economic damages"; and where "the injury is hard to detect". It goes on to weigh as a factor whether the actual damages awarded include a punitive component (as was the case with the $1,000,000 in actual damages there).

In this case the actual damages are miniscule compared with those awarded in State Farm, and they clearly have no punitive component whatsoever. And the conduct was particularly egregious.

The injury was extremely hard to detect. Indeed, as is typical of an unwitting buyer of a rebuilt wreck, when Scott was eventually asked if his Explorer had been wrecked, he formed only vague suspicions of some limited kind of damage. Only the extraordinary luck of having a Carfax revealing the salvage history ever gave him the true picture. It is essential to the fraudulent sale of rebuilt wrecks that it is very hard for the purchasers to detect the fraud; otherwise it would be impossible to sell these cars in the first place.

Scott would also note that the absolute numbers in State Farm – one million dollars in actual damages, 145 million in punitives – surely were a major factor in the outcome. In the instant case the entire award is well under the actual damages award alone in State Farm.

Of course, the Mathias, Parrott, Kemp, Johanson, and Grabinski (upholding 99-to-1) cases, above, all show significantly higher punitive damages ratios meeting with

approval, all (except Johanson) in a consumer context, and Parrott and Grabinski specifically involving rebuilt wrecks. See also Willow Inn, Inc. v. Public Service Mut. Ins. Co., 339 F.3d 224, 235 (3rd Cir. 2005) ($2,000 actual damages, $150,000 in punitives awarded in judge-tried case, 75-to-1, upheld on a first-party insurance bad faith claim; the court held that the plaintiff's statutory attorney fees of $135,000 could instead be considered in determining the damages ratio, giving ratio of close to 1:1); Lincoln v. Case, 340 F.3d 283, 294 (5th Cir. 2003) ($500 actual damages, $55,000 punitive damages, 110-to-1, upheld under State Farm analysis, in a case involving discrimination in housing rental).

Moreover, as noted above, TXO itself shows the Supreme Court weighing "potential" harm heavily in determining any applicable ratio. BSF's conduct is almost exactly analogous to the hypothetical described in TXO, where a person fires a gun into a crowd but does not hurt anyone. Here, BSF fired live ammunition right at Scott (and everyone who ever rode with him or shared the highways with him); fortunately, the bullets missed. The potential harm was a matter of life and death. BSF effectively admits that its many other customers who have been sold rebuilt wrecks have been in the same boat.

Scott submits that correct analysis of the awards here, considering the sweeping potential harm of BSF's misconduct, yields a ratio of under 1-to-1, rather than 30-to-1.

BSF, in its ratio arguments, cites only non-consumer cases that are readily distinguishable from this case.

In sum, the ratio is a factor to be considered; but correct calculation shows the

ratio here to be very low, the ratio is not by itself determinative in evaluating the punitives award, and in any event the ratio is not even the most important of the "guideposts" to be considered.

**3. The difference between the punitive award and penalties authorized or imposed in comparable cases**

See Grabinski, supra at 1026-7, for a recitation of legislative judgments in Missouri that weigh heavily in favor of an award of high punitive damages in this case. Note in particular the Eighth Circuit's pointed reference to:

> Mo.Ann.Stat. § 301.562.1, § 301.562.2(3), § 301.562.2(5), giving the Missouri department of motor vehicles the authority to refuse the issuance or the renewal of a motor vehicle dealer's license to anyone who has been convicted of fraud or who has obtained money by fraud, deception, or misrepresentation.

Possibly the Eighth Circuit intended something of an "elbow to the ribs" of the Missouri Department of Motor Vehicles to start enforcing these laws against these dealers; if so, unfortunately, as shown by the testimony of Leo Grothaus, that elbow was completely brushed off.

Note also that the conduct of BSF in this case surely has been shown to be a felony (or rather, a continuing series of felonies) under the Merchandising Practices Act. Grabinski, supra at 1026.

Scott would also mention that the Mathias "bedbug" opinion by Judge Posner, at page 678, relies significantly (like Grabinski), in upholding punitives in a 37-to-1 ratio,

on the potential for a business to lose its operating license.

Here, Scott submits that the "comparable penalty" is actually high punitive damages. R.S.Mo. § 407.025, authorizing a consumer to proceed for actual and punitive damages, equitable relief and attorney's fees for violations of R.S.Mo. § 407.020, was adopted by the Missouri legislature in 1973, one year after the Missouri Court of Appeals had upheld an award of $225 in actual damages and $10,000 in punitive damages for the sale of a vehicle as "new" with 500 miles when it was actually used with several thousand miles. Bowers v. S-H-S Motor Sales Corporation, 481 S.W.2d 584 (Mo.App. 1972). The legislative intent of enacting this statute authorizing punitive damages, given the history of previous reported punitive damages decisions, is clearly to support very large punitive awards. Also, these statutes lower the bar for finding liability for fraudulent misconduct, which further indicates the legislative intent to support such awards. See State ex rel. Danforth v. Independence Dodge, Inc., 494 S.W.2d 362, 368 (Mo.App. 1973).

**4. More discussion - deterrence**

Consider now the question of what amount needed to be awarded to deter BSF from engaging in similar misconduct in the future.

Here we have a case with one factor that makes it unique: the existence of a previous award of punitive damages against the same defendant for nearly identical misconduct, in a high ratio (99-to-1). And the evidence emphatically shows that that punitive damages judgment did not make a dent at all in BSF's continuing misconduct – involving Scott or anyone else. If 99-to-1 is entirely inadequate, how can 30-to-1 now be

too high? Since deterrence is probably the most important purpose of punitive damages in the constitutional analysis, how could this award even possibly be excessive?

But now there must be at least brief review the extraordinary litany of other sordid facts related to the issue of what amount of punitive damages it would take to deter BSF.

60 Minutes no less, with Mike Wallace, showed up filming at BSN and aired a piece February 21, 1993, on the selling of rebuilt wrecks, just as Balderston bought that companion dealership right next to BSF. And Balderston went on local TV at that time telling how his dealerships did not sell these vehicles. One would have thought that the 60 Minutes piece would act as a deterrent for car dealers all across the country selling such vehicles. But the astonishing fact is it didn't even deter Balderston and BSF – Vicki Grabinski's totaled rebuilt wreck was sold six days later. And all of the specific misconduct shown by BSF and Balderston in this case (after the first Looney Mustang) came after the 60 Minutes piece. By itself, this shows what can only be described as something like "colossal nerve"; certainly, BSF and Balderston were shown to be extraordinarily hard to deter.

Then the Grabinski suit was filed; it had no effect. The Grabinski discovery proceedings, protracted through the summer of 1994, had no effect. The Grabinski verdicts, for $50,000 against BSF and $100,000 against the Wholesale Outlet (and sizable awards against Dudley and others) had no effect. The publicity from the Grabinski case had no effect. BSF's business boomed. The filing of the Looney case in 1998 had no effect. Indeed, concealment from and lying to Scott continued while that case was pending, as did other rebuilt wreck frauds. The trial of the Looney case (ending in a

settlement) in May of 2000 had no effect. The filing of this case had no effect – note the continued lying by BSF to Freitag as this case proceeded.

Here it also becomes appropriate for the Court to note the offer of proof evidence on the five other rebuilt wrecks sold by BSF in 2000-2002, since it became admitted (and unrebutted) evidence in the proceedings on Scott's claim for injunctive relief.

Obviously, nothing, but nothing, seems to stop BSF and Balderston.

In addition, Balderston himself testified that, despite all the evidence shown at trial of the many rebuilt wreck fraudulent sales by BSF, and despite the extensive "cover-up" and "wrong" conduct of BSF to which he admitted, he has no fear of any law enforcement problems for BSF. This is no wonder: Leo Grothaus testified that dealer licensing actions against franchise dealers in Missouri for cheating consumers is nonexistent (to his frustration).

Moreover, unrebutted evidence presented in the injunctive relief proceeding showed that despite 351 consumer complaints to the Missouri Attorney General's office of franchise dealers selling rebuilt wrecks between January 1, 1990 and November of 2003, there had not been a single suit filed against any such dealer since 1990. (Ex. 102). (Note the contrast with earlier years – see the seminal case of State ex rel. Danforth v. Independence Dodge, supra.) BSF's entire lack of fear of law enforcement actions clearly is well-founded.

Note also the testimony of Grothaus, showing that most victims of these rebuilt wreck frauds don't discover these frauds unless some information is fortuitously presented to them. And, as he testified, most of those who are lucky enough ever to find

out, have difficulty getting an attorney at all. Again, there is no deterrent coming at BSF and Balderston from that direction.

Similarly, look at the compelling analysis by Judge Posner in the Mathias "bedbug" case, naming at least three more factors to consider in evaluating the amount of punitives needed as a deterrent in a consumer case. One: "[L]imiting the defendant's ability to profit from its fraud . . . if a tortfeasor is "caught" only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away." (Id., at 677.) Here, of course, BSF ordinarily makes the rational conclusion that it will be caught only very rarely, and even then with almost no consequences. And BSF was making profit on this one Explorer, including the retained ESP payment, of $12,617. (Ex. 31, Tr. 575-8). Two: "[W]ealth in the sense of resources enters . . . in enabling the defendant to mount an extremely aggressive defense against suits such as this and by doing so to make litigating against it very costly, which in turn may make it difficult for the plaintiffs to find a lawyer willing to handle their case, involving as it does only modest stakes, for the usual 33-40 percent contingent fee." (Id.) Here, of course, BSF's revenue is over $90,000,000 annually, making it most capable of mounting a defense involving three and four lawyers in the courtroom (as in this case). Three: "[O]ne function of punitive-damages awards is to relieve the pressures on an overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes." (Id., at 676.)

All of this discussion has only been considering the purpose of deterring BSF itself; some additional amount should of course be added for the sake of deterring all the

other car dealers that are undoubtedly well aware of BSF's sweeping misconduct, and watching closely to see how it fares in this rare litigation.

**5. More discussion – notice to BSF of possible high-ratio punitive awards**

A primary basis for constitutional due process scrutiny of the size of punitive damages awards is "notice": "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." Gore, supra, at 574. Discussion of this issue helps greatly in putting the award in this case – and in other consumer cases – in proper perspective. Scott submits that high-ratio punitive damages have long been awarded in consumer fraud cases, particularly in car fraud cases, and that car dealer defendants have had notice many times over of that threat.

As long ago as 1936, in the oft-cited case of Jones v. West Side Buick Auto Co., 93 S.W.2d 1083 (Mo.App. 1936), the Missouri Court of Appeals affirmed an award of $150 in actual damages and $2,000 in punitive damages in a case of fraudulent mileage representations in the sale of a car (over 13-to-1). (Note that fraudulent industry practices were of central concern there; obviously, unfortunately, little has changed.) Since then there have been numerous other reported decisions under Missouri law affirming judgments for sizable punitive damages awards in cases involving car fraud. A few examples include: Bowers v. S-H-S Motor Sales Corporation, 481 S.W.2d 584 (Mo.App. 1972) ($225 in actual damages and $10,000 in punitive damages, over 44-to-1); Smith v. New Plaza Pontiac Co., 677 S.W.2d 941 (Mo.App. 1984) ($400 actuals and $30,000

punitives, 75:1); Hughes v. Box, 814 F.2d 498 (8th Cir. 1987) ($8,000 actuals and $75,000 punitives, over 9-to-1); Montague v. Heater, 836 F.2d 422, 423-4 (8th Cir. 1988) ($1,400 in actual damages, separate punitives awards of $25,000, $20,000, and $10,000, over 18:1, 14:1, and 9:1); Freeman v. Myers, 774 S.W.2d 892 (Mo.App. 1989) ($7,559 actuals and $100,000 punitives, over 13-to-1); and DeLong v. Hilltop Lincoln-Mercury, Inc., 812 S.W.2d 834, 841 (Mo.App. 1991) ($3,000 actuals and $75,000 punitives, 25-to-1). Another local case deserves mention: Bishop v. Mid-America Auto Auction, Inc., 807 F.Supp. 683, 686 (D.Kan. 1992) ($5,000 actuals, separate punitives of $250,000, $250,000, and $100,000, ratios of 50-to-1 and 20-to-1). Collectively, these cases show that BSF and other dealers have very long had notice of the potential for high-ratio punitive damages.

Scott submits that there is nothing in the U.S. Supreme Court cases on due process to high punitive damages that smacks of rolling back traditional consumer fraud awards. Rather, it has been new and different problems, such as the award to an individual of $145,000,000 in punitive damages in State Farm, or the reliance on inappropriate evidence (as in Gore and State Farm), that has raised the "judicial eyebrow". The judgment here against BSF falls squarely within the ambit of traditional consumer fraud cases.

**C. Conclusion**

Scott submits that the punitives award against BSF was in all probability inadequate for the purposes of such an award, but was clearly not violative of due process as "grossly excessive".

## V. THE TRIAL COURT DID NOT ERR IN DENYING BSF'S MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON THE MAGNUSON-MOSS WARRANTY ACT CLAIM

**Argument**

Scott notes preliminarily that BSF's answer itself pleaded the lack of an opportunity to cure as an affirmative defense (L.F. 36-7, paragraphs 45 and 46); that was how the case was tried. Moreover, the only jury instruction it offered on this subject, its "refused instruction A" on Warranty/Magnuson-Moss (2nd SLF 88), said nothing about an "opportunity to cure".

BSF takes the position that there was not sufficient evidence to support a rational factfinder in concluding that it was given a "reasonable opportunity to cure". It is apparently saying that offering to buy the vehicle back in 2000 for its current book value – far under the price paid by Scott – was as a matter of law a sufficient offer to cure. It offers no authority for such an extreme position, and Scott knows of none. And such a position conflicts squarely with the testimony of Young that Scott should have been offered his full original purchase price, and with the later offer from Balderston, offering that full price. There was ample evidence that would have supported a jury in finding that BSF's response to Scott's appearance in February of 2003 was not a reasonable offer, so that it had been given a "reasonable opportunity to cure" and had responded inappropriately.

In addition, there is no such thing under Magnuson-Moss as "curing" a totaled rebuilt wrecked vehicle that was supposed to have been "not wrecked". One can't

"unwreck" a vehicle; it will always be a wrecked vehicle, that fact can't be "cured". This principle is established in Maberry v. Said, 911 F.Supp. 1393 (D.Kan.1995) in the context of a vehicle that merely had an odometer misrepresentation. In Maberry the defendants sought summary judgment, contending that the plaintiff was barred from recovery under Magnuson-Moss because he "did not give [them] an opportunity to cure prior to suit" (Id., at 1408); the court held, however, that "the court denies summary judgment because high actual mileage cannot be cured". (Id.)

Finally, where there is evidence that the seller knew of the defects at the time of the sale, the Magnuson-Moss opportunity to cure does not apply. Radford v. Daimler Chrysler Corporation, 168 F.Supp.2d 751, 753-4 (N.D.Oh. 2001); McFadden v. Dryvit Systems, Inc., Slip Copy, 2004 WL 2278542 (D.Or.), at p. 17. There was ample evidence from which the jury could – and did – conclude that at the time of the sale to Scott BSF knew that it was selling him a rebuilt wreck, and knew that it was not "traded in by an older couple".

Scott submits that BSF's point is plainly without merit.

## SCOTT'S APPEAL

## POINTS RELIED ON

**I. The Trial Court Erred In First Refusing To Submit Scott's § 407.025 Claim Against BSF For Punitive Damages To The Jury On The Ground That § 407.025 Reserved Punitive Damages Claims To "The Court", And Then In Refusing To Make Its Own Determination On This Claim On "Election Of Remedies" Grounds, Because Scott Was Entitled To Have His Claim Tried To The Jury And Face No "Election" Question, In That The Provision Of § 407.020 As Applied By The Trial Court Violates Art. I, § 22(A) Of The Missouri Constitution.**

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

Freeman v. Myers, 774 S.W.2d 892 (Mo.App. 1989)

State ex rel. Diehl v. O'Malley, 95 S.W.3d 82 (Mo.2003)

Wilkins v. Peninsula Motor Cars, Inc., 587 S.E.2d 581 (Va. 2003)

Missouri Constitution, Art. I, § 22(A)

R.S.Mo. §§ 407.020 and 407.025

Title 15 U.S.C. § 2310(d)

**II. The Trial Court Erred In Denying Scott's Claim Against BSF For Equitable Relief Under § 407.025 Enjoining BSF From Continued Similar Misconduct, Because Scott Established His Right To Such Relief, In That He Had**

**Established BSF's Multiple And Continuing Violations Of § 407.020 Causing Him Loss And Threatening Public Safety.**

State ex rel. Danforth v. Independence Dodge, Inc., 494 S.W.2d 362 (Mo.App.1973)

State ex rel. Ellis v. Creech, 259 S.W.2d 372, 374 (Mo. 1953)

State ex rel. Nixon v. Beer Nuts, Ltd., 29 S.W.3d 828 (Mo. App. E.D. 2000)

State ex rel. Nixon v. Continental Ventures, Inc., 84 S.W.3d 114 (Mo.App. 2002)

R.S.Mo. §§ 407.020 and 407.025

27A Am Jur 2d Equity, §§ 31, 45

**III. The Trial Court Erred In The Trial Of Scott's Claims Against Balderston By Refusing Scott's Offers Of Evidence Concerning Rebuilt Wrecks Sold By BSF In 2000 Through 2002 And Concerning The Grabinski Verdicts/Judgment And The Looney Settlement, Because That Evidence Was Highly Probative And Material, Particularly In That It: 1) Was Part Of The Direct Evidence Of Conspiracy, 2) Would Have Rebutted Balderston's Primary Defense Of Good Intentions And Having Adopted Corrective Practices, 3) Would Have Demonstrated Bad Motive In The Letter Sent To Scott, 4) Would Have Impeached The Testimony Of Balderston And His Supporting Witnesses, And 5) Would Have Been Compelling Evidence Of The True Nature Of Balderston's/BSF's Practices.**

Duval v. Midwest Auto City, Inc., 578 F.2d 721 (8th Cir. 1978)

Edgar v. Fred Jones Lincoln-Mercury of Oklahoma City, Inc., 524 F.2d 162 (10th Cir. 1975)

Gingerich v. Kline, 75 S.W.3d 776 (Mo.App.2002)

Wyman v. Terry Schulte Chevrolet, Inc. 584 N.W.2d 103, 107 (S.D. 1998)

22 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5239, at 450-51 (1978)

**IV. The Trial Court Erred In Overruling Scott's Claims And Pre-Judgment Motion For Attorney's Fees Against BSF Under The Merchandising Practices Act And The Magnuson-Moss Act On The Basis Of The Amounts Awarded To Scott For Punitive And Actual Damages, Because Scott Was Entitled To Recover His Attorney's Fees Under Those Statutes, In That He Had Obtained A High Degree Of Success On His Underlying Claims So That The Denial Of Fees Was An Abuse Of Discretion.**

Grabinski v. Blue Springs Ford Sales, Inc., 203 F.3d 1024 (8th Cir. 2000)

State ex rel. Danforth v. Independence Dodge, Inc., 494 S.W.2d 362 (Mo.App. 1973)

General Motors Acceptance Corp. v. Jankowitz, 553 A.2d 1380 (N.J.Super. 1989)

Jordan v. Transnational Motors, Inc., 537 N.W.2d 471 (Mi. App. 1995)

R.S.Mo. § 407.025

Title 15 U.S.C. § 2310(d)(2)

Title 42 U.S.C. § 1988(b)

## ARGUMENT

### I. THE TRIAL COURT ERRED IN FIRST REFUSING TO SUBMIT SCOTT'S § 407.025 CLAIM FOR PUNITIVE DAMAGES AGAINST BSF TO THE JURY ON THE GROUND THAT § 407.025 RESERVED PUNITIVE DAMAGES CLAIMS TO "THE COURT", AND THEN IN REFUSING TO MAKE ITS OWN DETERMINATION ON THIS CLAIM ON "ELECTION OF REMEDIES" GROUNDS, BECAUSE SCOTT WAS ENTITLED TO HAVE HIS CLAIM TRIED TO THE JURY AND FACE NO "ELECTION" QUESTION, IN THAT THE PROVISION OF § 407.020 AS APPLIED BY THE TRIAL COURT VIOLATES ART. I, § 22(A) OF THE MISSOURI CONSTITUTION.

#### A. Standard of Review

As this point on appeal raises only questions of law, Scott submits that the standard of review is de novo.

#### B. Argument

Scott's pleadings requested trial by jury on all claims (L.F. 30). As noted in the Statement of Facts, after in-chambers discussion with the Court, Scott made a formal request on the record that the trial Court submit to the jury the issue of punitive damages against BSF and Balderston for violations of Chapter 407, citing State ex rel. Diehl v. O'Malley, 95 S.W.3d 82 (Mo.2003), and tendering M.A.I. 10.01 punitives instructions for that purpose; the instructions were refused. (Tr. 1575; 1601-2; L.F. 161-2, tendered

instructions D and E). Scott raised this issue in his new trial motion on the same grounds. (L.F. 406).

Scott submits, as he argued to the Court below, that there is no principled basis for refusing to apply the rule recited in Diehl to § 407.025. In fact, R.S.Mo. §§ 407.020 and 407.025 are quite obviously rooted in the common law (certainly in applications such as those underlying Scott's claims for damages here). See State v. Shaw, 847 S.W.2d 768,l 775 (Mo.banc 1993): "Section 407.020 draws on the common law of fraud in determining which practices it considers unlawful. State ex rel. Danforth v. Independence Dodge, Inc. 494 S.W.2d 362, 368 (Mo. App. 1973)." "The purpose of these statutes is to supplement the definitions of common law fraud in an attempt to preserve fundamental honesty, fair play and right dealings in public transactions. In order to give broad scope to the statutory protection and to prevent ease of evasion because of overly meticulous definitions, many of these laws such as the Missouri statute 'do not attempt to define deceptive practices or fraud, but merely declare unfair or deceptive acts or practices unlawful . . .' Danforth, at 368.

Scott submits that § 407.025, as applied by the trial Court to reserve punitive damages claims for determination by the court, is unconstitutional in that respect.

This leads to the question of the relief sought by Scott.

First, to be clear, at no time has Scott requested double recovery of any item of damages; he is certainly not contending that he should recover punitive damages twice. However, the jury could properly have awarded higher punitive damages against BSF on the § 407.025 claim, especially since the BSF conduct addressed by that claim included

the same as that covered by the common law fraud instruction – plus additional nondisclosure conduct extending into 2000 (see Instructions No. 8 and 11, L.F. 132 and 135). Still, Scott does not seek a new jury trial on that claim in order to obtain higher punitive damages, unless he is disadvantaged (in some other way) by not requesting that trial. It is Scott's object to end up with the existing judgment for the actual and punitive damages awarded, and an attorney's fee award (and a permanent injunction against BSF – see the next point).

If the punitive damages had been awarded by the jury in the same amount on Scott's § 407.025 claim as on his fraud claim, then Scott would clearly be in a position now to obtain an award of attorney's fees in addition to the awards for actual and punitive damages, since all would be awarded under § 407.025. However, the trial Court employed a confused "election of remedies" analysis in its Amended Judgment when it stated that such an election was required, and refused to address Scott's § 407.025 claim for punitive damages. (Scott App. 3-4). The threat now is that, with no punitives award existing under § 407.025, if this Court orders that attorney's fees should be awarded under § 407.025 or Magnuson-Moss, the trial Court might require Scott to elect between the fraud punitives and the attorney's fee award, or might change the amount it awards in attorney's fees under § 407.025 because there is no punitives award under § 407.025.

Scott suggests that this Court should do two things: 1) remand with an order that judgment is to be entered for Scott on his § 407.025 claim against BSF for the same punitive damages as have been awarded on his common law claims (practically identical to what was done in Bird v. John Chezik Homerun, Inc., 152 F.3d 1014, 1017 (8$^{th}$Cir.

1998), for similar reason); and 2) hold that the trial Court erred in requiring Scott to "elect remedies", in that he should have been permitted to pursue all of his claims through a judgment, provided that the judgment included language to protect against double recovery of any element of his damages or fees.

Oddly enough, the jury instructions and the Amended Judgment (for the most part) exhibit procedure and language that Scott submits should be recommended as a model for preventing double recoveries while still (importantly!) permitting the plaintiff to obtain judgment on multiple overlapping theories. As Scott argued to the trial Court, Freeman v. Myers, 774 S.W.2d 892 (Mo.App. 1989) and Whittom v. Alexander-Richardson Partnership, 851 S.W.2d 504, 505-6 and 507-9 (Mo.banc 1993) provide the legal theory here. In Freeman, (a case involving claims under both odometer statutes and common law fraud for sale of a rolled-back odometer vehicle), the court held:

> Our case is ruled by this principle as stated in 25 Am.Jur.2d *Election of Remedies* § 12 (1966): "Where the remedies are not inconsistent, but are alternative and concurrent, there is no bar until satisfaction has been obtained, unless the plaintiff has gained an advantage or the defendant has suffered a disadvantage."

(emphasis in original). See also Wilkins v. Peninsula Motor Cars, Inc., 587 S.E.2d 581 (Va. 2003), a case that is remarkably on point.

Scott prays the relief described in detail above; alternatively, he prays for a new trial against BSF only on the issue of punitive damages on his § 407.025 claim.

## II. THE TRIAL COURT ERRED IN DENYING SCOTT'S CLAIM AGAINST BSF FOR EQUITABLE RELIEF UNDER § 407.025 ENJOINING BSF FROM CONTINUED SIMILAR MISCONDUCT, BECAUSE SCOTT ESTABLISHED HIS RIGHT TO SUCH RELIEF, IN THAT HE HAD ESTABLISHED BSF'S MULTIPLE AND CONTINUING VIOLATIONS OF § 4O7.020 CAUSING HIM LOSS AND THREATENING PUBLIC SAFETY.

### A. Standard of Review

§ 407.025 provides that in a case brought by a consumer with standing (one who has suffered an ascertainable loss by reason of conduct violating § 407.020), "the court may, in its discretion . . . provide such equitable relief as it deems necessary or proper". The standard is thus "abuse of discretion". But the issue of the application of that standard is deeply intertwined with the question of the law on this point. State ex rel. Nixon v. Continental Ventures, Inc., 84 S.W.3d 114 (Mo.App. 2002)[8], provides a discussion that is highly relevant. Continental is considering whether a trial court abused its discretion in refusing to grant the equitable relief in the form of restitution in a Chapter 407 case brought by the Attorney General. Continental finds persuasive precedent in cases showing a very liberal standard for granting injunctions in cases brought by the Attorney General, and to the consumer-plaintiff Grabinski case finding an abuse of

[8] Continental involves claims against a different "Bernard Brown" – not Scott's counsel(!).

discretion in the denial of the discretionary attorney fee award under § 407.025 (see the discussion of this in Scott's last point on appeal). Scott submits that Continental's reasoning leads to the conclusion that the trial court's discretion on Scott's claim for equitable relief was heavily constrained once Scott had prevailed on his § 407.025 claim for damages.

**B. Argument**

This case presents a remarkably important precedential question: the availability, and the standard for obtaining, injunctive relief for the protection of the public in cases under § 407.025 brought by individuals. Scott submits that at least where, as here, the plaintiff has not only amply demonstrated his standing by showing he has been harmed, but has also indisputably shown a pattern of § 407.020 violations threatening public safety that continues even while the lawsuit is being litigated, and that neither previous high-dollar punitive damages settlements/verdicts nor other extraordinary things (like 60 Minutes) have deterred the defendant, and that there is no law enforcement action being taken against this kind of rampant misconduct, and thus none feared by the defendant, it is appropriate – it is terribly important – that injunctive relief to protect the public be granted.

The phrase "equitable relief" clearly encompasses injunctive relief: an injunction "is an equitable remedy, and has been held the principal and the most important process issued by courts of equity", State ex rel. Ellis v. Creech, 259 S.W.2d 372, 374 (Mo. 1953). As stated in 27A Am Jur 2d Equity, § 31, "where equitable jurisdiction is conferred by statute, it is no objection that the plaintiff also has a plain, adequate, and

complete remedy at law"; and "closely allied" to this is the issue of any need to show "irreparable injury" (27A Am Jur 2d Equity, § 45). § 407.025 contains no such requirement to invoke the Court's equity jurisdiction; only that the plaintiff have demonstrated violation of § 407.020 and have standing to bring claims under § 407.025. Indeed, Scott submits that § 407.025 is in this respect exactly parallel to the Chapter 407 provisions authorizing Attorney General actions for equitable relief. As held in State ex rel. Nixon v. Beer Nuts, Ltd., 29 S.W.3d 828, 837-38 (Mo. App. E.D. 2000):

> Under the Act [Chapter 407], the only prerequisite to the issuance of an injunction is the court's finding that the defendant has engaged in, is engaging in or is about to engage in an unlawful practice as defined by the Act. Once the court finds that a violation of the Act has occurred or is about to occur, irreparable harm and harm to the public are presumed. [internal citations omitted]

The difference in actions for equitable relief brought by individuals is that they must not only show violation of § 407.020; they must also demonstrate that they have suffered "ascertainable loss". But the remedial purposes of the statutes, the public interests to be protected, and the liberal construction of the statutes, are the same, as discussed by Continental. The fundamental purpose of Chapter 407 is the "protection of consumers." State v. Polley, 2 S.W.3d 887, 892 (Mo.App. W.D.1999).

See also Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946), for additional guidance about the proper exercise of equitable powers ("[the court] may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other

issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice."

Scott submits that State ex rel. Danforth v. Independence Dodge, Inc., 494 S.W.2d 362, 370 (Mo.App.1973), the seminal Chapter 407 case (involving injunctive relief against a dealer that was selling rebuilt wrecks), provides the precedent to follow here. Unhappily, those sorely-needed law enforcement efforts exhibited in that case seem to be nonexistent now; Scott, for one, seeks to step into the breach.

Scott submits that the Court should hold that it was an abuse of discretion to refuse to enter an injunction barring similar misconduct by BSF under the facts of this case, and remand the case for prompt entry of such an injunction.

**III. THE TRIAL COURT ERRED IN THE TRIAL OF SCOTT'S CLAIMS AGAINST BALDERSTON BY REFUSING SCOTT'S OFFERS OF EVIDENCE CONCERNING REBUILT WRECKS SOLD BY BSF IN 2000 THROUGH 2002 AND CONCERNING THE GRABINSKI VERDICTS/JUDGMENT AND THE LOONEY SETTLEMENT, BECAUSE THAT EVIDENCE WAS HIGHLY PROBATIVE AND MATERIAL, PARTICULARLY IN THAT IT: 1) WAS PART OF THE DIRECT EVIDENCE OF CONSPIRACY, 2) WOULD HAVE REBUTTED BALDERSTON'S PRIMARY DEFENSE OF GOOD INTENTIONS AND HAVING ADOPTED CORRECTIVE PRACTICES, 3) WOULD HAVE DEMONSTRATED BAD MOTIVE IN THE LETTER SENT TO SCOTT, 4) WOULD HAVE IMPEACHED THE TESTIMONY OF BALDERSTON AND HIS SUPPORTING WITNESSES, AND 5) WOULD HAVE BEEN COMPELLING EVIDENCE OF THE TRUE NATURE OF BALDERSTON'S/BSF'S PRACTICES.**

**A. Standard of Review**

From Gingerich v. Kline, 75 S.W.3d 776, 779-80 (Mo.App.2002): "Appellate review of the exclusion of evidence is limited to a determination of whether the trial court abused [its] discretion . . . and not whether the evidence was, in fact, admissible. Still v. Ahnemann, 984 S.W.2d 568, 572 (Mo.App.1999). 'We will find no abuse of discretion in excluding evidence unless the materiality and probative value of the evidence were sufficiently clear, and the risk of confusion and prejudice so minimal, that we could say

that it was an abuse of discretion to exclude it.' Id."

**B. Argument**

From opening statements to closing arguments and at all points in between, this case was tried by Balderston on assertions that there may have been some problems with wrecked cars sold in the 1990s, but that he and BSF had learned about them and had taken multiple steps to correct those problems; that his letter to Scott was "to make it right", "trying to be fair", because it was "the right thing to do", and not with any "bad motivation"; and that Balderston was "trying to do and act in good faith" (Tr. 280-2, 284-5, 294-5, 1682-5; 1690-1708). And, knowing that the trial court had ordered in limine that Scott could not introduce any of his evidence of the five wrecked cars sold by BSF from April of 2000 to May of 2002, Balderston and at least two of his managers just happened to blurt out, at least four different times, unresponsive statements to the effect that BSF had after the 1990s overhauled its practices to avoid selling rebuilt wrecks (Carl Young at 653-4 and 657 - process improved "drastically"; Barrelman at p. 1017; and Balderston at p. 1396 – note the immediate comments to the trial Court by Scott's counsel). Because Scott was prohibited from introducing his evidence on those 5 cars and on the Grabinski judgment/verdicts and the Looney settlement offers, Scott ended up stuck with a trial of his claims against Balderston that was in multiple ways simply on absurdly false premises – entirely in Balderston's favor.

The 5 rebuilt wrecks that BSF sold between April of 2000 and May of 2002 were perhaps the strongest evidence Scott offered of Balderston's and BSF's bad intent, deliberateness, and dishonesty in trial testimony. It is perplexing that the trial court

seemed to have things backward – this evidence of continued wrecked car frauds by BSF even while this suit was pending was exactly the kind of evidence that should have come in. What would it take – more of these frauds? 50? 500? Selling rebuilt wrecks outside the courthouse during trial?

Scott had the heavy burden of proving Balderston engaged in a conspiracy at BSF to sell rebuilt wrecks, whether he participated all along or joined and helped cover it up in 2000 and later. On these conspiracy claims, the evidence on these vehicles was almost necessarily admissible, as direct evidence of acts pursuant to the conspiracy. "In cases where the incident offered is a part of the conspiracy alleged in the indictment, the evidence is admissible under Rule 404(b) because it is not an 'other' crime." United States v. Gibbs, 190 F.3d 188, 217 (3d Cir.1999). (quoting 22 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5239, at 450-51 (1978)). And in a car fraud conspiracy case like this, it is not merely permissible, but essential, to produce evidence of a large number of similar frauds. Duval v. Midwest Auto City, Inc., 578 F.2d 721, 726 (8th Cir. 1978).

Even without conspiracy allegations, other car fraud cases show reversals for refusal to receive similar frauds evidence. See Edgar v. Fred Jones Lincoln-Mercury of Oklahoma City, Inc., 524 F.2d 162, 167 (10th Cir. 1975); Wyman v. Terry Schulte Chevrolet, Inc. 584 N.W.2d 103, 107 (S.D. 1998) (providing a full analysis, finding abuse of discretion and determining that the probative value necessarily outweighed any inappropriate prejudice). And, of course, see Scott's arguments on BSF's first point on appeal.

Add in how this evidence was essential to rebut the central defense asserted by Balderston, and to impeach Balderston and witnesses supporting him, and it is obvious how this was simply not a fair trial of Scott's case. See Gingerich, supra.

Similarly, the Grabinski jury verdict/judgment, the amount of that verdict and judgment, the amounts being negotiated for the Looney settlement in May of 2000, and the amount of the Looney settlement, were all highly relevant on multiple grounds. Above all, they rebut and explain the true motive behind Ex. 1, the May, 2000 letter.

So far as the jury knew, if there was any award against BSF in Grabinski it could very well have been $500, it could have been $10,000. Nothing gave the jurors any information indicating anything like the fact that there was an award of over $200,000 in that case. Likewise, the jury heard nothing at all about the settlement offers in the Looney case just before that letter.

The scale is everything. Balderston's letter was actually an attempt to quick buy Scott off for cheap while he was still ignorant. How do we know it was not just "doing the right thing"? Because Balderston was right that moment busy talking settlement in the hundreds of thousands of dollars on a similar case, and he was living with the $200,000 Grabinski judgment, that's how. Any "prejudice" from this evidence pales compared to its essential nature. But in any event, Balderston and BSF "opened the door"; Scott could not then be prohibited from firing back.

Scott submits that the trial court abused its discretion by refusing to admit this proffered testimony, and that he should be granted a new trial on all claims against Balderston.

## IV. THE TRIAL COURT ERRED IN OVERRULING SCOTT'S CLAIMS AND PRE-JUDGMENT MOTION FOR ATTORNEY'S FEES AGAINST BSF UNDER THE MERCHANDISING PRACTICES ACT AND THE MAGNUSON-MOSS ACT ON THE BASIS OF THE AMOUNTS AWARDED TO SCOTT FOR PUNITIVE AND ACTUAL DAMAGES, BECAUSE SCOTT WAS ENTITLED TO RECOVER HIS ATTORNEY'S FEES UNDER THOSE STATUTES, IN THAT HE HAD OBTAINED A HIGH DEGREE OF SUCCESS ON HIS UNDERLYING CLAIMS SO THAT THE DENIAL OF FEES WAS AN ABUSE OF DISCRETION.

### A. Standard of Review

Scott submits that the standard of review is mixed, as reflected in the decision in Grabinski v. Blue Springs Ford Sales, Inc., 203 F.3d 1024 (8th Cir. 2000), in that there are mixed questions of law and discretion implicated on this issue. To the extent that the trial court was acting within a correct legal framework and exercising its discretion, the standard of review is abuse of discretion; to the extent that questions of law are implicated the review is de novo.

### B. Argument

This case on this issue is on all fours with Grabinski, supra. Scott will not repeat the discussion in that case, but he relies specifically on the reasoning and holdings in that case as persuasive authority here. Scott notes that here, as in Grabinski, the trial court expressly relied on the sizable awards of punitive and actual damages in order to refuse

an award of attorney's fees (see Scott App. 5[9]); as the Eighth Circuit held (referring to Ms. Grabinski), this "stands the matter entirely on its head because it punishes her for her success, the very thing that is supposed to be rewarded." (Id., at 1028.) Moreover, it treats punitive damages and actual damages as if they were awarded in part to compensate for attorney's fees; under Missouri law they were not, and they are not permitted to be assessed with that purpose in mind. Parsons v. First Investors Corporation, 122 F.3d 525, 530 (8th Cir. 1997). (And it is worth remembering that half of any punitive damages award, after attorney's fees, goes into a state victim's fund.)

Scott will state a few additional arguments, which his counsel previously made to the Eighth Circuit on the Grabinski case.

The reasoning of the trial court here (and of the trial court in Grabinski) would lead to the following:

1) if a consumer plaintiff loses the case, he/she gets no attorney fees;

2) if a consumer plaintiff wins, but only a small recovery, he/she gets reduced attorney fees (because of his/her reduced success);

3) if a consumer plaintiff wins a large judgment, he/she gets no attorney fees (as the trial court has held here).

Clearly, that makes no sense.

[9] "Scott App." is short for the Scott Appendix, at the end of this brief. Scott notes that the copies of the Amended Judgment in BSF's appendix and Legal File are both missing a critical page.

When car dealers engage in fraudulent sales schemes, the law can be enforced by governmental officials, or by the private parties who are defrauded. The cost of government enforcement is borne by the taxpayers. If the law is enforced by a private party, the cost is borne either by the plaintiff or the defendant. So the cost of enforcing the law must be borne by taxpayers, defrauded victims, or lawbreaking dealers. It seems obvious who should bear the burden.

The Chapter 407 statutes are clearly remedial. State ex rel. Danforth v. Independence Dodge, Inc., 494 S.W.2d 362, 368 (Mo.App. 1973). One reason for Chapter 407's enactment was because "experience had shown that individual action by consumers is much too costly in that the expense of litigation usually outweighs the amount of likely recovery." Id., at 370. Language in the Magnuson-Moss Consumer Warranty Act, Title 15 U.S.C. § 2310(d)(2), authorizing an award of attorney's fees includes the clause "based on actual time expended", is also found in the attorney fee language in R.S.Mo. § 407.025; this extra language, which is not found in 42 U.S.C. § 1988(b), is "designed to make the pursuit of consumer . . . economically feasible", by providing that the fee is to be "based upon actual time expended rather than being tied to any percentage of the recovery." General Motors Acceptance Corp. v. Jankowitz, 553 A.2d 1380, 1383 (N.J.Super. 1989) Thus, the language of § 407.025 is clearly yet more supportive of attorney fee awards than that found in many other fee-shifting statutes, such as § 1988.

See also Jordan v. Transnational Motors, Inc., 537 N.W.2d 471, 473-4 (Mi. App. 1995) (under Magnuson-Moss, noting its "remedial" nature, and reversing to award a

fully-compensatory fee).

The evidence in this case (and surely the Court's own experience) shows that consumer victims of fraud rarely can get attorney assistance. The economics of representing consumers in fraud cases are ordinarily almost impossibly bad by any ordinary business model: these cases are perforce normally on a contingency basis; the actual damages are small; the delay in payment is often great (five years and counting in this case); the expenses normally have to be advanced by counsel; modern practices such as enforced ADR require great time expenditures; and defense counsel are typically ample and able. Wall Street business analysts would find hilarity in a business model so improbable – it would seem to be only for the quixotic. Only full support from the courts can make it otherwise.

Scott submits that the judgment should be reversed on the issue of attorney's fees under Chapter 407 and Magnuson-Moss, and that the case should be remanded to the Circuit Court for the award of a "fully compensatory" fee for all services in the case, including on this appeal.

Respectfully submitted,

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## 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). The Microsoft Word program indicates that the total number of words contained in this brief, excluding the parts of the brief exempted, is 30845. This brief has been prepared using Microsoft Word 2000 in 13 point, Times New Roman font. Filed with this brief is an electronic copy of the brief in Microsoft Word, which has been scanned for viruses by the Norton anti-virus program and has been found to be virus free.

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## Certificate of Service

The undersigned hereby certifies that two copies of the above Brief of Appellant/Cross-Respondent, and a floppy disk with this brief in Microsoft Word electronic format, were mailed, postage prepaid, this 28th day of March, 2005, to each of the following:

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