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Introduction

Mr. Balderston is before this Court as a result of Mr. Scott's appeal on a single claim (Point III found at pages 119-122 of the Brief of Appellant/Cross-Respondent) relating to the trial court's exclusion of certain evidence. Mr. Scott's claim of error primarily involves "other act" evidence. As set forth in more detail below, ample evidence was adduced about the transaction at issue involving Mr. Scott. Similarly, substantial evidence was admitted as to other unrelated vehicle transactions identified as other 'bad acts' on the part of Blue Springs Ford. (*See* Brief of Appellant/Cross-Respondent at 39-57).

A brief overview of the facts with emphasis on the claims that were pursued against Mr. Balderston as a separate defendant is helpful. Lance Scott, Appellant/Cross-Respondent, filed a lawsuit against Blue Springs Ford (BSF) alleging violations of the Missouri Merchandising Practices Act, §407.010 RSMo., *et seq.* (MPA), fraudulent misrepresentation, fraudulent nondisclosure, violation of the Magnuson-Moss Warranty Act, 15 U.S.C. §2301 *et seq*., and conversion; and against Mr. Balderston, individually, conspiracy and violation of MPA, conspiracy and fraud, and conspiracy and conversion. (LF 4-13).[1] All of the claims relate to

[1] References to the Legal File will be designated "LF ___," references to the Supplemental Legal File will be designated "SLF ___," references to the Second Supplemental Legal File will be designated "2nd SLF ___." References to the trial transcript will be designated "Tr. ___." References to Exhibits will be designated

Mr. Scott's purchase of a 1991 Ford Explorer from Blue Springs Ford (BSF) in March 1994. (Tr. 298).

A jury verdict was entered against BSF in favor of Mr. Scott awarding him $25,500 in compensatory damages for his claims of violation of the MPA, fraudulent misrepresentation, and violation of the Magnuson-Moss Warranty Act, $2,099.82 in compensatory damages for conversion, and $840,000 in punitive damages.

The jury also found in favor of Mr. Balderston and against Mr. Scott on all claims submitted against Mr. Balderston. (LF 363-367). The plaintiff submitted three claims to the jury against Mr. Balderston: the Merchandising Practices Act claim, (Instruction No. 25, LF 149), the fraud claim (Instruction No. 27, LF 151), and the conversion claim (Instruction No. 30, LF 154).

Evidence involving the *Scott* vehicle

Mr. Balderston is the sole owner of Blue Springs Ford and has been since 1975. (Tr. 1364). Over the years, Mr. Balderston also has had ownership interests in Blue Springs Nissan (BSN), Blue Springs Ford Wholesale Outlet (BSFWO), Nevada Ford Lincoln Mercury in Nevada, Missouri, Warrensburg Chrysler Plymouth in Warrensburg, Missouri, Heartland Chevrolet in Liberty, Missouri, Stadium Honda (now Lee's Summit Honda), and Southtown Ford (now Extreme Ford). (Tr. 1365-1367).

"Ex.___."

On March 7, 1994, Lance Scott purchased a used 1991 Ford Explorer from BSF for $14,995 along with an Extended Service Plan (ESP) for $1,475, and credit life insurance for $1,633. (Tr. 298, 319-320, Ex. 17). Harvey Alexander, a BSF salesman, sold the vehicle to Mr. Scott. (Tr. 314-15). Mr. Scott alleged that during negotiations to purchase the vehicle, Mr. Alexander told him that the vehicle had not been wrecked. (Tr. 315-17).[2] At the time of the sale, the title to the vehicle did not indicate 'salvaged' and the Carfax report obtained by BSF at the time did not reveal a salvage title. (Tr. 298, Ex. 6, 12). In fact, the Carfax representative who testified at trial, George Bounacos, testified that this information was not added until after the sale. (SLF, 33-35, Ex. 6). Mr. Scott also had dealings with Steve Davidson at BSF regarding the financing of the transaction. (Tr. 366). Mr. Scott did not have any contact or dealings with Mr. Balderston during the sale transaction. (Tr. 403).

On March 18, 1994, Marnette Grace, a BSF employee, attempted to register the ESP contract with Ford Motor Credit Company and received an error code stating "all warranty cancelled except emission; title branded." (Tr. 298, 440-42). Ms. Grace did not specifically remember Mr. Scott's vehicle. She merely testified from the documents and what she remembered to be the standard practices. Moreover, Ms. Grace testified that she had

[2] Mr. Alexander was deceased at the time Mr. Scott notified BSF of this claim, as such, BSF had no opportunity to question Mr. Alexander regarding the transaction.

processed thousands of ESPs since 1994. (Tr. 449, 455). At the time of the Scott transaction, Ms. Grace was the warranty administrator but had not done that job for five years at the time of trial. (Tr. 431). Ms. Grace identified a notation on an exhibit in her handwriting, stating that the ESP could not be entered. She did not know why the ESP could not be entered, and explained why the matter should have been referred to the finance department:

> "I would assume that finance should take a look at the contract, maybe there was something written incorrectly, the warranty start date was incorrect, it could have been any number of things." (Tr. 448).

Ms. Grace turned the information over to the service manager but never talked with Mr. Balderston about the issue. (Tr. 458).

After purchasing the vehicle, Mr. Scott subsequently drove the car approximately 186,000 miles over five and one-half years. (Tr. 389). Mr. Scott brought the car in to BSF one time for service in August 1994 due to a leaky transmission (Tr. 374-76) and only had dealings with the service personnel, not Mr. Balderston. (Tr. 403). The repairs were completed without charge to Scott. (Tr. 374-76). Significantly, Scott had no contact or dealings with Mr. Balderston during the sale, during the financing transaction, or during his subsequent contact with the BSF service department. (Tr. 403).

In mid to late 1999, Mr. Scott learned that when he purchased the 1991 Ford Explorer in 1994 it had a salvage title. (Tr. 335-36). In February, 2000, Mr. Scott returned to the BSF dealership and spoke with BSF employees Paul Howe and Billy Harvey. (Tr. 339-348; 404-

05). Mr. Scott told Mr. Howe and Mr. Harvey that the car had a salvage title in 1994 when he originally purchased the vehicle. (*Id*.) In February 2000, BSF made a general offer to Mr. Scott to either trade him out of the car or give him the fair market value of the car. (Tr. 344-45, 406-08). Mr. Scott did not speak with Mr. Balderston or even request to do so at the time he appeared at the dealership in February, 2000. (Tr. 405, 409) Mr. Scott may have spoken with Carl Young. Carl Young testified that he was responsible for the day to day operations of the dealership. (Tr. 626-27). Mr. Young directed Billy Harvey to trade Mr. Scott out of the car or refund his money. (Tr. 580-81, 585, 617). Mr. Young further testified that he did not speak with Mr. Balderston about the Scott vehicle in February 2000. (Tr. 626-27).

Prior to appearing at the dealership in February 2000, Mr. Scott had retained a lawyer but he did not reveal this fact to Mr. Howe, Mr. Harvey or Mr. Young at the time he contacted BSF in February 2000. (Tr. 399). Further, Mr. Scott's counsel did not contact Mr. Balderston or anyone else at the dealership. Between February and May 2000, neither Mr. Scott nor his lawyer had any contact with Mr. Balderston about the Scott vehicle.

Sometime in early May 2000, Billy Harvey spoke with Mr. Balderston about the Scott vehicle. (Tr. 496-97, 529-30). Shortly thereafter, on May 11, 2000, Mr. Balderston sent a letter on behalf of BSF to Lance Scott offering to reimburse Scott $25,500 to cover the cost of the vehicle, as well as the ESP, credit insurance, and finance charges - even if Mr. Scott no longer owned the vehicle. (Tr. 411-12, Ex. 1). In fact, this letter is the only contact Mr. Scott had with Mr. Balderston. (*Id*.) A copy of the letter was also carbon copied to Plaintiff's counsel (Scott App. 1; Ex. 1). The letter was signed by Mr. Balderston on behalf of BSF. (*Id*.)

Neither Plaintiff nor his lawyer responded to the May 11, 2000 letter. There was no evidence that Mr. Balderston had any knowledge of the salvage title issue with the Scott vehicle before May 2000. There was no direct evidence that Mr. Balderston took any steps to hide or conceal the fact of the salvage title from Scott.

Evidence involving other vehicles

As referenced earlier, Mr. Scott was permitted to adduce a significant amount of evidence regarding other vehicle sales during the conspiracy period as alleged by Scott. The record includes significant testimony as to sales of other vehicles with some wreck damage that were sold by either Blue Springs Ford, Blue Springs Nissan, or Blue Springs Ford Wholesale Outlet. Specifically, the court permitted evidence regarding the Looney vehicle (sold by BSF in 1992) (Tr. 941-42; 812; 815-16; 965-66; 1028-34; Ex. 54; Ex. 64); the Grabinski vehicle (sold by BSFWO in 1993) (Tr. 991; 1152-53; 1401-04; 1465-88; Ex. 96); the Craig vehicle (sold by BSN in 1993) (Tr. 19-20, 29, 33-34; 1153-54; 1272-73; SLF 13-22); the Brooker vehicle (sold by BSN in 1995) (Tr. 92-93;972-90; Tr. 1000, Ex. 63); the Dover/Bredeman vehicle (sold by BSN in 1995/1996) (Dover - Tr. 906-07; 1223-42; Bredeman - 1346-55); the Garrison vehicle (sold by BSF in 1996) (Tr. 921-28); the Simpson vehicle (sold by BSF in 1998) (Tr. 1503-18); the Morrison vehicle (sold by BSF in 1998) (Tr. 900-20; Ex. 60); the Snell/Freitag vehicle (sold by BSF in 1999) (Snell - Tr. 1243; SLF 68-87; Freitag - 1247 -1260). Evidence regarding these vehicle transactions was admitted over Mr. Balderston's objection. (Tr. 91-177; 875-879; 997).

ARGUMENT

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ADMIT EVIDENCE CONCERNING 'REBUILT WRECKS' ALLEGEDLY SOLD BY BSF BETWEEN 2000 AND 2002, EVIDENCE CONCERNING THE *GRABINSKI* VERDICT/JUDGMENT, AND EVIDENCE CONCERNING THE *LOONEY* SETTLEMENT.

Appellant Scott asserts in Point III (found at pages 119 through 123 of Scott's brief) that the trial court abused its discretion in refusing or failing to admit the following: (1) evidence concerning rebuilt wrecks sold by BSF in 2000 through 2002; (2) evidence concerning the *Grabinski* verdict/judgment; and, (3) evidence concerning the *Looney* settlement. Mr. Scott asserts that the evidence was relevant as it (1) was direct evidence of conspiracy; (2) would have rebutted Mr. Balderston's alleged primary defense of 'good intentions' and 'corrective practices'; (3) demonstrated 'bad motive' in the letter sent to Mr. Scott; (4) impeached the testimony of Mr. Balderston and supporting witnesses; and (5) would have constituted compelling evidence of Mr. Balderston's/BSF's practices. Contrary to the appellant's assertion, the trial court did not abuse its discretion in limiting the evidence. Mr. Balderston's response will address each claim in the order raised in the point relied upon.

A. Standard of Review

The admissibility of evidence is a matter of discretion for the trial court and will not be disturbed absent abuse of discretion. *Nelson v. Waxman*, 9 S.W.3d 601, 603 (Mo. banc 2000). "The trial court abuses its discretion when its ruling is clearly against the logic of the

circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration." *Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. banc 1991). "The focus is not on whether the evidence was admissible, but on whether the [circuit] court abused its discretion in excluding the evidence." *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. <u>Discussion</u>

Some initial observations may be helpful in addressing Mr. Scott's contention. The trial court *did* admit ample evidence of twelve other alleged acts of misconduct. (*See* Brief of Appellant/Cross-Respondent at 39-57 and related transcript references). The trial court *did* allow a significant amount of evidence regarding the *Grabinski* matter, including allowing Mrs. Grabinski to testify. (Tr. 1465-89). The trial court *did* allow proof regarding the *Looney* matter. (Tr. 941-42; 812; 815-16; 965-65, 1028-34). The only limitation imposed by the trial court as to the *Grabinski* matter was to disallow evidence that another jury rendered a verdict in favor of Mrs. Grabinski, and to disallow evidence regarding the amount of the *Grabinski* judgment. (Tr. 53). The only limitation imposed by the trial court as to the *Looney* matter was to disallow evidence that the parties entered a settlement agreement, and to disallow evidence regarding the amount of the

settlement. In this case, there was a substantial amount of evidence regarding the other acts, the *Grabinski* matter, and the *Looney* matter. The trial court issued its rulings limiting the evidence after careful and deliberate consideration. There is no valid basis to conclude the ruling is against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary so as to shock the sense of justice. *Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. banc 1991). **1. Neither the evidence of 'rebuilt wrecks' allegedly sold by BSF between 2000 and 2002, the *Grabinski* verdict/judgment, nor the *Looney* settlement can properly be considered 'direct evidence' of a conspiracy.**

The trial court's refusal to admit certain evidence concerning allegedly rebuilt wrecks sold by BSF between 2000 and 2002, certain evidence concerning the fact of and the amount of the *Grabinski* verdict/judgment, and evidence concerning the fact of and amount of the *Looney* settlement would not necessarily have affected the jury verdict in this case. The excluded evidence would not have any tendency to prove the existence of a conspiracy, or, more specifically, Mr. Balderston's alleged participation in such an alleged conspiracy. Of course, the appellant bears the burden of establishing an abuse of discretion in refusing to admit certain evidence. *Aliff v. Cody*, 26 S.W.3d 309, 315 (Mo.App. 2000). Mr. Scott has failed to meet his burden in this regard.

In his brief, Scott correctly notes that he had the "heavy burden of proving that Balderston engaged in a conspiracy at BSF." (Brief of Appellant/Cross-Respondent at 121). A

claim of civil conspiracy requires proof that (1) two or more persons; (2) with an unlawful objective; (3) after a meeting of the minds; (4) committed at least one act in furtherance of the conspiracy; and (5) the plaintiff was thereby damaged. *Rice v. Hodapp*, 919 S.W.2d 240, 245 (Mo.banc 1966).[3] Mr. Scott summarily asserts that the excluded evidence regarding rebuilt wrecks sold by BSF between 2000 and 2002, the *Grabinski* verdict/judgment, and the *Looney* settlement "was almost necessarily admissible, as direct evidence of acts pursuant to the conspiracy." (Brief of Appellant/Cross-Respondent at 121). Apparently, Mr. Scott contends that the excluded pieces of evidence are proof of the fourth element in the civil conspiracy claim, namely 'at least one act in furtherance of the conspiracy.' The conspiracy as alleged by plaintiff Scott, however, extended from "the late 1980s through 2000." (First Amended Petition for Damages, LF 4 at 21 and 23). Contrary to Mr. Scott's assertion the excluded evidence would have no tendency to prove the existence of a conspiracy or Mr. Balderston's alleged participation in such an alleged conspiracy.

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[3] Importantly, as a matter of law, a corporation cannot conspire with its agents. *Creative Walking, Inc., v. American States Ins. Co.*, 25 S.W.3d 682, 688 (Mo.App.2000); *See also*, *Macke Laundry Service Ltd. Partnership v. Jetz Service Co., Inc.,* 931 S.W.2d 166, 176 (Mo.App. 1996) (no cause of action for conspiracy could exist because there are not separate entities involved). Mr. Balderstson, as a matter of law, and as an agent of BSF, cannot be deemed to conspire with BSF.

From the evidence that was adduced at trial there was a failure to establish that there was any "meeting of the minds" between Mr. Balderston and any officer or employee of BSF prior to or in connection with the sale in 1994 of a Ford Explorer to Mr. Scott. The proffered evidence does not show a "meeting of the minds" in order to conceal from Mr. Scott the fact that the 1991 Ford Explorer had been involved in a collision prior to the time BSF sold it to Mr. Scott. Further, the excluded evidence fails to establish any overt act by Mr. Balderston in furtherance of the alleged claim to induce Scott to purchase the Explorer in 1994 by concealing from him that the vehicle had previously been wrecked. In short, the excluded evidence would have no tendency to prove the existence of a conspiracy or Mr. Balderston's alleged participation in such an alleged conspiracy.

a. Evidence regarding rebuilt wrecks allegedly sold by BSF between 2000 and 2002.

Based upon the facts of this case, the court properly exercised its discretion in refusing to admit evidence of rebuilt wrecks allegedly sold by BSF between April 2000 and May 2002. While the transactions are not specifically identified in the appellant's brief, it appears that the excluded transactions at issue are as follows:

1. Oliver purchased a 1997 Ford Probe from BSF in April 2000. Previous wreck damage not disclosed. Matter settled without a lawsuit by returning down payment, taxes and attorney fees. (Tr. 1543-44; Ex. 2000).

2. Hendrix purchased a 1998 Honda CRX from BSF in November 2000. Previous wreck damage not disclosed. BSF took the vehicle back and sold a replacement vehicle from Stadium Honda. (Tr. 1542-43; Ex. 2000).

3. Hall purchased a 2000 Ford Mustang from BSF in April 2001. Previous wreck damage not disclosed. BSF reduced the interest rate on the finance agreement. (Tr. 1541-42; Ex. 2000).

4. Mehaffie purchased a 2000 Ford Explorer from BSF in December 2001. Previous wreck damage not disclosed. BSF replaced the Explorer with another one. (Tr. 1540-41; Ex. 2000).

5. Von David purchased a 2001 Ford Ranger from BSF in May 2002. Previous wreck damage not disclosed.(Tr. 1537-40; Ex. 2000).

Significantly, all but two of the excluded transactions occurred outside the conspiracy dates as alleged by Mr. Scott in his Petition as extending from "the late 1980s through 2000." (First Amended Petition for Damages, LF 4 at 21 and 23). Additionally, the proffered evidence in support of these additional transactions does not suggest that Mr. Balderston was involved in any of the sale transactions. (*See* Tr. 1537-1547).

In anticipation of the trial court ruling on this issue, counsel for Mr. Scott prepared and offered a "Short Synopsis of Pattern Vehicles" listing twenty-three vehicle sales he intended to offer as Other Act evidence during the trial in this cause. (LF.101-106; Tr. 106; Ex. 2000). Mr. Balderston filed a motion in *limine* to preclude the Other Act evidence identified by Mr. Scott. (LF 69-100). In support of his motion in *limine*, Mr. Balderston asserted that (1) the

other acts are not sufficiently similar; (2) the probative value of the other act evidence is outweighed by its prejudicial effect; (3) the other acts are too remote in time; (4) the other acts were never brought to the attention of Balderston; (5) the evidence does not constitute proper impeachment material; (6) other acts are not admissible to prove negligence; and (7) other acts are not admissible to maximize the plaintiff's ability to recover punitive damages. *Id*.

After careful consideration, the trial court entered its order allowing Mr. Scott to adduce evidence regarding 12 "other acts" as specifically delineated by the court in its order dated July 29, 2003 (LF 107 - 108; *see also* Tr. 174-176), including facts regarding both the Grabinski vehicle and the Looney vehicle. In ruling on the issue, the trial court received extensive narrative/argument regarding the underlying facts and admissibility regarding 23 different transactions. (Tr. 109 - 177). In reciting its ruling on this issue, the trial court stated as follows:

> The Court has made a ruling that, after reviewing the case law, and after obviously having a sense of the detail that is involved, that the Court is going to limit what evidence would come in regarding the other similar instances.
>
> The reason for that, obviously, was the fact that I feel that that being an exception to the rule rather than the general rule of allowing that type of evidence in, that the Court has to place a limit on what comes in as well as also making sure that we do not have 11 mini trials that get started in this case.

(Tr. 877-78).

Specifically, the court permitted evidence regarding the Looney vehicle (sold by BSF in 1992) (Tr. 941-42; 812; 815-16; 965-66; 1028-34; Ex. 54; Ex. 64); the Grabinski vehicle (sold by BSFWO in 1993) (Tr. 991; 1152-53; 1401-04; 1465-88; Ex. 96); the Craig vehicle (sold by BSN in 1993) (Tr. 19-20, 29, 33-34; 1153-54; 1272-73; SLF 13-22); the Brooker vehicle (sold by BSN in 1995) (Tr. 92-93;972-90; Tr. 1000, Ex. 63); the Dover/Bredeman vehicle (sold by BSN in 1995/1996) (Dover - Tr. 906-07; 1223-42; Bredeman - 1346-55); the Garrison vehicle (sold by BSF in 1996) (Tr. 921-28); the Simpson vehicle (sold by BSF in 1998) (Tr. 1503-18); the Morrison vehicle (sold by BSF in 1998) (Tr. 900-20; Ex. 60); the Snell/Freitag vehicle (sold by BSF in 1999) (Snell - Tr. 1243; SLF 68-87; Freitag - 1247 - 1260). As noted, both Mr. Balderston and BSF objected to the admission of many of the other acts on the basis that the transactions were not sufficiently similar to warrant admission. (Tr. 109 - 177). Notwithstanding the defendants' objections, the trial court allowed evidence regarding the referenced transactions.

The trial court further identified six areas of inquiry that would be permitted in pursuing the questioning related to the other acts. Specifically, the court set parameters regarding the other acts as follows: (1) when the incident occurred; (2) the dealership involved; (3) the vehicle involved; (4) the salesman involved; (5) the representations made at the time of the sale; and (6) the damage discovered that was not disclosed at the time of the sale. (Tr. 878-79). After the court's ruling, extensive evidence regarding the other 12 transactions was adduced at trial. (See references in above paragraph.)

In his brief, Mr. Scott asserts that "other car fraud cases show reversals for refusal to receive similar frauds evidence," citing *Edgar v. Fred Jones Lincoln-Mercury of Oklahoma City, Inc.*, 524 F.2d 162, 167 (10th Cir. 1975)(trial court abused its discretion in excluding evidence of similar conduct) and *Wyman v. Terry Schulte Chevrolet, Inc.*, 584 N.W.2d 103, 107 (S.D. 1998)(same). In these cited cases, however, the trial court refused to allow *any* evidence of similar acts. The evidence adduced during the *Scott* trial stands in stark contrast to these cited cases. In this case, the trial court allowed Mr. Scott to adduce a significant amount of other act evidence during the trial - both in the form of live witnesses and through the reading of designated deposition excerpts for other witnesses not called at trial. As such, the *Edgar* and *Wyman* cases are not applicable.

In determining whether to allow evidence of alleged 'other misconduct' the trial court must consider whether the incidents are sufficiently similar to be probative of the point for which they are offered, and weigh the probative value of the evidence against the risk of unfair prejudice or confusion. *Pierce v. Platte-Clay Electric Cooperative*, 769 S.W.2d 769, 774 (Mo. 1989); *Bird v. John Chezik Homerun, Inc.*, 152 F.3d 1014, 1016 (8th Cir. 1998). Further, the trial court clearly has the discretion to exclude cumulative evidence. *See Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 72 (Mo. banc 1999); *Still v. Ahnemann*, 984 S.W.2d at 575 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence" *citing* Fed. R. Evid. 403). As such, even if the evidence

would otherwise be admissible, the trial court has the discretion to limit other act evidence as was done in this case.

In this case, the trial court properly weighed the probative value of the evidence against the risk of unfair prejudice or confusion and ruled that the evidence should not be admitted. (Tr. 877-78). As noted above, the trial court's ruling in this regard is given substantial deference on appeal. *Nelson v. Waxman*, 9 S.W.3d 601, 603 (Mo. banc 2000). Appellant Scott has failed to meet his burden of establishing an abuse of discretion in refusing to admit the evidence of the 2000-2002 vehicle transactions. *Aliff v. Cody*, 26 S.W.3d 309, 315 (Mo.App. 2000).

b. Evidence regarding the *Grabinski* verdict/judgment.

The trial court properly exercised its discretion in refusing to allow evidence regarding the *Grabinski* verdict/judgment. Mr. Scott asserts that the excluded evidence regarding the *Grabinski* verdict/judgment "was almost necessarily admissible, as direct evidence of acts pursuant to the conspiracy." (Brief of Appellant/Cross-Respondent at 121). While Mr. Balderston maintains that the evidence was not sufficiently similar so as to warrant admission in this case, the trial court allowed extensive evidence regarding the underlying facts of the *Grabinski* case. In that case, Mrs. Grabinski purchased a vehicle from the Blue Springs Ford Wholesale Outlet (BSFWO) and subsequently pursued a lawsuit against BSF, BSFWO, and three individual salesmen. Mr. Balderston was not a party in that lawsuit. The facts underlying the Grabinski case are set forth in *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024 (8th Cir. 2000). In fact, the *Grabinski* case was referenced repeatedly by plaintiff's counsel

during the Scott trial. For example, counsel inquired of one witness, "Did you hear about the Grabinski case? . . . . Vicki Grabinski, the person who brought a suit against Blue Springs Ford, who bought a GMC Jimmy that went through Blue Springs Ford and the Wholesale Outlet in February of 1992 . . . . Were there any changes made at the dealership, to your knowledge, in the wake of that Grabinski case and after that trial in 1994?" (Tr. 840-41). Mr. Scott can not credibly claim that the trial court unfairly limited evidence regarding the underlying facts of the *Grabinski* case.

Mr. Scott also asserts that the fact and amount of the *Grabinski* jury verdict "constitutes direct evidence of acts pursuant to the conspiracy," but fails to further articulate any basis for this claim. At trial, the plaintiff contended that the amount of the verdict/judgment rendered against BSF in the *Grabinski* case is relevant to his claim for punitive damages. (Tr. 1458-62; L.F. at 109; 107). As noted, however, the *Grabinski* verdict was entered against BSF, not Mr. Balderston. Significantly, Mr. Scott was attempting to offer this evidence against both BSF and Mr. Balderston. The court was concerned about the relevancy of the amount of judgments or verdicts. The court was also concerned about the jury's reaction to another jury making such a determination and wanted to avoid unnecessary mini-trials. (Tr. 877, 878)

In determining the admissibility of the evidence, the trial court weighed the probative value of the evidence against the risk of unfair prejudice or confusion. *See e.g,. State ex rel. Malan v. Huesemann*, 942 S.W.2d 424, 427 (Mo. App. 1997). In this case, after careful deliberation, the trial court did not abuse its discretion in refusing evidence regarding the specific amount of the *Grabinski* verdict/judgment. Again, Scott has not clearly articulated the

basis for the admissibility of this evidence, and, thus, has not satisfied his burden of establishing an abuse of discretion in refusing to admit evidence of the *Grabinski* verdict/judgment. *See Aliff, supra.*

c. Evidence regarding the *Looney* settlement.

Likewise, the trial court did not abuse its discretion in refusing evidence regarding the specifics of the *Looney* settlement. It is well established that evidence regarding offers of settlement and completed settlements is not admissible in a subsequent trial, regardless of whether the settlement is made with another party in the same case or in a different case. *State ex rel. Malan v. Huesemann*, 942 S.W.2d 424, 427 (Mo. App. 1997); *See also Gingerich v. Kline*, 75 S.W.3d 776, 783 (Mo.App. 2002) (it is only the *occurrence* [of the similar act], and not the ensuing lawsuit or the settlement of the lawsuit, that is admissible).

In *Malan*, the court definitively states that evidence of settlement agreements is not admissible for any purpose and provides an extensive discussion regarding the public policy considerations upon which the prohibition is based. Specifically, disclosure of settlements would discourage settlement in future cases, contrary to the public policy favoring the settlement of disputes. *Id.* "Settlement agreements tend to be highly prejudicial and should be kept from the jury unless there is a clear and cogent reason for admitting a particular settlement agreement." *Id. citing Asbridge v. General Motors Corp.,* 797 S.W.2d 775, 781 (Mo. App. 1990). Scott has failed to assert any clear and cogent reason for admitting the

Looney settlement agreement. The trial court did not abuse its discretion in limiting evidence of the amount of the *Looney* settlement.

d. Conclusion.

The trial court's decision to exclude the evidence regarding the five other vehicles allegedly sold by BSF between 2000 and 2002, the *Grabinski* verdict/judgment and *Looney* settlement was not "clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration." *Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. banc 1991). As such, there has been no showing of abuse of discretion and the jury verdict in favor of Respondent Balderston should be affirmed.

2. Neither the evidence of rebuilt wrecks sold between 2000 and 2002, the *Grabinski* verdict/judgment nor the *Looney* settlement would have rebutted Balderston's purported 'primary defense' of good intentions and having adopted corrective practices.

Mr. Scott asserts that Mr. Balderston's primary defense was that of good intentions and having adopted corrective practices. Certainly, there is no dispute that Mr. Balderston's defense at trial was a general denial of the specific claims that had been filed against him involving the transaction with Mr. Scott. (Tr. 283, ll. 16-25; Tr. 284, ll. 1-25). Mr. Balderston testified that he offered to settle Scott's claims and learned of the issues regarding the Scott

vehicle shortly before he wrote the letter to Scott offering to refund his money. (Tr. 1444). Mr. Balderston further testified that he thought Mr. Scott would be more favorably disposed towards Blue Springs Ford if the matter were settled. (Tr. 1447). Mr. Scott has failed to explain how the excluded evidence would have rebutted Mr. Balderston's purported 'primary defense' of good intentions.

In his brief, Mr. Scott asserts in conclusory fashion that evidence of rebuilt wrecks sold between 2000 and 2002, the *Grabinski* verdict/judgment, and the *Looney* settlement would have rebutted Mr. Balderston's purported 'primary defense' of having adopted corrective practices. This argument is fallacious and, to some extent, constitutes an artificial argument that is not supported by the testimony. Much of the evidence in aide of his defense that Mr. Balderston was not liable emerged on direct examination by the Plaintiff. No questions were asked of Mr. Balderston by any defense counsel. Mr. Balderston had already denied on direct examination any participation in a scheme or conspiracy. Similarly, Mr. Balderston had already explained his role and purpose in sending the May 11th letter of settlement. (Tr. 1444-1448). No additional testimony was elicited following direct examination. There was no desire to open up a wide ranging set of issues, including a possible assertion that Mr. Balderston's testimony had either intentionally or inadvertently touched upon the implementation of general remedial or corrective actions beyond the time frame that involved the Scott transaction. In other words, Balderston did not advance a genera wide-ranging 'primary defense' of having adopted corrective practices at the trial in this cause. Instead, he denied the claims and explained that the May 11th letter was sent to address Mr. Scott's concerns. The three specific

claims against Mr. Balderston are referenced in the jury instructions. (*See*, L.F. at 149-155). The defendant did not 'open the door' regarding the issue of corrective measures, and more specifically, did not elicit testimony from witnesses regarding 'corrective practices.' To the extent that any testimony was adduced regarding corrective measures it was not elicited by defense counsel. The good faith defense as to Mr. Balderston concerned his dealings with the Mr. Scott transaction.

Significantly, it was Mr. Scott who elicited evidence regarding general 'corrective practices.' The general rule of law is that a party may not invite error and then complain on appeal that the error invited was in fact made. *Rosencrans v. Rosencrans,* 87 S.W.3d 429, 432 (Mo. App. S.D. 2002). At a very early stage in the trial, the trial court clearly ruled that Mr. Scott would not be permitted to present evidence concerning rebuilt wrecks sold by BSF in 2000 through 2002 during the liability portion of the trial, except for certain specific instances as set forth earlier. The court also allowed testimony from some witnesses as to certain training and practices.

For example, appellant's counsel read deposition testimony of Carl Young as follows:

Question: Did the used car managers have any training in finding previous damage prior to the trainings that you all implemented after the big meeting?

Answer: No.

Question: And the technicians, prior to the changes that you implemented were not looking for previous damage, is that correct?

Answer: That's correct.

(Tr. 653). It was at this point that Carl Young indicated "[t]he process was improved drastically." *Id.* Thereafter, Mr. Scott's counsel inquired as follows:

Q. All right. Let's go through them one at a time. One, as to the steps that you would take, under your tenure, while you were running things -

A. I was there through 2003, which the steps were different, that we improved the steps.

MR. BROWN: I note that was volunteered by the witness, Your Honor, for other purposes.

Q. Through 1999, the steps you took to keep from handling wrecked vehicles. . . .

(Tr. 657). Taken in context, it is clear that Mr. Scott's counsel essentially invited the above-referenced responses. The responses cannot be deemed 'non-responsive' since, in fact, the responses were the natural consequence of the line of questioning presented. Other than pointing out for the court that the information was volunteered by the witness, no further relief was asked of the trial court by Plaintiff's counsel. (*Id*.)

Similarly, the line of questioning with Mr. Barrelman was as follows:

Q. Would you describe what kinds of changes that were actually implemented because of the 60 Minutes piece, to your knowledge?

* * *

Q. Now, the service techs that would look at the cars were not trained in body repair or discovering body damage, is that fair to say?

A. At what time?

Q. Throughout the 1990s.

A. That's partially correct. They knew a little, but not as much as they do now.

(Tr. 1016-17). Again, this response was proper and elicited by the question asked. There was no motion to strike or request for a limiting instruction by counsel for the Plaintiff. (*Id*.)

Further, during examination of Mr. Balderston, Plaintiff's counsel questioned as follows:

Q. Did you take any steps to correct any practices about your handling of wrecked cars after the Grabinski trial?"

A. Yes. Particularly one thing that came out was this tow away affidavit or junk affidavit, tow away form that we quit using that. They were instructed to – they were selling, at that time, an older car and we had instructed them to start selling a new car over at the Wholesale Outlet, rather than selling an older type car and inspecting them better.

(Tr. 1391). Plaintiff's questions on this topic were wide ranging and contained no limit as to time. Thereafter, Plaintiff's counsel inquired:

Q. How about having your body people train your technicians. You could have done that; couldn't you?

A. Yes. And we do that today.

(Tr. 1396). There was no request by Mr. Scott's counsel to have the response stricken or disregarded by the jury. (Tr. 1397). While an argument was presented at the bench that the response 'opened the door' as to current practices, the question that elicited the response was not properly focused or specific as to time frame. (Tr. 1396). Further, the response simply asserted that 'body people train [the] technicians.' The response addressed the issue of training, not the sale of undisclosed wrecked vehicles. The trial court overruled the objection after considering the context in which the information was elicited. Significantly, the follow-up questioning was directly focused on the practices in place during the 1990s. In fact, this evidence showed that throughout the 1990s the technicians may not have been properly trained. (Tr. 1399-1400).

As noted, a party may not invite error and then complain on appeal that the error invited was in fact made. *Rosencrans v. Rosencrans,* 87 S.W.3d 429, 432 (Mo. App. S.D.,2002)(quoting *Hankins Constr. Co. v. Missouri Ins. Guar. Ass'n,* 724 S.W.2d 583, 590 (Mo.App.1986)). In this case, it is the plaintiff who elicited testimony now the subject of complaint. He can not claim now that the trial court erred in refusing to allow additional testimony to rebut the very testimony he elicited in the first instance. As such, there has been no showing of abuse of discretion and the jury verdict in favor of Respondent Balderston should be affirmed.

3. Neither the evidence of rebuilt wrecks sold between 2000 and 2002, the *Grabinski* verdict/judgment nor the *Looney* settlement would have demonstrated 'bad motive' in the letter sent to Scott.

Mr. Scott asserts that the May 11, 2000 letter from Mr. Balderston to Mr. Scott constitutes an overt act evidencing Mr. Balderston's efforts to "cover-up" the purported fraud. In that letter, Mr. Balderston asserts that BSF had no knowledge of the salvage title at the time the car was sold to Mr. Scott. (Ex. 1) Additionally, in the letter BSF offers to repurchase the car and pay Mr. Scott's out of pocket costs of $25,400. (*Id*.) Under Mr. Scott's theory, it is the May 11, 2000 letter that constitutes the "cover-up." Clearly, the letter was admitted into evidence. Further, this theory was advanced by Mr. Scott at trial and argued during counsel's closing argument. (Tr. 1628-1633).

A contrary argument was advanced by defense counsel based upon Mr. Balderston's direct examination and the other evidence. (Tr. 1697). Clearly, the jury is entitled to reject any arguments that counsel advances. *Mayer v. Orf*, 404 S.W.2d 733 (Mo. 1966); *State v. Willard*, 142 S.W.2d 1046 (Mo. 1940). There is no valid error on this basis. Both inferences or arguments were presented to the jury based on the evidence in the record.

Mr. Scott's alternative argument that the *Grabinski* verdict/judgment and the *Looney* settlement is necessary in order to place Mr. Balderston's offer to Mr. Scott "into context" is not persuasive. The fact that Mr. Balderston on behalf of BSF offered to compromise Mr. Scott's claim for $25,400 does not necessarily support a reasonable inference that Mr. Balderston or BSF feared that if they didn't settle with Mr. Scott, BSF would suffer yet another

judgment. Quite to the contrary, if Mr. Balderston truly believed that the *Grabinski* judgment and award were proper and that he had engaged in similar misconduct with regard to Mr. Scott, the settlement proposal may likely have been far greater than $25,400. Evidence regarding the *Grabinski* verdict/judgment and the *Looney* settlement is not a predicate to understand the plaintiff's theory.

As explained earlier, the trial court allowed Mr. Scott, over defendants' objection, to introduce a substantial amount of evidence regarding the underlying facts involving both the Grabinski and Looney vehicles. The trial court determined that the *Grabinski* allegations and the *Looney* facts were factually similar and reasonably close in time to the allegations raised in the Scott matter to warrant admission in this case. In fact, Vicki Grabinski was permitted to personally testify in the Scott trial regarding the facts and circumstances of her purchase of the vehicle from Blue Springs Ford Wholesale Outlet, as well as the fact that a lawsuit was filed. (Tr. 1465 - 1488). Other witnesses also commented on their knowledge of the Grabinski vehicle.[4] Mr. Scott was not precluded from presenting this evidence as circumstantial proof in support of his theory of the case.

[4] The *Grabinski* matter is referred repeatedly and regularly throughout the entire transcript.

There is no legal basis supporting the notion that this jury should have been informed that a prior jury returned a verdict against defendants in *Grabinski* or the amount of the verdict, or that a settlement agreement was entered with respect to the *Looney* matter in order to demonstrate the alleged 'bad motive' in the letter sent to Scott. As a result, there has been no showing of abuse of discretion.

4. The excluded evidence would not have served as relevant impeachment material against Mr. Balderston.

Mr. Scott alleges in his brief that the trial court, in excluding evidence of the sales of rebuilt wrecks between 2000 and 2002, the evidence of the *Grabinski* verdict/judgment and the *Looney* settlement precluded him from appropriately impeaching Mr. Balderston and other witnesses during the course of the trial. It appears from Mr. Scott's brief that he is also alleging error in that he was precluded from impeaching Mr. Balderston and two of his managers when they testified that the current practices of BSF were in accordance with sound business and consumer practices. (Brief of Appellant/Cross-Respondent at 120). Specifically, Mr. Scott complains that Mr. Balderston and the managers were allowed to provide "unresponsive" statements to the jury and thereby present their theory of the defense without rebuttal. (Brief of Appellant/Cross-Respondent at 120).

As set forth earlier, perhaps it should be noted that during the trial Plaintiff's counsel may have properly observed that the responses to his questions were fair and reasonable. In other words, no corrective action by Plaintiff's counsel was needed. If Plaintiff's counsel believed that Mr. Balderston's answers were not appropriate, then, counsel could have moved

the trial court to strike the testimony from the witnesses. Plaintiff's counsel failed to do so, and also did not move for a curative instruction. Since no further relief was requested, this court cannot now say that the trial court abused its discretion in not taking further action it was never requested to do so. *See Redick v. M. B. Thomas Auto Sales*, 273 S.W.2d 228, 238 (Mo.1954); *Williams v. Thompson*, 251 S.W.2d 89, 94 (Mo. 1952).

> Thus, to the extent that any answers were allegedly unresponsive to the particular inquiry, counsel for Scott had adequate opportunity to object or further clarify his inquiry. **5. Scott fails to support in his brief before this Court his assertion that the excluded evidence would have evidenced the "true nature of Balderston's/BSF's practices."**

As with the previous allegations of error in excluding the evidence of the rebuilt wrecks and the judgment and settlement details, Mr. Scott, however, fails to connect the excluded evidence to the allegation that the "true nature" of the business practices would be revealed. Moreover, Scott further fails to demonstrate how the information, if admitted, would have altered the judgment of the jury.

The general allegation of the "true nature" of the business practices was not the issue before the jury. Rather, the claims as to Mr. Balderston only involved whether he participated in a violation of the Missouri Merchandising Practices (See L.F. at 149), or participated in fraud (See L.F. at 151), or participated in a conversation (See L.F. at 154).

As a result, the trial court correctly excluded the evidence on the basis that it would be irrelevant to any material fact or legal claim at issue in the trial. There is no valid basis to

conclude that the ruling to exclude the evidence is against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary so as to shock the sense of justice. *Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. banc 1991). In short, there has been no showing of abuse of discretion on this basis as well.

CONCLUSION

The trial court did not abuse its discretion in excluding certain evidence concerning the sales of rebuilt wrecks or evidence concerning the amounts of settlements or judgments in two other cases. Rather, the trial court carefully weighed the evidence, and allowed significant proof of at least twelve other sales of wrecked vehicles. The trial court also allowed significant evidence of the transactions involving the so-called *Looney* and *Grabinski* vehicles. Any additional evidence was denied in the court's discretion as irrelevant, cumulative, not necessary to any legal theory, or having a prejudicial impact that far outweighed any probative value. Thus, the verdict in favor of Mr. Balderston should not be disturbed on appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two (2) copies of the Brief of Respondent was served via U.S. Mail, first class postage prepaid, to the following on this ___ day of June, 2005:

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Brief of Respondent contains the information required by Rule 55.03 and complies with the limitations of Rule 84.06(b). Relying upon the word count of Word Perfect 10.0, the undersigned certifies that the total number of words contained in the brief is 8,081 has been prepared using WordPerfect 10.0 in 13 pt, Times New Roman font, and includes a 3.5" floppy disk, which has been scanned for viruses by the Norton anti-virus program and has been found to be virus free.

_____

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