S. C. Case No. S222211

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

CARL STONE, *et al.*
Plaintiffs and Petitioners,

v.

RACEWAY FORD, INC.
Defendant and Respondent.

After Decision by the Court of Appeal
Fourth Appellate District, Division Two (E054517, E056595)
(Superior Court of Riverside County, Case No. JCCP 4476,
Hon. Dallas Holmes (ret.))

Reply to Answer to Petition For Review

Service on Attorney General and District Attorney Required
(Bus. & Prof. Code § 17536.5)

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I. Introduction

The Court of Appeal held it had "good reason to disagree" with the 2010 opinion in *Nelson v. Pearson Ford*, 186 Cal.App.4th 983, and therefore chose to "decline to follow it in some respects." (Opn., at 23.) The Court of Appeal referred to the *Nelson* opinion as "flawed in multiple respects." (Opn., at 33.) Whereas *Nelson* held the practice of backdating violated the Automobile Sales Finance Act and the Consumers Legal Remedies Act (186 Cal.App.4th at 1000-1007 and 1021-1023), the Court of Appeal here held backdating *may* violate the Automobile Sales Finance Act if certain conditions are met and *does not* violate the Consumers Legal Remedies Act. (Opn., at 27-28, and 36-37.)

Both this case and *Nelson* involved identical factual situations. In both cases consumers purchased vehicles from a car dealer. In both cases the car dealer called the consumer back to the dealership on a later date to sign a new contract. In both cases, the dealership dated the second contract the same date as the first contract. Both dealerships engaged in this practice over 1,000 times during a four-year period. As noted by the trial court, "It would be a fool's error if I decided for me to try and distinguish it on the facts." (5 RT 842:11-12.)

Raceway Ford's Answer suggests further factual analysis is necessary before the issue is ripe. That is not true because the Opinion creates a split in the published authority. The trial court will be bound by

the law of the case to follow the Opinion. Petitioners' time to challenge the decision is now, before the trial court applies the holding of the Opinion instead of *Nelson*. A re-trial under the Opinion would defeat Petitioners right to have their case tried under the proper law. They were entitled, based on their motion for a new trial, to have the case tried under *Nelson*. The Court of Appeal disregarded Petitioners' procedural right in a footnote and expressed its disagreement with the substance of *Nelson*. (Opn., at 2, n. 2.) Accordingly, the case is ripe for review by this Court, and Petitioners respectfully request the Court grant their petition for review "to secure uniformity of decision" in the lower courts. (Cal. R. Ct., R. 8.500(b)(1).)

II. The Opinion is Diametrically Opposed to *Nelson* and Other Cases Interpreting the Automobile Sales Finance Act as a Consumer-Protection Statute

On its surface, the Opinion disagrees with *Nelson's* conclusion backdating violates the Automobile Sales Finance Act. On a deeper level, however, the Opinion reflects an underlying difference in philosophy regarding the nature and purpose of consumer-protection statutes. Review should be granted not only because of the split in published opinions regarding the legality of backdating, but also to address how the Act itself is meant to operate.

The Opinion treats a vehicle sale contract as one where parties of equal bargaining power are negotiating all the terms of an agreement, rather

than a situation where a consumer typically negotiates a monthly payment and down payment and then relies on the car dealer to prepare a contract that accurately reflects their agreement. Thus, the Opinion makes the following conclusions: (1) "nothing in Regulation Z forbids interest on consumer credit contracts to be calculated as accruing from a date prior to consummation of the contract, if the parties agree among themselves to such a calculation." (Opn., at 23-24); (2) "A buyer signing even a backdated contract may be presumed to know the date that they are signing it." (Opn., at 33); (3) "There are no hidden, undisclosed costs in the contracts entered into by the members of Class Two; the amounts charged for smog-related fees were accurately and explicitly stated in writing, and the terms of the deal, including the smog fees, were accepted by the customers when they signed their contracts." (Opn., at 41-42); and (4) "the contracts between Raceway and the members of Class Two accurately disclose the economics of the transaction agreed to by the parties in all respects." (Opn., at 43).

In *Thompson v. 10,000 RV Sales, Inc.* (2005) 130 Cal.App.4th 950, the Court of Appeal analyzed the practice of "rolling" negative equity from trade-ins into the purchase price of a vehicle to determine whether the practice violated the Automobile Sales Finance Act. The Court of Appeal explained that the Act has a "remedial purpose of protecting consumers from inaccurate and unfair credit practices through full and honest

disclosures." (*Id.*, at 978.) The *Thompson* court followed this Court's mandate that "in determining whether consumer protection laws such as the ASFA apply to a particular transaction, we look to the substance of the transaction and do not allow mere form to dictate the result. (*Id.*, at 966 (citing *King v. Central Bank* (1977) 18 Cal.3d 840, 847).)

Fundamental to the *Thompson* court's opinion was "the ASFA's overriding policy of full and fair disclosure" which "presupposes the dealer has honestly disclosed the true value" of the terms of the transaction. (*Id.*, at 975.) Resonating throughout *Thompson* is the importance of "full and honest" disclosures under the Act. (*Id.*, at 956; see also *id.*, at 963 ("full and complete"), at 964 ("full and complete"), 975 ("full and fair"), 976 ("full and fair"), and 978 ("full and honest").) Thus, in interpreting the Act, the *Thompson* court concluded

> The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he [or she] transacts business. Laws are made to protect the trusting as well as the suspicious. [T]he rule of *caveat emptor* should not be relied upon to reward fraud and deception.

(*Id.*, at 978 (citations omitted).)

Thompson's belief that a "remedial statute must be liberally construed so as to suppress the mischief at which it is directed and advance or extend the remedy provided," (*id.* [citation omitted]), was advanced in *Nelson* in determining whether backdating violated the Automobile Sales Finance Act. Acknowledging the Act did not expressly prohibit backdating or specifically require the disclosure of pre-consummation interest, the *Nelson* court nonetheless concluded the creation of pre-consummation interest was an illegal finance charge and resulted in the hiding of costs associated with the practice. (*Nelson*, 186 Cal.App.4th at 1002-1003.) Fundamental in this analysis was "that the disclosure requirements of the ASFA protect against '*inaccurate* and unfair credit practices.'" (*Id.*, at 1003 (citing *Thompson*, 130 Cal.App.4th at 979, original italics).)

The *Nelson* court then concluded backdating also resulted in a violation of the Act's "single document rule" because one could not determine from the face of the contract when it was signed and when it was consummated. As the *Nelson* court explained, "Unless dealers disclose correct information the disclosure itself is meaningless and the informational purpose of the ASFA is not served." (*Id.*, at 1005.)

By contrast, the Opinion dismisses the "single document rule" as "a technical rule about document format," wondering "whether a formatting rule should have any applicability to alleged inaccuracies in the substance of the document." (Opn., at 32.) Civil Code Section 2981.9 is entitled

"Requirements of conditional sale contracts." While the Opinion considers the Section a "formatting rule," the Legislature considered the requirements significant enough that a violation of "***any*** provision of Section 2981.9" renders the contract unenforceable. (Civil Code Section 2983(a).) The Opinion's disregard for the significance of Section 2981.9 is contrary to both the Legislature's express mandate and *Nelson*'s application and interpretation.

"[T]his court limits its review to issues of statewide importance." (*S. Cal. Ch. of Associated Builders etc. Com. v. California Apprenticeship Council* (1992) 4 Cal.4th 422, 431, n. 3 (citation omitted).) The Opinion, as Justice Mosk once wrote, "unsettle[s] the law as it stands today and sow[s] the seeds for a harvest of conflict in the future." (*In re Marriage of Assemi* (1994) 7 Cal.4th 896, 912 (dis. opn. of Mosk, J.).) *Nelson* and *Thompson* interpret the Automobile Sales Finance Act as a remedial statute. Nearly 60 years ago, this Court explained that consumer protection statutes should be interpreted to protect consumers:

> Taking into consideration the policies and purposes of the act, the applicable rule of statutory construction is that the purpose sought to be achieved and evils to be eliminated has an important place in ascertaining the legislative intent. *Wotton v. Bush*, 41 Cal.2d 460, 261 P.2d 256. Statutes should be interpreted to promote rather than defeat the legislative

> purpose and policy. *People v. Centr-O-Mart*, 34 Cal.2d 702, 214 P.2d 378. '(I)n the interpretation of statutes, when two constructions appear possible, this court follows the rule of favoring that which leads to the more reasonable result.' *Metropolitan Water Dist. of Southern California v. Adams*, 32 Cal.2d 620, 630, 197 P.2d 543, 549. And, 'That construction of a statute should be avoided which affords an opportunity to evade the act, and that construction is favored which would defeat subterfuges, expediencies, or evasions employed to continue the mischief sought to be remedied by the statute, or to defeat compliance with its terms, or any attempt to accomplish by indirection what the statute forbids.' 50 Am.Jur., Statutes, s 361; *see In re Reineger*, 184 Cal. 97, 193 P. 81.

(*Freedland v. Greco* (1955) 45 Cal.2d 462, 467-68.)

The Opinion does not interpret the Automobile Sales Finance Act to "increase protection for the unsophisticated motor vehicle consumer and provide additional incentives to dealers to comply with the law." (*Nelson*, 186 Cal.App.4th at 999 (citations omitted).) The Opinion does not further the Act's informational purposes. With regard to the smog-related charges, the Opinion acknowledges its reading of the Act did not protect consumers from excessive charges. (Opn., at 43.) Rather than defeat subterfuges, the

Opinion opens consumers up to subterfuges under the guise that so long as a charge is listed on the contract it cannot be inaccurate. The Act requires itemization of all charges, and it requires honest disclosures. The Opinion abandons that purpose in the name of what it calls "accuracy." The Act requires honest disclosures to provide meaningful information of actual costs, not accurate disclosures of false information for inapplicable costs.

III. To Make the Act, and this Case, About Attorney's Fees is to Defeat the Purpose of the Act

In the Opinion, the Court of Appeal vacated the award of attorney's fees to Respondent and remanded the matter for reconsideration after a re-trial under the Opinion's interpretation of backdating. (Opn., at 4.) Nevertheless, Respondent claims Petitioners' petition is "a last ditch effort to avoid a $1.5 million attorney fee award" and "is really about attorney's fees." (Answer, at 1, 4.) If this case is about attorney's fees, it is because the Opinion made it so.

The Automobile Sales Finance Act includes a reciprocal attorney's fees clause. (Civil Code Section 2983.4.) The Opinion turns backdating into a potential violation of the Act without a remedy. (Opn., at 35 ("the question remains what remedy may be available to plaintiffs. It is not apparent that the ASFA provides any remedy at all.").) Whereas *Nelson* held backdating violated both Sections 2981.9 and 2982(a), entitling

consumers to rescind their contracts, the Opinion holds backdating does not violate either of those Sections. (Opn., at 35.)

Thus, the better questions are what protection does the Act provide at all and why would a consumer bother to sue? If there is no remedy to the consumer for a violation, and the consumer runs the risk of paying the dealership's attorney's fees, what consumer would ever sue under the Act?

"The Legislature's primary purpose in enacting section 2983.4 was to enable consumers with good claims or defenses to find attorneys willing to represent them in court, and also prevent the abusive practice of inserting into form contracts under the ASFA an unenforceable, one-sided attorney fee provision." (*Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 150 (citation omitted).) A good claim should result in a recovery, not a reading of the Act that prohibits a remedy to the consumer. The Opinion holds that the Act provides for "a symbolic judgment unaccompanied by any specific remedy." (Opn., at 39.) The re-trial thus becomes significant to determine the prevailing party entitled to attorney's fees.

The Opinion's interpretation of the Act that provides for "a symbolic judgment unaccompanied by any specific remedy" defeats the purpose of allowing consumers with "good claims" from pursuing them. If the Act only exists to award attorney's fees to consumers with good but remedy-less claims, what consumer will utilize the Act? How will the Act protect

unsophisticated consumers from abusive selling practices and excessive charges? It won't. If dealers can put any charge on the contract and have it deemed an "accurate" disclosure even if it is not a legitimate charge, how is the Act protecting consumers? It isn't. Therefore, the Opinion should be reviewed to determine whether the Act really protects consumers or dealers.

IV. Conclusion

The Opinion is in direct conflict with the published decision in *Nelson* regarding whether backdating violates the Automobile Sales Finance Act. The Opinion is based on a philosophical interpretation of the Act that is in direct conflict with published decisions stating the Act is a consumer-protection statute that should be interpreted to defeat the evils of misrepresentations in car deals. Petitioners respectfully request the Court grant their petition for review to secure uniformity of decision in the lower courts.

Respectfully submitted,

ROSNER, BARRY & BABBITT, LLP

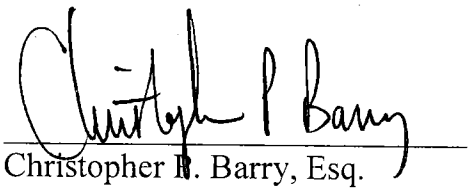
DATE: December 1, 2014

Christopher P. Barry, Esq.
Attorneys for Plaintiffs and Petitioners
CARL STONE, *et al.*

CERTIFICATE OF COMPLIANCE PURSUANT TO THE CALIFORNIA RULES OF COURT, RULE 8.504(d)(1)

Pursuant to the California Rules of Court, Rule 8.504(d), I certify the foregoing petition is proportionally spaced - is at least one and a half spaced - has a typeface of 13 points, and based upon the word count feature of the computer program used to prepare this brief (Microsoft Word 2010), contains 2,234 words.

DATE: December 1, 2014



Christopher R. Barry, Esq.

PROOF OF SERVICE
(Sections 1013a, 2015.5 C.C.P.)

RACEWAY FORD CASES
Supreme Court Case No.: S222211
Court of Appeal, 4th District, Division Two, Case No.: E056595
Riverside Superior Court Case No.: JCCP4476

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is: 10085 Carroll Canyon Road, Suite 100, San Diego, California 92131.

On **December 1, 2014**, I served the foregoing document(s) described as:

Reply to Answer to Petition For Review

on the interested parties in this action at San Diego, California:

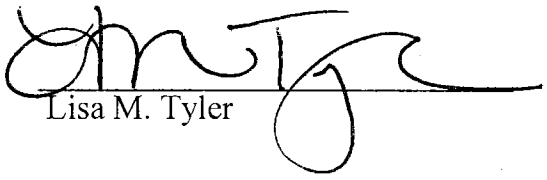
[X] **BY U.S. MAIL:** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed on the attached list and:

(1) [ ] deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.

(2) [X] placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the business's practice for collecting and processing correspondence for mailing. Under that practice, on the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage thereon fully prepaid, at San Diego, California. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[X] (**STATE**) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **December 1, 2014,** at San Diego, California.



Lisa M. Tyler

RACEWAY FORD CASES
Supreme Court Case No.: S222211
Court of Appeal, 4th District, Division Two, Case No.: E056595
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