

CASE NO. 1090285

IN THE SUPREME COURT OF ALABAMA

GUNTERSVILLE BOAT MART, INC.,

Appellant,

v.

ELLEN SMITH,

Appellee.

On Appeal from the Circuit Court of Marshall County,
Alabama

CV-2006-054

Brief of Appellee,

Ellen Smith

Attorney for Appellee

Steven D. Adcock
Post Office Box 219
Talladega, Alabama 35161
Telephone-(256) 362-3848
Facsimile-(256) 362-1341
E-mail: stevendadcock@bellsouth.net

STATEMENT REGARDING ORAL ARGUMENT

Appellee, Ellen Smith, does not request Oral Argument in this matter as the facts and legal arguments are adequately presented in this brief.

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STATEMENT OF THE CASE

On February 7, 2004, Appellee Ellen Smith ("Smith") entered into an agreement with Appellants, Gunterville Boat Mart, Inc. ("GBM"), to purchase the following: (i) one (1) 2000 Procraft 190 SP Boat, (ii) one (1) 2000 Mercury 175 EFI boat motor, (iii) one (1) 2000 Procraft boat trailer, (iv) GAP insurance coverage, and (v) an three-year extended service contract through Tracker Marine Group ("Tracker"), to take effect after the expiration of the original warranty ("Factory Warranty"). (C. at 24.) In consideration of the purchase, Smith and her husband agreed to pay to GBM the sum of \$18,345.00, (C. at 153), to be financed for twelve years by Bank of the West. (C. at 104.)

On or about June 11, 2005, GBM refused to repair Smith's boat motor until it received payment, alleging the repair work and parts were not covered by warranty. (C. at 118.) As result, Smith suffered a loss in value of the non-functioning boat motor, and damages to her property and emotional distress. (C. at 25, 26-27.)

In her complaint, filed on February 6, 2006, Smith alleged facts in support of her claims for breach of

contract and promissory fraud. (C. at 24.) In its Answer, filed on April 22, 2009, GBM pled the Statute of Frauds as an affirmative defense. (C. at 53.)

Following trial on the evidence and before the jury was charged, GBM entered its motion for judgment as a matter of law ("JML") on two bases. (R. at 885-889.)¹ First, GBM argued no evidence had been presented concerning GBM's intent not to perform and intent to deceive Smith at the time of the misrepresentation. (R. at 885-886.) Second, GBM sought JML on the statute of frauds, arguing the contract in question was unambiguous and "never listed any expressed warranty" and that "[n]o one could point to a signed written document that indicated an expressed warranty." (R. at 886-887.) The court denied GBM's motion finding that viewing the evidence in a light most favorable to Smith, she had proven a prima facie case of breach of contract and promissory fraud. (R. at 888-889.)

GBM then entered its objections to the court's refusal

¹Please note: The clerk of circuit court has consecutively numbered the entire record, including the trial transcript. Pursuant to Rule 28(g), R. will be used herein to denote the portion of the clerk's record containing the reporter's transcript, but the clerk's page number (the larger number found on each page of the transcript) will be referenced for ease of location in the electronic record.

to give two jury instructions based on the Statute of Frauds, pursuant, respectively, to § 7-2-201 of the Alabama Commercial Code and Code of Alabama § 8-9-2. (R. at 890-893.) Finding certain ambiguity in the contract and that certain aspects of the contract fell outside the statute of frauds, the court overruled GBM's objections. (R. at 892.)

The jury returned a unanimous verdict in favor of Smith following deliberation, awarding her \$30,550 in compensatory damages on breach of contract and \$175,000 on her promissory fraud claim plus costs. (R. at 922.) The trial court entered judgment consistent with the jury's findings, (C. at 164), but following hearing of GBM's Motion for Remittitur, found the promissory fraud damages of \$175,000 to be punitive in nature and ordered the \$175,000 award reduced to \$90,000. (C. at 370-372.)

GBM appealed the verdict in favor of Smith alleging the trial court erred in refusing to give its jury instructions on the Statute of Frauds and for refusing to grant its Motion for Judgment as a Matter of Law. (Petition at 4.)

STATEMENT OF THE ISSUES

I. WHETHER THE COURT PROPERLY REFUSED TO PRESENT JURY INSTRUCTIONS ON THE STATUTE OF FRAUDS WHEN SUCH INSTRUCTION WAS UNSUPPORTED BY FACTS DEVELOPED BY THE EVIDENCE AT TRIAL AND WOULD HAVE BEEN "CONFUSING AND UNNECESSARY."

a. Application of Code of Alabama § 8-9-2 in the instant case is unsupported by the facts.

b. The contract met the writing requirements of the applicable § 7-2-201 of the Commercial Code as a matter of law.

i. Section 7-2-201 of the Commercial Code requires a written agreement evidencing the sale of goods priced \$500 or more.

ii. The contract between the parties met the requirements of the Statute of Frauds.

iii. GBM waived its right to treat the Statute of Frauds as a defense when it admitted the contract between Smith and GBM as evidence at trial.

iv. The "contemporaneous-writing principle" reads as one agreement all documents concerning a single transaction between two parties.

c. Even if GBM's agreement to purchase an extended service contract on behalf of Smith was a separate contract, it was a valid oral agreement falling outside the Statute of Frauds.

II. WHETHER THE TRIAL COURT PROPERLY DENIED GBM'S MOTION FOR JUDGMENT AS A MATTER OF LAW ON THE ISSUES OF BREACH OF CONTRACT AND PROMISSORY FRAUD.

a. The trial court properly denied GBM's Motion for Judgment as a Matter of Law on the issue of breach of contract when the evidence presented at trial was of such weight and quality that fair-minded persons in the exercise of impartial judgment could reasonably infer both the existence of a contract between the parties and that GBM breached that agreement.

b. The trial court properly denied GBM's Motion for Judgment as a Matter of Law on the issue of promissory fraud when evidence presented at trial was

of such weight and quality that fair-minded persons in the exercise of impartial judgment could reasonably infer the existence of all elements of fraud and GBM's intent to not perform and intent to deceive at the time of sale.

STATEMENT OF FACTS

The following facts were introduced into evidence at trial on the merits.

Appellant Guntersville Boat Mart, Inc. ("GBM"), has been a seller of new and used boats throughout the southeastern U.S. since 1972. (R. at 410-411, 792.)² Appellee Ellen Smith ("Smith") has a 10th grade education and works as an inspector at the Brecon Knitting Mill in Talladega, where she has been employed for 29 years. (R. at 671, 760.)

On February 7, 2004, Smith and her husband, Carl Smith ("Carl") (collectively, "the Smiths"), visited GBM's Guntersville location to purchase a new boat they had seen at a recent boat show in Birmingham. (R. at 672-676, 761-764.) The Smiths asked to see GBM's sales manager, Randy Roberts ("Roberts"), with whom they had dealt at the boat show. (R. at 677, 761.)

Roberts informed the Smiths that the boat the couple

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wanted from the boat show had been sold and that there were no more new boats left for sale on the lot. (R. at 677-678, 764.) Roberts advised Carl that the wait for a new boat was "six to eight weeks or longer." (R. at 678.)

Instead, Roberts showed the Smiths a used boat comparable to the one they wanted, saying it had never been sold to a third-party and had only been used by GBM for marketing, *et cetera*. (R. at 678, 681, 764.) Boats are not titled in Alabama, (R. at 452), and the Smiths relied on Roberts' representations in the sale negotiations, (R. at 684, 768.)

The Smiths told Roberts they wanted a new boat so it would have a warranty. (R. at 678-680, 733, 765, 768.) Roberts told the Smiths the used boat he was showing them had a two-year factory warranty that could be transferred to them, (R. at 678-679, 681, 683-684, 690, 733, 764-765, 772), and that GBM would sell them a three-year extended service contract to cover the boat when the factory warranty expired, (R. at 678-679, 682, 683-684, 690, 772-773, 767-768, 787).

In fact, two different GBM agents, Roberts and Melody Hunkapiller ("Hunkapiller"), discussed the extended service

contract with the Smiths at the time of sale, (R. at 678-679, 683-684, 688-690, 733, 764-768, 770-772), and Roberts represented that the service contract would not come into effect until 2006, after the factory warranty coverage expired, (R. at 707, 740, 772-773, 857, 867, 875). The extended service contract would then last for three additional years. (R. at 678-679, 682, 683-684, 690, 764-765, 768, 772-773.) Smith and Carl both testified they would not have bought a boat without a warranty. (R. at 679-680, 732-733, 765.)

At trial, Roberts testified he could not recall the sale to the Smiths, (R. at 608-610, 846), but he said he did have a clear recollection of the original sale of the boat in 2000 because he conducted the sale on behalf of GBM. (R. at 609-610, 616-617, 624-625.) Roberts said he recalled that the original owners of the boat had purchased a five year extended service contract in 2000, a year of which remained when he sold the boat to Smith. (R. at 618-619, 624-625.)

Notwithstanding his testimony that he could not remember any details of the boat sale to Smith, (R. at 610), Roberts did recall telling the Smiths that the boat

had one year left of the first owners' extended service contract, (R. at 624-625). Roberts then contradicted his testimony about his clear recollection of the February 2000 sale of the boat to the original owners, however, when evidence was introduced that he was not even employed by GBM until the end of 2000. (C. at 121; R. at 629-630, 797.) Eric Long ("Long"), GBM's principal officer, testified Smith's boat did not have any service contract left-over from the original owner when she bought it in February 2004. (R. at 477-479, 513-514.)

The price on the window of the boat the Smiths purchased was \$15,900, including that trailer and motor. (R. at 680-681, 756, 764, 767, 783, 787, 828-832, 871.) Roberts also discussed GAP insurance with the Smiths and told them it cost \$525 in addition to everything else. (R. at 682-683.)

GBM's Roberts and Hunkapiller each told the Smiths the price of a three year extended service contract would be \$1,500 in addition to the price of the boat. (R. at 682, 683, 766-767, 846.) At trial, Roberts repeatedly denied ever having any discussions about extended service contracts with the Smiths, going so far as to say he never

sold extended service contracts to anyone because "it was not his job." (R. at 616, 618-620, 623-624, 627, 846.) In fact, he testified, he did not even get a commission for selling extended service contracts and only got paid for the sale of the boat. (R. at 637, 847.)

Contrary to Roberts testimony, however, GBM's Long stated that it was Roberts responsibility at that time to deal with factory warranties and extended service contracts on boats. (R. at 413-414, 832.) Long also testified, and GBM introduced into evidence, the actual price of such a three-year extended service contract on a used boat with a 175 horsepower engine was listed as \$2,668. (C. at 157; R. at 803-804, 805, 832.)

To conclude the sale, Roberts took the Smiths to Hunkapiller's office to complete their paperwork. (R. at 685-686, 766-768.) Hunkapiller told Smith she qualified for 100% financing of the boat because of their good credit. (R. at 768-769, 873.)

There was some initial confusion, however, when Roberts told Smith he had noticed Hunkapiller filling out the sales documents on a new boat instead of the used boat he had sold the Smiths. (R. at 685-686, 769-770.) Roberts

suggested the Smiths go to lunch while Hunkapiller corrected the forms. (R. at 685-686, 770.)

When the Smiths returned from lunch, Hunkapiller was still not ready to meet with them, and Smith was rushed through signing all the sale documents because other people were waiting. (R. at 770, 785-786.) During the signing process, the Smiths testified Hunkapiller gave them a duplicate Tracker service contract application including terms and conditions, retaining the original copy, and gave them a brochure as well that she used to highlight what the contract did and did not cover. (C. at 110-114; R. at 688-690, 770-772, 868.) Long testified there would have been no reason for Smith to be given a duplicate of a service contract agreement unless she had purchased it. (R. at 456.) Smith testified Hunkapiller did not go over any documents in detail with her except the service contract and the finance payments. (R. at 772, 785.)

As a result of GBM's negotiations, it is undisputed that Smith entered into an agreement with GBM on February 7, 2004, to purchase (i) one (1) 2000 Procraft 190 SP Boat, (ii) one (1) 2000 Mercury 175 EFI boat motor, (iii) one (1) 2000 Procraft boat trailer, and (iv) GAP insurance. (C. at

122, 124, 153-154.) GBM only disputes whether the sale included a three-year extended service contract through Tracker, to take effect after the expiration of the original factory warranty ("factory warranty"). (C. at 110-114.) In consideration of the purchase, Smith and her husband agreed to be financed for twelve years by Bank of the West which paid GBM \$18,345.00, (C. at 109, 115, 153; R. at 691, 755, 757, 782, 788, 871).

GBM's sales documents constituting its agreement with the Smith's included, an Alabama "Retail Installment Contract and Security Agreement," signed by the Smiths and Sarah Eddleman, dated February 7, 2004, ("Retail Installment Contract") (C. at 122, 124, 153-154), a GBM "Bill of Sale," signed by Melody Hunkapiller, dated February 7, 2004, ("February 7 Bill of Sale") (C. at 109), Tracker Marine Group "Premier Protection Plans" Marine Service Contract Application, TMG Number 013963, including "Terms and Conditions," ("Tracker Application") (C. at 110-112), a "Tracker Premier Protection Plans" brochure, ("Tracker Brochure") (C. at 113-114), a "Carleton, Inc., Loan Disclosure" form, (C. at 115), an "Arbitration Agreement," signed by Carl Smith, dated February 7, 2004,

(C. at 125), a "Limited and Irrevocable Power of Attorney," signed by Carl Smith and Ellen Smith, dated February 7, 2004, (C. at 126), and an American Bankers Insurance Company of Florida "GAP Asset Protection-Application for Insurance," signed by Carl Smith and Sarah Eddleman, dated February 7, 2004, (C. at 127). The document listed above were all drafted and prepared by GBM. (R. at 755.)

When the Smiths left GBM, they believed they had all of the documents necessary to prove the purchase of the boat, including a two-year factory warranty on their boat and motor, and a three-year extended service contract on the same from Tracker. (R. at 772-773, 854, 867-868, 870.) GBM represented to Smith that the Tracker Application and Tracker Brochure were evidence of the extended service contract she purchased. (R. at 854, 867-868.)

Long testified that GBM should have tendered something to Smith at the time of sale documenting the factory warranty, but that no such writing was given her. (R. at 446-447, 476.) Long also testified GBM had a duty to submit applications for service contracts "when it received the money," (R. at 458), but that GBM never sent Smith's service contract application to Tracker upon receipt of the

\$18,345 from Bank of the West. (R. at 460, 691.)

In fact, Long admitted at trial GBM sold Smith a warranty, (R. at 409), and testified GBM had no intention of submitting the Smith's application to Tracker at the time of sale, (R. at 655-656). Carl returned the following day, February 8, 2004, without Smith to pick up the boat from GBM. (R. at 722-723.) Neither he nor Smith signed additional documents that day. (R. at 723-724.)

During the next year, GBM made repairs to the Smiths' boat on at least three occasions that the Smiths believed were covered by their warranty and/or extended service contract. (C. at 116-117, 119; R. at 693, 697.) Long testified that Smith's repairs were not covered by any warranty because no service contract then existed and that the repairs were made merely as a "goodwill gesture." (R. at 477-479.)

On or about June 11, 2005, Carl brought the boat to GBM to repair an engine knock. (C. at 118; R. at 702-704.) GBM diagnosed the problem as a faulty power head but refused to repair Smith's boat motor until it received payment, alleging the repair work and parts were not covered by any warranty and, for the first time, Carl was

told no warranty or extended service contract existed on the boat or motor. (C. at 118; R. at 703-704, 713.)

Carl returned to GBM a few days later to discuss the allegations Smith had no warranty on the boat. (R. at 703.) He was told by Ken Chambers in GBM's service department to go see the sales department. (R. at 704-705.) Carl was told Roberts was no longer employed there and spoke to the "new sales manager," who attempted to locate and review Smith's file but could not find it. (R. at 705.)

Carl then retrieved the extended service contract documents Smith had been given at the time of sale to prove the existence of Smith's warranty. (R. at 706-707.) GBM's sales manager told Carl that the documents did not show anything that's considered a warranty or extended service contract, but asked Carl if he could keep a copy of the documents. (R. at 708, 709-710.)

A few days later, the sales manager called Carl and said, "'We found your paperwork. You got a warranty. We're going to fix your boat.'" He said, 'Give us about two weeks.'" (R. at 712.) Carl agreed and called Ken in two weeks to check on repairs. (R. at 712-713.) That's when

Ken advised, "As far as I know you ain't got no ... warranty," and that GBM was waiting for payment before beginning repairs. (R. at 713.)

When Carl returned to GBM on the following day, Ken told him to go see Eric Long, the owner of GBM. (R. at 715.) Carl testified that Long told him, "you couldn't buy extended warranty [sic] on a used boat to begin with." (R. at 718.)

Carl went back to GBM on the following Saturday to pick up the boat. (R. at 722.) The boat has remained on its trailer in the Smith's yard under a cover, unusable since June 2005, because the Smiths cannot afford both to fix the motor and keep making the monthly finance payments and semi-annual insurance premium payments as they have been. (R. at 724-726.) The boat has lost value as a result of the inoperable motor from \$18,000 when it was working to \$3,000 afterward. (R. at 728, 750-751, 780.) And, Smith was otherwise deprived of her use and enjoyment of the boat and other benefits of her bargain as a result of GBM's refusal to repair the boat's motor. (R. at 726-728, 778, 859-860.)

On December 6, 2005, GBM responded to Smith's request

that it send her a copy of all documents in her file pertaining to the sale of her boat when it mailed her the documents admitted into evidence as Plaintiff's Exhibit 14. (C at. 122-127; R. at 774-775.) Included in the file copy provided by GBM was an alleged Bill of Sale, dated February 8, 2004 ("February 8 Bill of Sale"), the date of the day after Smith actually bought the boat. (C. at 123; R. at 723.)

Two names are handwritten on February 8 Bill of Sale that read "Carl Smith" and "Ellen Smith," mimicking the signatures of the Appellants. (R. at 723, 735-736, 780-781.) Both Smith and Carl testified they did not sign the February 8 Bill of Sale and averred that Ellen Smith did not even go to GBM on February 8, 2004. (R. at 723-724, 735-736, 780-781.) The first time she saw the February 8 Bill of Sale was as part of the file mailed by GBM on or about December 6, 2005. (R. at 780-781.)

Indeed, Long testified at trial that there should have been only one, final bill of sale and that the final bill should be given to the customer, as the February 7, 2004, version had been. (R. at 448.) Furthermore, Long admitted the names written on the February 8 Bill of Sale did not

appear to be the signatures of the Smiths. (R. at 451, 516-517, 659.) Finally, Long stated that while the February 7 version properly calculated the taxes, and the February 8 version did not, GBM's files did not contain the February 7 Bill of Sale. (R. at 454.)

On December 22, 2005, Smith received a fax from GBM containing additional documents following her second request that GBM send her a copy of her file. (R. at 776-777.) Those documents were admitted into evidence as Plaintiff's Exhibit 15. (C. at 128-143; R. at 776.)

Included in the fax from GBM were documents the Smiths had never seen before, most importantly a letter from GBM to the Smiths dated May 31, 2004, ("Lisa's Letter") from Lisa Smith ("Lisa"), GBM's Service Manager. (C. at 133-134; R. at 698-700, 740-741, 743-744, 773-777.) In the letter, Lisa indicated that Smith's warranty would expire on February 18, 2005. (C. at 133-134.) At trial, Lisa testified she had no proof of underlying warranty coverage when she wrote the letter about and only arrived at the expiration date in the letter because "someone else" told her what to put. (R. at 593-594.)

Long was also questioned about Lisa's Letter at trial. Specifically, Long was asked why he failed to produce it at the company's deposition on October 2008. (R. at 428-430.) At the deposition, Long testified that no factory warranty existed at the time of the sale of the boat to the Smiths. (R. at 430.)

Long contradicted his deposition testimony at trial, stating there was, in fact, one year of extended warranty remaining from the original owners left on the boat motor in February 2004. (R. at 431.) Upon further examination, however, he admitted he could find no documentary evidence in GBM's files to support his belief there was any remaining warranty at the time of sale, saying he actually was relying only Lisa's letter to prove a warranty existed. (R. at 431, 438, 477-479.)

Trial of the matter was heard before a jury on May 11, 2009; Hon. Tim Jolley, Circuit Judge of Marshall County, Alabama, presiding. (R. at 188.) At trial, GBM introduced a copy of the Retail Installment Contract into evidence as Defendant's Exhibit 1, and Carl Smith testified he signed Defendant's Exhibit 1 copy of the Retail Installment Contract on February 7, 2004. (C. at 153-154; R. at 501,

746.)

Although Defendant's Exhibit 1 is difficult to read, it appears to be a duplicate of the more easily readable Retail Installment Contract introduced by Plaintiff as Plaintiff's Exhibit 14. (C. at 122, 124, 153-154.) Long affirmed Defendant's Exhibit 1 was GBM's finance contract with Smith. (R. at 501-504.)

Evidence introduced by Smith included information concerning the "Itemization of Amount Financed" area of the pre-printed Retail Installment Contract form used by GBM. In that area of the contract, the amount of set forth as the "Goods and/or Services Price" is \$21,300. (C. at 124; R. at 463, 734.) Finally, \$3,500 is typed in the blank to the right of the pre-printed words "Cash Down Payment" and is also written on the February 7 Bill of Sale. (C. at 124; R. at 734, 744-745, 755, 787-788, 823-825, 872-873.)

Additionally, there appears a line item marked "Service Contract" that contains the typewritten word "gap" in the blank immediately to the right of it and a money amount of \$525 typed to the right of that. (C. at 124; R. at 464-465, 514-515.) Parole evidence introduced at trial explained that the \$525 amount in the "Service Contract"

blank was not actually in payment of a service contract, but was in payment of the Smith's GAP insurance policy. (C. at 124, 153-154; R. at 464-465, 514-515.)

While the parties agreed at trial that the \$1,500 price for the extended service contract GBM charged Smith was not listed as a separate line item on the Retail Installment Contract, (R. at 858, 871), Long testified the cost of the extended service "could be included in the sale price," (R. at 475). Indeed, Smith and Long agreed that the "Amount Financed" of \$18,345, shown on the Retail Installment Contract, less the actual \$15,900 list price of the boat, less \$525 for GAP insurance, and less \$410 paid in taxes equals \$1,510—almost the exact price the Smiths say they agreed with Roberts and Hunkapiller to pay for the three-year extended service contract, (R. at 756-757, 828-832, 858, 871).

Testimony also demonstrated how GBM artificially inflated the price of the boat, motor and trailer to \$21,300, and then listed a fictional down payment of \$3,500 to make the numbers total the actual "Amount Financed" by Smith. (R. at 463-464, 687-688, 734, 744-745, 755, 788, 824-826, 872-873.) In describing the sales process,

Roberts testified he negotiated prices and noted whatever the resulting charge was to be when he concluded negotiations and sent customers to the finance department. (R. at 617.)

So, Hunkapillar obtained from Roberts the \$21,300 price she used to complete the "Goods and/or Services" blank on the Retail Installment Contract. Smith affirmed she was unaware of either the price of the boat set forth in the agreement or the \$3,500 listed as a down payment because GBM never asked her to pay it and because Hunkapillar told Smith she had received 100% financing. (R. at 687-688, 744-745, 754-755, 788, 824, 873.)

STATEMENT OF THE STANDARD OF REVIEW

There are two standards of review relevant to the instant action on appeals. The first standard relates to Issue I, herein, concerning a refused jury instruction, and the second, to Issue II concerning a denied Motion for Judgment as a Matter of Law.

I. REFUSED JURY INSTRUCTIONS

In deciding whether to give a jury instruction, the court must determine whether "giving the requested instruction would have been 'confusing and unnecessary.'" Henriksen v. Roth, 12 So.3d 652, 662 (Ala. 2008.) After all, "an incorrect or misleading charge may be the basis for the granting of a new trial." Baldwin County Elec. Membership Corp. v. Fairhope, 999 So.2d 448, 459 (Ala. 2008) (quotation marks omitted).

It obviously follows that if an issue has not been presented, the jury should not be instructed about it. See 75A Am.Jur.2d *Trial* § 991 (2007) (noting that "[t]he instructions given by the trial court should be confined to the issues raised by the pleadings in the case at bar and the facts developed by the evidence in support of those issues or admitted at the bar").

Henriksen, 12 So.3d at 662.

Therefore, the Court should

look to the entirety of the [jury] charge to see

if there was reversible error, and reversal is warranted only if the error is prejudicial.

Baldwin County Elec. Membership Corp., 999 So.2d at 459

(emphasis added) (quotation marks omitted).

II. DENIED MOTION FOR JUDGMENT AS A MATTER OF LAW

In Beiersdoerfer v. Hilb, Rogal and Hamilton Co., a case involving a contract dispute, the court set forth the following standard of review.

"When reviewing a ruling on a motion for a JML, this Court uses the same standard the trial court used initially in granting or denying a JML. Regarding questions of fact, the ultimate question is whether the nonmovant has presented sufficient evidence to allow the case or the issue to be submitted to the jury for a factual resolution. ... A reviewing court must determine whether the party who bears the burden of proof has produced substantial evidence creating a factual dispute requiring resolution by the jury."

953 So. 2d 1196, 1205 (Ala. 2006) (citation omitted).

Substantial evidence is "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved."

Id. See also Mantiply v. Mantiply, 951 So.2d 638, 643 (Ala. 2006).

SUMMARY OF THE ARGUMENT

The trial court properly refused to charge the jury with the Statute of Frauds in light of the evidence introduced at trial.

First, the Statute of Frauds set forth at Code of Alabama § 8-9-2 is inapplicable to the facts of the case because the parties' respective performances were due well within a year of the date the agreement was made. Second, although GBM does not argue the applicability of § 7-2-201 in its Petition, that section of the Commercial Code does apply to the facts in evidence given that the transaction in question was for a good valued at \$500 or more.

Evidence at trial clearly met the more liberal writing requirement found at the Commercial Code of Alabama § 7-2-201. The evidence included proof that the contract was for a good, the boat priced at \$15,900, that the contract was signed by both parties, and specified the quantity of goods sold. All of the documents between the parties were also correctly read by the trial court as one contract when making its determination the Statute of Frauds' writing requirement was met, in light of the "contemporaneous-writing principle" adopted by this Court.

Moreover, GBM waived its right to treat the Statute of Frauds as a defense when it admitted the contract between Smith and GBM into evidence.

For all of the aforementioned reasons, the trial court properly denied GBM's requested instructions on §§ 7-2-201 and 8-9-2 Statute of Frauds.

The trial court also properly denied GBM's Motion for Judgment as a Matter of Law on the issues of breach of contract and promissory fraud. The court properly determined that Plaintiff Smith had borne her burden of proof by producing "substantial evidence creating a factual dispute requiring resolution by the jury."

Smith's evidence was "of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of" a contract between GBM and Smith that included GBM's promise to submit her extended service contract application to Tracker. Smith's evidence further demonstrated GBM's breach of that contract. Finally, Smith introduced substantial evidence GBM intended not to perform and intended to deceive her at the time GBM made its promise to submit Smith's extended service contract application.

Accordingly, the trial court properly found evidence on both issues of such weight and quality as to allow them to be submitted to the jury for factual resolution. As a result, the court's denial of GBM's JML motion is due to be affirmed.

ARGUMENT

For several reasons, the rulings of the Marshall County Circuit Court refusing to give jury instructions on the Statute of Frauds and denying GBM's Motion for Judgment as a Matter of Law were proper and this appeal is due to be denied.

I. THE COURT PROPERLY REFUSED TO PRESENT JURY INSTRUCTIONS ON THE STATUTE OF FRAUDS WHEN SUCH INSTRUCTION WAS UNSUPPORTED BY FACTS DEVELOPED BY THE EVIDENCE AT TRIAL AND WOULD HAVE BEEN "CONFUSING AND UNNECESSARY."

Although GBM pled an affirmative defense of Statute of Frauds in its Answer, it failed to demonstrate why in fact or law it was entitled to a jury charge based on the evidence presented at trial. As a result, the trial court's refusal to give a jury charge on the Statute of Frauds was proper.

The basis of GBM's argument on the jury instruction issue appears to rely on two erroneous assertions. GBM's first assertion was that the contract between GBM and Smith was to be performed over the course of more than one year. This argument is without basis in fact. GBM's second assertion was that Smith must point to one and only one

document with express, unambiguous language concerning the sale of the extended warranty to prove a writing "sufficient to satisfy" the Statute of Frauds. This argument is without basis in law.

In the instant case, GBM asked the trial court to charge the jury with Statute of Fraud instructions both as Code of Alabama § 8-9-2(1) and § 7-2-201(1) of the Commercial Code of Alabama. (R. at 890-893.) The trial court refused to give the instructions, and GBM entered its objections as to the court's refusal as to both code sections. (R. at 892-893.)

On appeal, GBM only argues and submits authority concerning the trial court's refusal to instruct the jury as to § 8-9-2, and not as regards § 7-2-201. Out of an abundance of caution, however, Smith will address the applicability of both code sections of the Statute of Frauds GBM cited in its objection at trial.

a. Application of Code of Alabama § 8-9-2 in the instant case is unsupported by the facts.

Contrary to GBM's position, § 8-9-2(1) cannot be applied given the facts of this case. GBM and Smith's respective obligations to perform under the Retail

Installment Contract were due to be completed within a day or two; well within the year that would have triggered a writing requirement pursuant to the Statute of Frauds.

Smith fulfilled her obligations under the agreement when her finance company, Bank of the West, paid \$18,345 to GBM on her behalf for the boat, motor, trailer, GAP insurance, and extended service contract, (R. at 691), and when she then accepted delivery of the boat, (R. at 722-723). GBM fulfilled its obligations under the agreement when it accepted payment from Bank of the West made on Smith's behalf and tendered delivery of the boat to Smith's husband Carl, and would have fulfilled its final obligation had it submitted Smith's extended service contract application to Tracker.

Because the contract between GBM and Smith was to be performed within a year, § 8-9-2(1) cannot apply as a matter of law and, therefore, the contract falls outside of this section's Statute of Frauds writing requirements.

Moreover, nothing in evidence or GBM's argument attacked the sufficiency of the contract in question, other than GBM's repeated assertion that the Statute of Frauds requires a line item labeled, "three-year extended service

contract," separately labeling the \$1,500 Smith paid for the service contract. GBM never produced evidence or argued that the contract in question did not otherwise

contain the essential terms of the alleged contract, "namely, an offer and an acceptance, consideration, and mutual assent to the essential terms of the agreement."

Fausak's Tire Center, Inc., v. Blanchard, 959 So.2d 1132, 1138 (Ala. Civ. App. 2006) (citation omitted).

In fact, ample evidence introduced at trial proved the essential terms required by Frauds were found on the face of the Retail Installment Contract, signed by GBM. The pre-printed form labeled "Service contract" was completed with a monetary amount. (C. at 124; R. at 464, 514-515.) What that monetary amount represented created ambiguity and a question for the trier of fact.

Furthermore, GBM admitted the \$1,500 Smith paid to purchase the extended service contract was included in the "Amount Financed" listed on the face of the Retail Installment Contract. (C. at 124; R. at 475, 828-832.) Again, what this monetary amount represented was ambiguity and a question for the jury.

GBM's argument that compliance with the Statute of Frauds requires a contract contain express language,

separately identifying the precise item at controversy and setting forth the disputed amount represents a fundamental misunderstanding of degree of specificity Frauds requires. Applying GBM's reasoning would mean all ambiguous contracts automatically violate Frauds. This argument clearly goes too far.

In discussing how much detail is required to satisfy the writing requirement in the Statute of Frauds, the Restatement (Second) of Contracts § 131, Comment g. (1981), states:

"The 'essential' terms of unperformed promises must be stated; 'details or particulars' need not. What is essential depends on the agreement and its context and also on the subsequent conduct of the parties, including the dispute which arises and the remedy sought."

Fausak's Tire Center, Inc., 959 So.2d at 1138-1139 (emphasis added). So long as these requirements are met, ambiguousness of a term does not automatically bar the writing from complying with the Statute of Frauds.

Because § 8-9-2(1) is inapplicable to contracts the purpose of which are to be fulfilled within one year and because the Statute of Frauds does not require a complete absence of ambiguity, § 8-9-2 would be misapplied to the facts in this case as a matter of law, and GBM's requested jury instruction was properly denied.

b. The contract met the writing requirements of the applicable § 7-2-201 of the Commercial Code as a matter of law.

If any Alabama Statute of Frauds section is applicable to the transaction at controversy in the instant case, it is § 7-2-201(1) of the Alabama Commercial Code.

i. Section 7-9-201 of the Commercial Code requires a written agreement evidencing the sale of goods priced at \$500 or more.

To enforce a contract for the sale of goods for the price of \$500 or more, the Commercial Code of Alabama § 7-2-201(1) requires a

writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought.

Given that the contract in question was for the sale of a boat, a good priced at more than \$500, § 7-2-201 requires a written commemoration of that contract.

Therefore, the Commercial Code Statute of Frauds must be applied when determining whether the contract between GBM and Smith contained all essential terms.

ii. The contract between the parties met the requirements of the Statute of Frauds.

The writing requirements of the Commercial Code no longer require "all the essential terms of the agreement." Port City Constr. Co., Inc., v. Henderson, 266 So.2d 896, 900 (Ala. Civ. App. 1972). Indeed,

[a]ll that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction.

Id. (quoting Ala. Code § 7-2-201 at Comment 1).

So liberal is the writing requirement of § 7-2-201 that price, time and place of payment or delivery, the general quality of the goods, or any particular warranties may all be omitted.

Ala. Code § 7-2-201 at Comment 1. Indeed,

[o]nly three definite and invariable requirements as to the memorandum are made by this subsection. First, it must evidence a contract for the sale of goods; second, it must be "signed", a word which includes any authentication which identifies the party to be charged; and third, it must specify a quantity.

Ala. Code § 7-2-201 at Comment 1.

In the instant case, both GBM and Smith introduced into evidence the Retail Installment Contract (C. at 122, 124, 153-154.) The contract evidenced the sale of a boat, which is a "good" defined by § 7-2-105(1). The contract was signed by both parties. (C. at 122-124, 153-514; R. at 614-615, 746.) Finally, the contract specified the quantity of

boats, motors and trailers sold thereby. (C. at 122-124.)

Therefore, there was no question a contract existed between the parties, according to the § 7-2-201 of the Alabama Commercial Code, and the Statute of Frauds was satisfied as a matter of law. Any jury instruction on Frauds would have been "confusing and unnecessary" and may have formed the basis for granting a new trial. See Henriksen, 12 So.3d at 662; Baldwin County Elec. Membership Corp., 999 So. 2d at 459.

Moreover,

[r]eceipt and acceptance of the good or of the price constitutes an unambiguous overt admission by both parties that a contract actually exists.

Ala. Code § 7-2-201 at Comment 2.

It was never disputed that the Smiths paid GBM's price for the boat and took delivery of the boat on February 8, 2004. GBM's principal, Eric Long, admitted the price of the extended service contract was included in the "Amount Financed" by Smith and accepted by GBM in full payment of the boat. (R. at 475, 830-832.)

Therefore, GBM has admitted "that a contract actually exists," and the trial court properly refused the instruction on the Statute of Frauds.

iii. GBM waived its right to treat the Statute of Frauds as a defense when it admitted the contract between Smith and GBM as evidence at trial.

At trial, GBM introduced a copy of the Retail Installment Contract into evidence as Defendant's Exhibit 1. (C. at 153-154; R. at 501, 746, 785, 870-871.) GBM went on to elicit testimony concerning particulars of the Retail Installment Contract, admitting that it was, in fact, the embodiment of the agreement between the parties. (C. at 501-502, 504.)

GBM's admission of Defendant's Exhibit 1 precluded it from arguing the Statute of Frauds as a defense.

If the making of a contract is admitted in court, either in a written pleading, by stipulation or by oral statement before the court, no additional writing is necessary for protection from fraud. Under this section it is no longer possible to admit the contract in court and still treat the Statute as a defense.

Ala. Code § 7-2-201 at Comment 7 (emphasis added).

Because GBM admitted the contract in court, it is barred from treating the Statute as a defense, and the trial court properly refused to instruct the jury on the issue of Statute of Frauds.

iv. The "contemporaneous-writing principle" reads as

one agreement all documents concerning a single transaction between two parties.

To the extent GBM argues that fulfillment of the Statute of Frauds requires a single, unambiguous writing, this Court has adopted a "contemporaneous-writing principle" to assist it in constructing such contracts "when it is 'necessary to ascertain the intention of the parties.'" Ex parte Bill Heard Chevrolet, Inc., 927 So.2d 792, 800 (Ala. 2005) (quoting Hunter-Benn & Co. v. Bassett Lumber Co., 139 So. 348, 349 (Ala. 1932)).

[I]n the absence of anything to indicate a contrary intention, writings executed at the same time by the same parties for the same purpose, and in the course of the same transaction, are in the eye of the law one instrument, and will be received and construed together as constituting one contract and evidencing the intention of the parties.

Id. (quoting Weeden v. Asbury, 138 so. 267, 270 (Ala. 1931)).

The evidence at trial did not indicate any intention that the documents constituting the agreement between GBM and Smith be treated as separate transactions. Indeed, those documents were all for the purpose of effectuating the sale of a boat and other items from GBM to Smith. A reading of all documents relating to the sale was needed to

assist the jury in determining GBM had actually sold an extended service contract to Smith for \$1,500.

Furthermore, that a group of documents is ambiguous does not mean it is automatically insufficient to fulfill the writing requirements of the Statute of Frauds. In fact, "[i]f a contract is unambiguous on its face, there is no room for construction and it must be enforced as written.'" Ex parte Bill Heard Chevrolet, Inc., 927 So.2d at 800. The court found ambiguity in reading the contract between Smith and GBM. Therefore, its meaning was a question of fact.

Because the "contemporaneous-writing principle" assisted the jury in ascertaining GBM's intent from all documents related to the transaction at issue in the instant case, GBM's argument that fulfillment of the Statute of Frauds requires a single, unambiguous document is clearly not supported by Alabama law.

c. Even if GBM's agreement to purchase an extended service contract on behalf of Smith was a separate contract, it was a valid oral agreement falling outside the Statute of Frauds.

To the extent GBM argues that the sale of the extended service contract was a separate oral agreement, neither § 8-9-2 nor § 7-2-201 requires a written embodiment of that agreement.

GBM was not to be the warrantor of the boat; Tracker was. GBM's only role was to sell the extended service contract to Smith and to submit Smith's application to Tracker—a role to be fulfilled within a year. (R. at 458, 857.) Therefore, should the purchase of the extended service contract be deemed a separate contract, it would fall outside coverage of § 8-9-2 Statute of Frauds.

Moreover, an extended service contract is not a "good" as defined by § 7-2-105 of the Commercial Code. Even though the price of the extended service contract was \$1,500, § 7-2-201(1) only requires a writing when the agreement is for the sale of goods. Accordingly, § 7-2-201 does not apply to a separate contract for the sale of the extended service contract, and any such agreement would fall outside of coverage of the Commercial Code writing requirement.

For all of the aforementioned reasons, any charge on the Statute of Frauds would have been "misleading,"

"confusing and unnecessary" insofar there was no question of fact remaining for the jury to decide concerning the Statute of Frauds. See Henriksen, 12 So.3d at 662; Baldwin County Elec. Membership Corp., 999 So. 2d at 459. Because the issue of Statute of Frauds was decided as a matter of law, the trial court properly denied the jury instruction and its decision is due to be upheld.

II. WHETHER THE TRIAL COURT PROPERLY DENIED GBM'S MOTION FOR JUDGMENT AS A MATTER OF LAW ON THE ISSUES OF BREACH OF CONTRACT AND PROMISSORY FRAUD.

In initially denying GBM's JML, the trial court found Smith presented substantial evidence creating a factual dispute sufficient to allow the issues of breach of contract and promissory fraud to be submitted to the jury for resolution. See Southlandbank v. A & A Drywall Supply Co., Inc., 21 So.3d 1196, 1202 (Ala. 2008); Beiersdoerfer, 953 So.2d at 1205; Mantiply, 951 So.2d at 643.

A reviewing court must determine whether the party who bears the burden of proof has produced substantial evidence creating a factual dispute requiring resolution by the jury. In reviewing a ruling on a motion for a JML, this Court views the evidence in the light most favorable to the nonmovant and entertains such reasonable inferences as the jury would have been free to

draw.

Southlandbank, 21 So.3d at 1202-1203. See also
Beiersdoerfer, 953 So.2d at 1205.

Substantial evidence is "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved."

Beiersdoerfer, 953 So.2d at 1205.

Then the trial court viewed the evidence in a light most favorable to Smith, it found she had produced sufficient evidence of such weight and quality that fair-minded jurors in the exercise of impartial judgment could reasonably infer the existence of a breach of contract and promissory fraud. The court, therefore, properly submitted the case to the jury for a factual resolution.

a. The trial court properly denied GBM's Motion for Judgment as a Matter of Law on the issue of breach of contract when the evidence presented at trial was of such weight and quality that fair-minded persons in the exercise of impartial judgment could reasonably infer both the existence of a contract between the parties and that GBM breached that agreement.

At trial, Smith presented substantial evidence of a valid contract between the parties to buy and sell a boat, including an extended service contract, the existence of said contract GBM admitted. (C. at 153-154.) Smith also presented substantial evidence that GBM failed to submit her application for the extended service contract to Tracker pursuant to the parties' agreement, thereby breaching that contract. (R. at 460.)

In order to establish a breach of contract, the plaintiffs were required to prove, among other things, the existence of a valid contract.

Southlandbank, 21 So.3d at 1203 (citation omitted). Additionally, to show a breach of contract, a party must demonstrate "(2) [their] own performance under the contract, (3) the defendant's non-performance, and (4) damages." DeVenney v. Hill, 918 So.2d 106, 116 (Ala. 2005) (citation omitted).

Smith presented substantial evidence that the contract with GBM was a valid written contract according to the requirements of § 7-2-201. See supra at 29-41. Smith introduced substantial evidence demonstrating her performance under the contract when GBM admitted Smith and when GBM received payment from Bank of the West. (C. at

135, 140, 148-150; R. at 691, 756-757, 830.)

Smith also presented "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of" GBM's non-performance when GBM admitted it had not submitted Smith's application for the extended service contract to Tracker, even after GBM received payment from Smith's finance company. (R. at 460, 655-656, 691.) Finally, Smith introduced substantial evidence that she was damaged as a result of GBM's failure to perform, when she, Carl and GBM testified about the boat's dramatic loss of value with a non-operative motor, (R. at 724, 726, 728, 750-751, 780), and Smith's other deprivation of the benefits of her bargain, (R. at 725-728, 778, 859-860).

Because Smith, the non-movant plaintiff, bore her burden of proof by producing "substantial evidence creating a factual dispute requiring resolution by the jury," the trial court properly denied GBM's JML motion and submitted the question of breach of contract to the finder of fact.

b. The trial court properly denied GBM's Motion for Judgment as a Matter of Law on the issue of promissory fraud when evidence presented at trial was

of such weight and quality that fair-minded persons in the exercise of impartial judgment could reasonably infer the existence of all elements of fraud and GBM's intent to not perform and intent to deceive at the time of sale.

In its petition, GBM challenges the sufficiency of Smith's evidence of fraud on only two of six points, that is, GBM's intent not to perform and GBM's intent to deceive at the time of its misrepresentation. (Petition at 17-20.)

Notwithstanding any contention of GBM to the contrary, Smith has presented "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of" GBM's intent not to perform and its intent to deceive at the time of its misrepresentation to Smith. See Beiersdoerfer, 953 So.2d at 1205. See also Waddell & Reed, Inc. v. United Investors Life Ins. Co., 875 So.2d 1143, 1160 (Ala. 2003); Padgett v. Hughes, 535 So.2d 140, 142 (Ala. 1988). Accordingly, the trial court properly denied GBM's JML motion and submitted the question of promissory fraud to the jury.

"[F]or the purposes of a promissory-fraud claim,

the factfinder may consider [the failure to perform the promised act], together with other circumstances, in determining whether, at the time the promise was made, the promisor intended to deceive."

Mantiply, 951 So.2d at 653 (quoting Byrd v. Lamar, 846 So.2d 334, 343 (Ala. 2003); Ex parte Grand Manor, Inc., 778 So.2d 173, 182 (Ala. 2000)) (emphasis added) (quotation marks omitted).

Smith presented the following evidence at trial in support of her claim GBM intended not to perform and intended to deceive her concerning her purchase of the extended service contract at the time of the boat sale:

- 1) Smith advised Roberts she wanted to buy a new boat, but was told no new boats were available for immediate sale. (R. at 677-678, 764.) Additionally, Roberts represented that no new boats would be available for delivery until "six to eight weeks or longer" from that time. (R. at 678.)

From this a jury could reasonably infer GBM would be unable to make a sale unless Roberts convinced Smith to accept a used boat as a substitute.

- 2) GBM's Roberts misrepresented to Smith that the boat she purchased never entered the stream of commerce. (R. at 678, 681, 764.)

From this a jury could reasonably infer Roberts knew Smith would want a relatively lightly used boat, if she had to settle for a used boat instead of new. The jury may also have drawn an inference that GBM intended to deceive at the time of sale as the boat Roberts sold Smith was one he claimed at trial he knew was previously sold by GBM to a third-party in 2000. (R. at 609-610, 616-617, 624-625.)

- 3) Boats are not titled in Alabama. (R. at 452-453)

From this a jury could reasonably infer Roberts was in a better position to know the prior sales history of GBM's inventory than Smith. The jury could also verify evidence that the Smiths relied on Robert's representations concerning the boat in the sale negotiations. (R. at 684, 768.)

- 4) GBM's Roberts misrepresented at trial that he

remembered how much warranty remained on the boat because he sold it its original owner, and then also testified he was not employed at GBM (the seller) at the time of the original sale. (C. at 121; R. at 609-610, 616-617, 624-625, 629-630, 797.) GBM's Roberts also misrepresented at trial that he had not been told by GBM's principal officer, Eric Long, to listen carefully to Long's testimony while Long was on the stand, a fact confirmed by both Long and Lisa Smith. (R. at 493-498, 584-585, 611-613.)

From this a jury could reasonably infer Roberts' veracity was subject to question.

- 5) The sale of the used boat was contingent upon the Smith's obtaining an extended service contract making it comparable to a new boat in that respect. (R. at 678-680, 764-766, 768.)

From this a jury could reasonably infer Roberts' motive for telling Smith she could obtain an extended service contract was to close the sale and earn a commission on the sale of the boat he

would not have sold otherwise.

- 6) Roberts told the Smiths the used boat he sold them had a two-year factory warranty that could be transferred to them and that GBM would sell them a three-year extended service contract to cover the boat when the factory warranty expired. (R. at 678-679, 681-684, 690, 733, 764-765, 767-768, 772-773.)

From this a jury could reasonably infer GBM's intent to deceive at the time of sale by creating a false belief and reliance in the Smiths that their requirements for an extended warranty on a boat would be met by or through GBM.

- 7) GBM's Roberts and Hunkapiller each represented to Smith that the price of the extended service contract was \$1,500, when the price of said plan was really \$2,668. (C. at 157; R. at 682, 683, 766-767, 786, 803-804, 805, 832, 846.)

From this a jury could reasonably infer GBM did not intend to perform its promise of submitting

Smith's extended service contract application to Tracker at the time of the sale. If GBM intended to perform but merely failed to submit Smith's extended service contract application to Tracker, it would have charged Smith the correct price.

- 8) GBM's Hunkapiller led Smith to believe she had purchased the extended service contract when Hunkapiller (1) went over plan terms in detail, highlighting coverage and limitations of the plan, and (2) provided Smith with a duplicate copy of the Tracker Marine Group "Premier Protection Plans" Marine Service Contract Application, TMG Number 013963, including "Terms and Conditions," retaining the original. (C. at 110-114; R. at 688-690, 770-773, 868.)

From this a jury could reasonably infer GBM's intent to deceive at the time of sale.

- 9) Roberts testified he made no commission on the sale of extended warranties, and only received a commission on the sale of the boat. (R. at 637, 847.) Furthermore, GBM's principal officer, Eric

Long, admitted the \$1,500 that the Smiths say was the price of the extended service contract was included in the "Goods and/or Services Price" set forth on the Retail Installment Contract. (R. at 475, 828-832.)

From this a jury could reasonably infer Roberts' motive for deceiving the Smiths at the time of sale was to artificially inflate the sale price of the boat and thereby increase the commissions GBM paid to him on the sale.

- 10) GBM's Long agreed that the "Goods and/or Services Price" on the "Retail Installment Contract" included the \$1,500 price of the extended service contract. (R. at 475, 828-832.)

From this a jury could reasonably infer GBM's Roberts and/or Hunkapiller made an effort to conceal the fraud they perpetrated on Smith from detection, and thereby, reasonably infer GBM's intent to deceive at the time of sale.

- 11) GBM's Long testified at trial that a second Bill

of Sale, dated February 8, 2004, which appeared in GBM's files, was not properly completed and did not appear to bear Carl and Ellen Smith's actual signatures. (R. at 451, 516-517, 659.) Other evidence was also introduced that Smith did not sign the February 8 Bill of Sale and was not even on GBM's premises on February 8, 2004. (R. at 723-724, 735-736, 780-781.)

From this a jury could reasonably infer GBM committed forgery at the time of the sale to conceal or remove evidence of fraud.

- 12) GBM's Hunkapiller told Smith she qualified for 100% financing of the boat, but listed a \$3,500 downpayment on the Retail Installment Contract that she did not ask Smith to pay. (R. at 687-688, 733-734, 744-745, 754-755, 788, 824-826, 872-873.)

From this a jury could reasonably infer GBM's Robert's and/or Hunkapiller's effort to conceal the fraud on the Smith's from detection by introducing additional, unnecessary line items

into the calculation of the "Amount Financed" and thereby reasonably infer GBM's intent to deceive at the time of sale.

Because Smith introduced ample "evidence of such weight and quality that fair-minded person in the exercise of impartial judgment can reasonably infer the existence of" GBM's intent not to perform and its intent to deceive at the time of sale, the trial court's denial of GBM's JML motion was proper and its decision is due to be affirmed.

CONCLUSION

GBM and Smith entered into a contract for the sale of a boat, as evidenced by several documents which collectively satisfy the Statute of Frauds § 7-2-201. GBM promised to submit an extended service contract on the boat to Tracker in exchange for the price of \$1,500, as part of that transaction. GBM breached its agreement and defrauded Smith. As a result, Smith was harmed.

Contrary to GBM's argument in its Petition, Code of Alabama § 8-9-2 is inapplicable to the facts of this case presented at trial. Therefore, the trial court's denial of a jury instruction based on this Code section was proper as a matter of law.

Additionally, including GBM's admission of existence of the Retail Installment Contract precluded GBM from arguing Frauds as a defense. Evidence at trial, supported the trial court's conclusion that the writing requirement of § 7-2-201 had been met as a matter of law. For the court to charge the jury on the Statute of Frauds in light of the evidence would have been "misleading," "confusing and unnecessary."

When it denied GBM's Motion for Judgment as a Matter of

Law, the trial court properly found Smith bore her burden as plaintiff of producing "substantial evidence creating a factual dispute requiring resolution by the jury." Smith presented "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of" a contract and GBM's breach thereof when it failed to submit her extended service contract application to Tracker. Smith also presented substantial evidence of GBM's intent not to perform and intent to deceive at the time GBM sold her the boat, including the extended service contract.

For all of the aforementioned reasons, Appellee Ellen Smith respectfully requests this Court affirm the trial court's decisions to refuse GBM's jury instruction on the Statute of Frauds and to deny of GBM's JML motion.

Respectfully submitted,

STEVEN D. ADCOCK (_____)
Attorney for Appellee,
Ellen Smith

OF COUNSEL:

STEVEN D. ADCOCK

P.O. Box 219
Talladega, Alabama 35161
Telephone: (256) 362-3848
Facsimile: (256) 362-1341
E-mail: stevendadcock@bellsouth.net

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via U.S. Mail, postage prepaid, on this the _____ day of February, 2010, upon the following counsel of record:

Hugh M. Flanagan
Long, Flanagan & McDonald, L.L.C.
3446 Highway 69 South
Guntersville, Alabama 35976

Hon. A. Tim Jolley
Circuit Judge
27th Judicial District
Marshall County, Alabama
424 Blount Avenue
Guntersville, Alabama 35976-1102

Of Counsel