

IN THE COURT OF APPEALS
STATE OF GEORGIA

LINDSEY M. BENDER and	:	
CORY N. BENDER,	:	
	:	
Appellants,	:	
	:	Appeal No. A16A0784
vs	:	
	:	
SOUTHTOWNE MOTORS OF	:	
NEWNAN II, INC.	:	Coweta File No. 12-V-1440
and ALLY BANK	:	
	:	
Appellees.	:	

BRIEF OF APPELLANTS

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BRIEF OF APPELLANTS

COME NOW, Corey and Lindsey Bender and for their Brief, state as follows:

PART I

STATEMENT OF THE CASE

This case involves the sale of a manufacturer buyback or “lemon” car with branded title to a Georgia consumer without proper disclosure of the lemon history of the car in violation of the Georgia Lemon and Regulations promulgated thereunder. The Georgia Lemon Law, OCGA 10-1-790 provides:

(a) **No ... new motor vehicle dealer ... shall knowingly resell ...a reacquired vehicle**, including a vehicle reacquired under a similar statute of any other state, **unless**:

(1) **The fact of the reacquisition and nature of any alleged nonconformity are clearly and conspicuously disclosed in writing to the**

prospective transferee, lessee, or buyer;¹ (emphasis supplied)

Ga. Comp. R. & Regs. §122-23-.02. Return, Transfer and Resale of a Reacquired Vehicle provides:

(1) A reacquired vehicle shall not be transferred, leased, or sold, either at wholesale or retail, unless the following conditions are met:

(a) **At the time of each transfer** of the reacquired vehicle, the transferor **shall provide** the transferee **the form required by Rule 122-23.01**.

(b) The ultimate consumer must be provided the opportunity to read the form in its entirety **before purchasing** or leasing the reacquired vehicle.

(c) Both the transferor of the reacquired vehicle and the ultimate consumer must sign the form **at the time of the sale or lease to the ultimate consumer**. **The original of the form shall be provided to the ultimate consumer**. The transferor of the reacquired vehicle must send a copy of the completed and dated form to the Administrator within thirty (30) days from the date of the sale or lease. (emphasis supplied)

The trial court granted summary judgment finding that Southtowne had complied with Georgia law in disclosing the resale of a manufacturer buyback or lemon car by using an Illinois form which does not include the word lemon and which is materially different than that required by Georgia law. The trial court decision renders these provisions of Georgia law regarding timing and method of disclosure to the “prospective ... buyer” meaningless. This chart summarizes the Georgia

¹ A knowing violation of this subsection shall constitute an unfair or deceptive act or practice in the conduct of consumer transactions under Part 2 of Article 15 of Chapter 1 of Title 10 and will subject the violator to an action by a consumer under Code Section [10-1-399](#).

statutory and regulatory scheme and the violations:

Statutory or Regulatory Reference	Evidence of Violation
OCGA 10-1-790(a)(1) conspicuous disclosure to prospective buyer	No presale disclosure R-232; R-171; R-238; R-241; R-269; R-423; R-424; R-425; R-426
OCGA 10-1-790(a)(1) notification of 12 month warranty	No disclosure of required 12 month warranty at all R-29; R-428
Ga. Comp. R. & Regs. §122-23-.02(1)(a) must disclose on Form specified by Regs	No form presented at time of sale R-425; R-258
Ga. Comp. R. & Regs. §122-23-.02(1)(b) consumer must have chance to read the required form prior to purchase	No presale disclosure R-233; R-171; R-233; R-241; R-269; R-423; R-424; R-426. No form presented at time of sale R-426; R-258. Lindsey Bender never signed. R-259-2260. C Bender not allowed to read. R-187-189.
Ga. Comp. R. & Regs. §122-23-.02(1)(c) consumer must sign at the time of sale	See above
Ga. Comp. R. & Regs. §122-23-.02(1)(c) consumer must be given copy of form at time of sale	Not given the form. R-258
Ga. Comp. R. & Regs. §122-23-.02(1)(c) Seller must send copy of form to the State Lemon Law Administrator.	No form sent to Administrator for this car and 85 other cars in 90 days period. R-657; R-387-388
Ga. Comp. R. & Regs. §122-23-.02(2) must notify Administrator warranty has been activated.	See above and the Benders were never told about this warranty. R-291
Ga. Form required has heading “Lemon Law Notice” R-643	Illinois form relied on by trial court says it is a “Resale Disclosure Statement” R-643
Ga. Form Notice uses the word “Lemon” R-643	Illinois Form has no mention of “Lemon” R-643
Ga. Form Notice requires notification of mandated 12 month warranty R-643	Illinois form makes no mention of the 12 month mandated warranty R-643
Ga. Form Notice requires form to be sent to Ga. Lemon law Administrator R-643	Illinois form makes no mention of sending to the State Administrator R-643

As the clear intent of the statutory and regulatory scheme of Georgia's Lemon Law is to prevent a consumer from even committing to the purchase of a used vehicle without knowledge of its lemon history, this decision is clearly erroneous and must be reversed. See Diaz v. Paragon Motors of Woodside, Inc., 424 F. Supp. 2d 519 (E.D.N.Y 2006). This is a case of a per se violation.

The trial court ignored this most important fact and law in this case: The Benders were the first consumer purchasers of this vehicle after it was repurchased by Hyundai under the Texas Lemon Law and the manufacturer repurchase was not properly disclosed to the plaintiffs **PRIOR** to the purchase as affirmatively required by BOTH the Texas² and Georgia³ lemon laws on the form required by Georgia Regulations. Southtowne employee Simmons essentially admits the violation of the statute. This court should focus on Southtowne's failure to disclose as mandated by law rather than the Bender's alleged lack of reasonable reliance as claimed by Southtowne.

The Walker case⁴ relied upon by the trial court is inapposite because in

2 Texas Occupations Code Subchapter M Sec. 2301.610. DISCLOSURE STATEMENT. Texas Law requires that the car be resold with a "hanger" (R-341) on the rear view mirror disclosing the history. This "hanger" was not present on the car when sold. Texas Administrative Code Rule 215.210(4); R-423-4.

3 OCGA § 10-1-790.

⁴ Walker v. Southtowne Motors of Newnan II, Inc. No. A14A0964 (Georgia Court

Walker, the plaintiff was not the first purchaser after the reacquired manufacturer buy back and the case did not involve the affirmative obligations to notify cited above. Here, the Benders are the first consumer purchasers of the reacquired vehicle. In Walker, Southtowne claimed it did not know the car had a branded title. Here, Southtowne was affirmatively informed that the car **did** have a branded title and the salesman did affirmatively misrepresented the history of the car. A better reasoned case is Harmon v. Major Chrysler Jeep Dodge, Inc., 955 N.Y.S.2d 357 (App. Div. 2012) (seller violated lemon laundering statute when disclosure that car was a returned lemon was dated after signature of purchase contract), See Diaz, supra, at 424 F. Supp. at 536 (Summary judgment granted to consumer where disclosure not made at time consumer committed to purchase and paid funds).

The result of the trial court's finding is that the lemon law does not mean what it says and that there is no affirmative obligation to disclose to consumers that they are buying lemon cars. This cannot be the intent of the lemon law.

STATEMENT OF FACTS

The vehicle was sold to Southtowne at a Manhiem auction in Illinois on January 10, 2012. R-410; R-417. This was a closed auction for Hyundai dealers only at which manufacturer buyback vehicles were sold. R-410; Manheim

of Appeals, November 21, 2014)(unpublished)

Documents R-378. At the time of this sale, the car had a Texas manufacturer's buyback branded title.

BID# 2012-002-060025 12:31:57 06-0025
 DBLACKBUR1 1/10/2012

MANHEIM ARENA ILLINOIS
 200 N OLD CHICAGO DR
 BLDG 1000, IL 60440
 (630) 737-3800 FAX(630) 737-9668

KMHGCADFKAU097905
 TX 12/21/2011
 TITLE REC'D X
 61B1392

YEAR	MAKE	MODEL/SUB SERIES	BODY	COLOR	ENG	INT	HT	R	FR	PS	PB	AC	EW	ES	TOP	CO	EL	AX	YL	SRS	SI	RD
2010	HYUNDAI	GENESIS	4DSN	GRAY	B6	BRN	L	C	A	X	X	X	X	X	SR	X	X	X	X	D	B	X

ANN COND: NAV SYSTEM

NOTES:
 MANUFACTURER'S BUYBACK/LEMON LAW
 BRANDED TITLE
 DRIVERS FRONT WINDOW INDP BACK UP CAMERA INDP
 NO SALE STATES-OR, NH, ID, IN, PA, VT
 HYUNDAI FRANCHISE DEALERS ONLY

PSI 7 FULL
 PSI 14 FULL
 SALE CHECK

CLERK DR.
 SOLD BY RCB

10B3402
 4901850 12B1289
 HYUNDAI BUYBACKS
 10630 TALLENT AVE
 FOUNTAIN VALLEY, CA 92728

SELLING PRICE \$ 18,000.00
 BUYER'S FEE \$ 185.00
 MISC FEE \$
 BUYER'S \$
 ADJ \$

ODOMETER DISCLOSURE STATEMENT Section 5805 Disclosures from FEDERAL LAW AND STATE LAW, IF APPLICABLE, REQUIRE THAT YOU STATE THE MILEAGE UPON TRANSFER OF OWNERSHIP. FAILURE TO COMPLETE OR PROVIDING A FALSE STATEMENT MAY RESULT IN PENALTY AND/OR IMPROPERMENT.

(1) I hereby certify to the best of my knowledge the odometer reading reflects the amount of mileage in excess of its mechanical limits.

(2) I hereby certify that the odometer reading is NOT the actual mileage
 -WARNING- ODOMETER DISCREPANCY

HYUNDAI BUYBACKS

25037 DIG 6 STATE THAT THE ODOMETER NOW READS MILES/NOTES THIS AND TO THE BEST OF MY KNOWLEDGE THAT IT REFLECTS THE ACTUAL MILEAGE OF THE VEHICLE DESCRIBED HEREIN, UNLESS NOTED DIFFERENTLY ABOVE.

For value received I hereby sell, assign or transfer the vehicle described on this document to the purchaser named at mt.

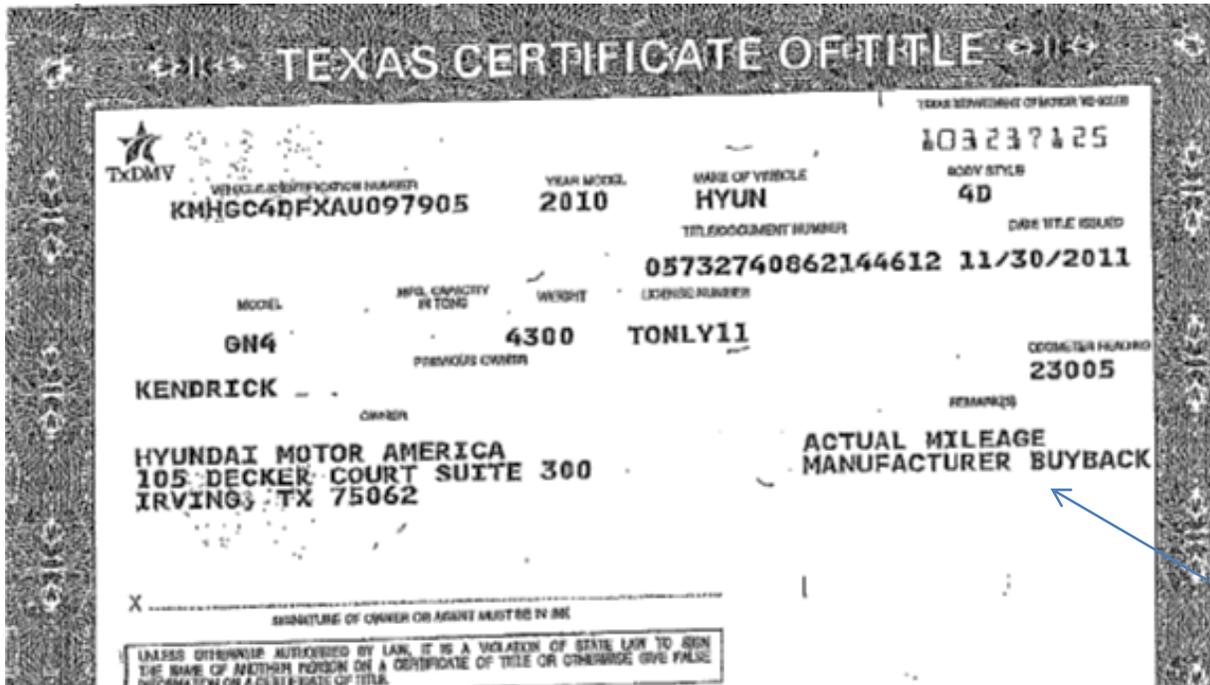
R-408; Auction Invoice, Manhiem Documents R-373. This auction invoice shows that the lemon branded title is present. The Rules for the Auction require the dealer to disclose to the consumer the repurchase history of the vehicle:

Buyback Vehicles

Purchase of buyback vehicles is restricted to authorized HMA dealers only and must be sold to the ultimate consumer by the dealer only. Dealer (or authorized agent) is required to acknowledge purchase of buyback vehicles by signing a Notice of Nonconformity Statement at the conclusion of the sale. A copy will be provided to the purchaser at the time. The dealer bears sole responsibility for providing full disclosure to the ultimate consumer and securing purchaser's acknowledgement by signing the Notice of Nonconformity Statement provided.

Manhiem Documents R-384 Southtowne manager Simmons acknowledged this.

R-411; R-429. The Texas title carries the manufacturer buyback brand.



ISG Documents R-343, R-413; R-470. The Manhiem auction documents establish the title was present at the auction at time of sale. The records also show the title was shipped to the dealer on January 13, 2012. Manhiem Documents R-377-379.

The available records also indicate that at the time of Auction, there was also present on the car a Texas Lemon Law “Hanger” as required by the Texas Lemon Law⁵ which hanger is supposed to be kept on the car until such time as the car is sold to the first consumer purchaser.

R-339

Documents Included:

	Buyback Decal
X	Transport Request
X	Branded Title
	Title
X	Dealer Disclosure Instructions
X	Disclosure
	Power of Attorney
X	Texas Hang Tag

⁵ Texas Administrative Code Rule 215.210(4)

The Texas "Hanger" is pasted below.

**TEXAS
LEMON LAW
REACQUIRED
VEHICLE**

Violation of 43 TAC §8.210 to remove prior to retail sale.

**1-800/622-8682
512/416-4800**

WWW.TEXASLEMONLAW.US

Revised 11/08



YEAR: 2010

MAKE: Hyundai

MODEL: Genesis

VIN: KM1H6K4D1XAU077905

1st Retail Buyer's Signature **Date**

I attest that this disclosure decal was affixed to the purchased vehicle pursuant to 43 TEX. ADMIN. CODE §8.210(4).

Name of Dealership of 1st Retail Sale

Signature of Dealership's Representative **Date**

THE SELLING DEALER SHALL RETURN THIS LABEL AND THE REACQUIRED VEHICLE DISCLOSURE FORM TO THE TEXAS DEPARTMENT OF TRANSPORTATION, MOTOR VEHICLE DIVISION WITHIN 60 DAYS OF THE RETAIL SALE.

ISG 000031

ISG 000032

R-341

It was not present on the car at the time of sale. R-241; R-413.

The Benders visited Southtowne on January 15, 2012. They were shown the subject Genesis by salesman Buck Bush. Lindsey Bender testified that Bush told her "that he could do a super deal; it's a lease turn-in; due to the economy that was happening at that present time; it's probably some woman who couldn't pay her car note, turns in her keys and that's how it ends up being a used vehicle and we were

going to be very, very lucky because this is a once in a lifetime.” R-439. She was never told the vehicle was a manufacturer buy-back vehicle. The salesman told the Benders that the car had a clean Carfax, that he had seen it. R-248. There were no forms attached to the vehicle which would disclose the buy back history. R-253. The Benders were shown an Illinois Disclosure Form signed January 15, 2012. R-254. The Benders were told the form related to the car being a lease turn in. Corey Bender confirmed this testimony. R-179.

The Hyundai resale rules of auction require:

The following rules apply for all buyback vehicles:

- Every dealer must adhere to their individual state's requirements and those requirements of Hyundai, including disclosure and title branding.
- While Dealer trades and/or wholesale transactions are allowed, disclosure requirements are identical to those of retail sales.
- You must obtain customer(s) signature, printed name, address, and date on the disclosure form and provide the customer with the designated copy of the form.

Purchasing Dealer:
Charlie Simmons
 Name & Title (Please print)
Southtowne Motors of Maunahan 866 Bullsboro Drive Maunahan, GA
 Name & Address of Purchasing Dealer (Please print)
 30265
 Signature: 
 Date: 1-10-12

Simmons signed this acknowledgment. R-412; ISG Letter to Dealer dated December 9, 2011, ISG Docs R-312. ISG also wrote Southtowne noting that the required consumer signed form had not been provided to it. R-321. These auction rules were not complied with. R-429.

Southtowne's agreement with Ally Financial requires that cars which have been manufacturer buybacks or which have branded lemon titles are NOT to be financed. Specifically, Section 6 of the Ally Retail Plan agreement governing the retail instalment sales contracts between Ally and Southtowne provides:

Section 6. Dealer Warranties and Representations.
With respect to each Contract submitted to Ally, Dealer warrants and represents:

(n) The vehicle described in the Contract has not been subject to a "lemon law" buyback or repurchase right and has never been represented, or required to be represented, by a salvage, flood or branded title;

So the dealer's conduct not only defrauded the Benders but also Ally. R-588.

The Benders were NOT shown the Georgia Lemon Law Notice of Resale form at any time prior to the sale. Simmons testified:

Q Do you acknowledge, sir, that the Georgia form was not signed until after the purchase?

A Yes, sir.

R-422. Simmons acknowledges that the dealer did not even receive the form from ISG until after the sale to the Benders. R-425.⁶ The Benders first saw the Georgia Lemon Law Notice for Reacquired Vehicle form near the end of summer 2012.

⁶ Simmons goes on to claim that a "lady" at the state told him they understand the forms are sometimes signed after the sale. R-426. The Governor's Office of Consumer Protection's position is that all sellers must comply with the lemon law statute. R-658.

R-258. This Georgia Lemon Law Notice for Reacquired Vehicle form was never signed by Ms. Bender and it was signed by Mr. Bender a week or more after the actual purchase of the Genesis. R-259-260. Buck Bush called Ms. Bender and told her Southtowne needed the Benders to return and sign a loan document rather than the Georgia form. R-260. This Georgia form was not signed by the manufacturer until January 20, 2012. This form was Fedexed to the dealer by Hyundai on January 20, 2012. ISG Documents R-317; R-422-425. The Benders were never provided with the warranty document required by Georgia law. ISG Documents R-319. The Georgia (R-318) lemon law disclosure forms are materially different from the Illinois form (R-313) which Southtowne provided to plaintiff. The Georgia form refers to the lemon law prominently on the page. The Illinois form does not. R-457-458

Southtowne purchased the subject Genesis for \$18,185.00. R-548. Manhiem Documents R-373. Southtowne sold this vehicle to the Benders for \$34,995.00. This is a huge profit for a used vehicle sale. Carmax offered the Benders \$11,000.00 for the car on September 5, 2012. R-598; R-207. Robert Eppes, an immensely qualified expert formerly employed by United States Department of Transportation, National Highway Traffic Safety Administration - Odometer Fraud Unit located in Kansas City, Missouri and a certified vehicle appraiser opines:

50. In this case, the vehicle was purchased on 12/21/2011 by Southtowne Motors of Newnan II Inc., Newnan, GA for **\$18,000**. On or about January 15, 2012, the vehicle was purchased by the Benders for **\$34,995**. This is an extremely high mark-up when one considers typical vehicles of this class are typically marked up \$3-5K depending on condition.
51. Based upon my education, training and experience as an appraiser and a former federal investigator specializing in automotive industry related cases, it is my opinion that on 01/15/2012, a like kind make, model, mileage and equipped vehicle, without defects or non-conformities of warranty, without a “branded title, in clean condition, had a Fair Market Retail Value of **\$34,995**.
52. Based upon my education, training and experience as an appraiser, and my prior law enforcement experience in purchase and sale of motor vehicles, it is my opinion that on 01/15/2012, the fair market retail value of the subject vehicle with branded “Manufacturer or Lemon Buyback” title and all material facts disclosed had a Fair Market Retail Value of **\$21,950**.

Affidavit of Robert Eppes R-548. Clearly the value of the vehicle is substantially diminished/impaired as a result of the manufacturer buyback/lemon history.

JURISDICTIONAL STATEMENT

Jurisdiction is properly vested in this Court because this Appeal involves a subject upon which jurisdiction is not conferred upon the Supreme Court by the Georgia Constitution Article VI, Section VI, Paragraph II, and involves correction of errors of law. Jurisdiction is vested in the Court of Appeals under Article VI, Section V, Paragraph III of the Georgia Constitution.

Part II

ENUMERATION OF ERRORS

I. IT WAS ERROR TO GRANT SUMMARY JUDGMENT ON THE BENDERS' GEORGIA FAIR BUSINESS PRACTICES ACT CLAIMS WHICH ALLEGED THE DEALER VIOLATED THE GEORGIA LEMON LAW DISCLSURE RULES FOR MANUFACTUER BUY BACK OR LEMON CARS. OCGA §10-1-790; Ga. Comp. R. & Regs. §122-23-.02 .

II. SUMMARY JUDGMENT ON THE BENDER'S FRAUD CLAIMS WAS ERROR WHERE THE DEALER NOT ONLY PROVIDED FALSE INFORMATION BUT ALSO WAS UNDER AN AFFIRMATIVE STATUTORY OBLIGATION TO PROVIDE FULL INFORMATION.

III. THE TRIAL COURT ERRED IN FINDING THE BENDERS FAILED TO STATE A CLAIM FOR REVOCATION OF ACCEPTANCE UNDER O.C.G.A. ' 11-2-608

Part 3

STANDARD OF REVIEW

“Summary judgment should be granted only in cases where undisputable, plain, and palpable facts exist on which reasonable minds could **not** differ as to conclusion to be reached.” *Stuckes v. Trowell*, 119 Ga. App. 651, 168 S.E. 2d 616 (1969); *Indian Trail Village, Inc. v. Smith*, 139 Ga. App. 691, 229 S.E. 2d 508 (1979)(emphasis added).

ARGUMENT AND CITATIONS OF AUTHORITY

I. IT WAS ERROR TO GRANT SUMMARY JUDGMENT ON THE BENDERS' GEORGIA FAIR BUSINESS PRACTICES ACT CLAIMS WHICH ALLEGED THE DEALER VIOLATED THE GEORGIA LEMON LAW DISCLOSURE RULES FOR MANUFACTURER BUY BACK OR LEMON CARS. OCGA 10-1-790; Ga. Comp. R. & Regs. §122-23-.02 .

A. THE SALE WAS MADE IN VIOLATION OF THE GEORGIA LEMON LAW

The Georgia Lemon Law, OCGA 10-1-790 provides:

(a) **No** manufacturer, its authorized agent, **new motor vehicle dealer**, or other transferor **shall knowingly resell**, either at wholesale or retail, lease, transfer a title, or otherwise transfer a reacquired vehicle, including a vehicle reacquired under a similar statute of any other state, unless the vehicle is being sold for scrap and the manufacturer has notified the administrator of the proposed sale or:

(1) The fact of the reacquisition and nature of any alleged nonconformity are clearly and conspicuously disclosed in writing to the prospective⁷ transferee, lessee, or buyer; and

(2) The manufacturer warrants to correct such nonconformity for a term of one year or 12,000 miles, whichever occurs first.

A knowing violation of this subsection shall constitute an unfair or deceptive act or practice in the conduct of consumer transactions under Part 2 of Article 15 of Chapter 1 of Title 10 and will subject the violator to an action by a consumer under Code Section [10-1-399](#).(emphasis supplied)

⁷ Miram Websters Dictionary defines prospective as: ***1***: relating to or effective in the future ***2a*** : likely to come about : expected <*the prospective benefits of this law*>***b*** : likely to be or become <*a prospective mother*>

Ga. Comp. R. & Regs. §122-23-.02. Return, Transfer and Resale of a

Reacquired Vehicle provides:

(1) A reacquired vehicle shall not be transferred, leased, or sold, either at wholesale or retail, unless the following conditions are met:

(a) **At the time of each transfer** of the reacquired vehicle, the transferor shall provide the transferee the form required by Rule 122-23.01.

(b) The ultimate consumer must be provided the opportunity to read the form in its entirety before purchasing or leasing the reacquired vehicle.

(c) Both the transferor of the reacquired vehicle and the ultimate consumer must sign the form **at the time of the sale or lease to the ultimate consumer. The original of the form shall be provided to the ultimate consumer.** The transferor of the reacquired vehicle must send a copy of the completed and dated form to the Administrator within thirty (30) days from the date of the sale or lease.

(2) The manufacturer shall activate the warranty required pursuant to O.C.G.A. § 10-1-790(a)(2) at the time of the sale or lease of the reacquired vehicle to the ultimate consumer. The manufacturer shall also notify the Administrator that the warranty has been activated within ninety (90) days of the sale or lease.

Authority O.C.G.A. §§ 10-1-790 and 10-1-795

The Georgia Lemon Law was not complied with in this case. Lindsey M. Bender and Cory N. Bender bought this used 2010 Hyundai Genesis from Southtowne on January 15, 2012. At the time of sale, Southtowne knew that the vehicle was a lemon buyback vehicle, but it failed to inform the Benders-the first

consumer purchasers of the vehicle after manufacturer buy back⁸- that it was a manufacturer buyback or that it had a branded title before their purchase. R-171; R-232; R-241; R-269; R-424; R-425; R-428.

The Georgia lemon law requires that notice be given on a prescribed form. Ga. Rules and Reg. §122-23-.01. Ga. Rules and Reg. § 122-23-.02.(1)(a) prescribes:

At the time of each transfer of the reacquired vehicle, the transferor shall provide the transferee the form required by Rule 122-23.01.

(b) The ultimate consumer must be provided the opportunity to read the form in its entirety **before** purchasing or leasing the reacquired vehicle.

The required Georgia Notice of Non Conformity Form was not submitted to the Benders as “prospective ...buyers” (future buyers) **prior** to purchase as required by Georgia law and regulation and when it was later submitted only to Mr. Bender, it was submitted and explained as a form needed for financing only. R-457; R-187. The Regulations require that the form be given to the consumer at the time of sale. “The original of the form shall be provided to the ultimate consumer.” Ga. Rules and Reg. §122-23-.02. (c). The Benders were not given a copy of the form even when signed. R-258-259. Not only were the Benders deprived on the required Georgia notice, they were also deprived of the Texas “hanger” notice as well.

⁸ This fact alone differentiates this case from the Walker v. Southtowne Motors of Newnan II, Inc., No. A14A0964 (Unpublished Georgia Court of Appeals, November 21, 2014) case primarily relied upon by Defendant.

The required Georgia form was not presented to the consumer plaintiff Bender's at the time of sale of the car. See, e.g., Harmon v. Major Chrysler Jeep Dodge, Inc., 955 N.Y.S.2d 357 (App. Div. 2012). In Harmon, the New York Appellate Division was dealing with a New York Lemon Law provision that required a specified notice of lemon history "shall be given to the prospective purchaser to read and keep prior to his [or her] signing a contract or making a deposit for the vehicle" 15 NYCRR 78.13[h][2]. Id. at 359 The Dealer gave the required notice to the consumer two days after execution of the sales agreement and finance contract. The Court reversed the grant of summary judgment to the dealer and granted summary judgment to the consumer for the violation of the lemon law disclosure requirement. Id. at 360. In the instant case, the notice was provided only to Mr. Bender some ten days or more after the signing of the purchase agreement. R-259-260; R-422-423.

In a similar context, this Court has upheld a grant of summary judgment to the consumer for a violation of an affirmative obligation to disclose. In Neal Pope, Inc. v. Garlington, 245 Ga. App. 49 (2000) the court dealt with the statutory obligation of the dealer to inform the consumer of pre-sale damage found in OCGA §40-1-5. Just as the Lemon Law OCGA §10-1-790 requires presale disclosure of the vehicle history, OCGA §40-1-5 requires presale notice of the damage history of the new car.

In Garlington, the Court affirmed Garlington’s motion for partial summary judgment on the FBPA claim because the undisputed facts established a violation of OCGA § 40-1-5, and thus a per se violation of the FBPA. “Contrary to Neal Pope’s arguments, given the facts of this case and the applicability of OCGA § 40-1-5, there is no factual issue on the FBPA claim regarding due diligence and reasonable reliance. “ Id. at 53.

The required Georgia form was not signed by plaintiff consumer Lindsey Bender. The form was not provided to the Benders at closing. Southtowne failed to inform the Benders of the mandatory 12 month 12,000 mile warranty applicable to the car because it was a manufacturer buyback as required by both Texas⁹ and Georgia¹⁰ law. Further, Southtowne did not disclose the brand on the title in violation of the Federal Odometer Act 49 U.S.C. § 32705(a) (2000); 49 C.F.R. § 580.5 (2000) and OCGA §11-2-312.

The Benders were never informed about the warranty available with the reacquired vehicle because the Southtowne did not want them to know it was a lemon vehicle. R-291. As stated in the National Consumer Law Center, Automobile Fraud (5th ed. 2015):

9 Texas Adm. Code §215.210(4).

10 OCGA § 10-1-790(a)(2).

A significant number of state lemon laundering laws require that the buyer of a lemon buyback be given a twelve-month or 12,000 mile warranty. In some states the warranty goes only to the non-conformities leading to the buyback, while in other states it goes to the whole vehicle. In order to hide the car's history, the selling dealer may conceal the existence of this warranty, and then compound the fraud by selling the consumer a duplicative service contract.

p. 193.

Further, it appears that Southtowne failed to send the Georgia form to the Governor's Offices of Consumer Protection 122-23-.01. Reacquired Vehicle Nonconformity Disclosure Form.

- (1) A manufacturer who reacquires a vehicle in this state, or resells, leases, transfers, or otherwise disposes of a reacquired vehicle in this state, shall notify the Administrator on a form prescribed by the Administrator.

The Regulations require that the Governor's Office of Consumer Protection be copied with the notices to the consumer and notice that the warranty required has been activated. This is designed to assure that the consumers ARE being put on notice. However, for the 86 Hyundai cars purchased by Southtowne at Manheim auctions during a three month period, including this car, none of the required notices were provided. R-657. This is again a per se violation of the Georgia FBPA. And for those affiants in the record R-570, R-580, R-583, there are similar facts substantiating a pattern or practice or improper late disclosures.

B. THE FAIR BUSINESS PRACTICES ACT

As stated by the Georgia Lemon Law, the failure to comply with the lemon law with respect to the resale of a repurchased motor vehicle is a violation of the Georgia Fair Business Practices Act.¹¹ O.C.G.A. § 10-1-390 et seq contains Georgia's Fair Business Practices Act. Unfair or deceptive acts or practices in the conduct of consumer transactions and consumer acts or practices in trade or commerce are declared unlawful. The purpose of Fair Business Practices Act is to protect consumers and legitimate business enterprises from unfair and deceptive practices in the conduct of any trade or commerce in part or in this State. It is the intent of the General Assembly of Georgia that such practices be stopped swiftly and that this statute be **liberally construed and applied** to promote the purposes and policies. O.C.G.A. § 10-1-391(a). (emphasis added) Neal Pope, Inc. v. Garlington, 245 Ga. App. 49 (2000) (summary judgment granted to Plaintiff on FBPA claims for violation of O.C.G.A. §40-1-5).

The trial court order is internally inconsistent in its application of the lemon law. Thus on page seven the trial court states: "The Court finds this disclosure in

¹¹ This is also arguably a violation of O.C.G.A. § 43-47-10 which prohibits used car dealers from deceptive or misleading conduct.

compliance with the purpose of the Georgia Lemon Law. O.C.G.A. § 10-1-790.” On page four the court stated: “Because the Plaintiffs’ vehicle was sold as used, the Georgia Lemon Law disclosures were not required.” As the statute requires disclosure to “prospective ...buyers” no post sale disclosure could ever comply. Appellants believe the Lemon Law clearly applied to the sale of this car and that the trial court’s flawed logic is exposed.

It is clear in this case that Southtowne failed to make statutorily required disclosures. It is further clear that Southtowne failed to make required disclosures and made representations that the car had specific existing qualities or conditions which the car did not have and which the Southtowne knew to be false. O.C.G.A. § 10-1-393(b)(7).

C. PER SE VIOLATION OF FAIR BUSINESS PRACTICES ACT

The Lemon Law specifically states that a failure to comply with the statute is a Fair Business Practices Act violation. OCGA § 10-1-790. Where the underlying consumer protection statute explicitly states that a violation is deemed to be an unfair trade practice this results in a per se violation. Neal Pope, Inc. v. Garlington, 245 Ga. App. 49 (2000)(presale disclosure of damage statute violation per se violation of FBPA without regard to reliance); *See, e.g., McClelland v. Hyundai*

Motor Company America, 851 F. Supp. 680 (E.D. Pa. 1994) (Pennsylvania's Lemon Law explicitly states that a violation of it is a UTPCPL violation). The *per se* cases are significant because many, if not all, of the claims arising under the primary, substantive statutes do not contain common law elements such as reliance and scienter. Instead, many impose affirmative disclosure duties on sellers, the violation of which constitute a *per se* violation of the FBPA. Engrafting additional elements for a private claim onto these statutes would, for all practical purposes, obliterate the ability to enforce the substantive statutes and result in either increased regulation of the subject industries, wide-ranging regulatory oversight, or numerous and redundant private rights of action under each of the substantive statutes. Accordingly, the FBPA should not be interpreted to codify the reliance elements of common law fraud where there is a *per se* violation.

D. WALKER v. SOUTHTOWNE IS INAPPOSITE

The trial court failed to do any real analysis of the Lemon Law application to this case or to apply the Walker v. Southtowne case to the Lemon Law and FBPA claims of this case. Appellees and the trial court relied extensively on the Walker case as to the Rescission Count. The Benders address Walker because the trial court found that Walker held that because the car sold to Bender was a used car, the lemon law resale requirements did not apply. R-738. This is nonsensical. All

manufacturer reacquired vehicles will be used cars when resold by the manufacturer. OCGA §10-1-782(21). OCGA §10-1-790 applies to reacquired vehicles which this car clearly was. Just after the portion of the Walker case cited by the trial court, Walker goes on to state:

Moreover, the regulations promulgated under the Lemon Law require disclosure of a branded title to the ultimate consumer, Ga. Comp. R. & Regs., 122-23-.02(1) which is defined under the regulations as “the first person who purchases or leases a reacquired vehicle for purposes other than resale.” Ga. Comp. R. & Regs., 122-23-.02(17).”

Clearly, the Benders are such first purchasers and the flawed rationale of Walker is inapplicable.

II. SUMMARY JUDGMENT ON THE BENDER’S FRAUD CLAIMS WAS ERROR WHERE THE DEALER NOT ONLY PROVIDED FALSE INFORMATION BUT ALSO WAS UNDER AN AFFIRMATIVE STATUTORY OBLIGATION TO PROVIDE FULL INFORMATION.

The trial court disregarded the statutory affirmative obligation of the dealer to inform the Benders of the Lemon history of the car in granting summary judgment. This is not a case of simple misrepresentation. This is a case of breach of an affirmative legal obligation to disclose. Therefore reliance issues are not applicable. Here, justifiable reliance may be that the consumer relied on the dealer’s failure to disclose what he was legally obligated to disclose. Basic, Inc. v. Levinson, 485 U.S. 224 (1988) (“There is, however, more than one way to prove a

causal connection. Indeed, we have previously dispensed with a requirement of positive proof of reliance where a **positive duty of disclosure** had been breached, concluding that the necessary nexus between the plaintiff's injury and the Southtowne's wrongful conduct had been established." Stated another way, causation may be demonstrated by presuming reliance upon the other party to disclose the allegedly concealed facts. 37 Am. Jur.3d, Fraud and Deceit § 228 (1964). This mode of proof has long been judicially recognized under the common law, which provides an "assumption of reliance" where the omitted facts are material or are required to be disclosed by statute, regulation or the circumstances of the transaction. See Adams v. Little Missouri Minerals, 143 N.W.2d 659, 683 (N.D. 1966) ("As the facts suppressed in the instant case were material, inducement and reliance are inferred from the circumstances.").

Nevertheless, Southtowne claims that the Benders were not entitled to rely on their statements about the quality or condition of the car. The Georgia and Texas Lemon laws require that disclosures be made and that they be made in a specific fashion. O.C.G.A. § 43-47-10 precludes used car dealers from making false representations. Benders are entitled to rely on the Southtownes following the prescribed legal requirements in the sale of the used buyback car and the statements being true. The dealer placed itself in a confidential relationship with the benders

when it agreed to act on their behalf in the transfer of title using the Georgia reassignment supplement form. R-472. There is no issue of diligence in this case.

Even assuming arguendo that the Benders are required to expect the dealer to break the law, the issue of diligence is a matter for jury determination. Raysoni v. Payless Auto Deals, LLC, 296 Ga. 156 (2014), 766 S.E.2d at 26. (Supreme Court addressed false statements made using a Carfax for support. Whether it was reasonable for one to rely upon a certain misrepresentation is generally a question for a jury, although in some cases, the answer may appear so clearly that the question can be decided by a court as a matter of law.); Campbell v. Beak, 256 Ga. App. 493 (2002) (Evidence was presented that Beak viewed the car himself and test drove it. Beak inquired three times as to its condition and history, and the jury obviously believed that Campbell lied in response. Although the vehicle was sold "as is," that language does not require a different result.) *See* Johnson v. GAPVT Motors, 292 Ga. App. 79 (2008)(Although the conclusion that Johnson should have realized the car was not an authentic Saleen was authorized by the evidence, this conclusion was not demanded by the evidence. Indeed, whether a buyer could ascertain the falsity of a seller's representations by proper diligence, or whether the buyer was as diligent as the circumstances warranted, is a matter for a jury to determine.); Catrett v. Landmark Dodge, 253 Ga. App. 639, 641 (1) (560 SE2d 101) (2002); Home v.

Claude Ray Ford Sales, 162 Ga. App. 329, 330 (2) (290 SE2d 497) (1982).

A. The Contract Language Does Not Protect Southtowne from Antecedent Fraud.

Southtowne cites to cases which appear to hold that language in a contract document may absolve the seller of its antecedent false representations. However, the 1974 case that should govern cases like this one that have the same operative facts, City Dodge, Inc. v. Gardner, 232 Ga. 766 (1974), the Court noted two lines of Georgia cases on this subject, one holding “that a disclaimer clause in the contract prevents the buyer from asserting reliance,”¹² and the other holding that when the contract is “void because of antecedent fraud, the disclaimer therein is void and offers no protection to the seller.”¹³ The Court rejected one argument that the contractual disclaimer should control by finding that the enactment of the U.C.C. *preserved* the right of a buyer “to rescind the contract and sue in tort for alleged fraud and deceit.”¹⁴ The Court then considered the two lines of authority and

¹² *Id.* at 769–770, citing Floyd v. Woods, 110 Ga. 850 (1900), and Holbrook v. Capital Automobile Co., 111 Ga. App. 601 (1965). Arguably, the Holbrook case cited by defendant as specifically overruled by this case.

¹³ *Id.* at 770, citing Brown v. Ragsdale Motor Co., 65 Ga. App. 727 (1941), Eastern Motor Co. v. Lavender, 69 Ga. App. 48 (1943), and Annot., Liability for representations and express warranties in connection with sale of used motor vehicle, 36 ALR3d 125, 151–172 (1971).

¹⁴ *Id.* at 767–769, relying upon the specific terms of what is now OCGA § 11-1-103

concluded:

We believe the better view is that the question of reliance on the alleged fraudulent misrepresentation in tort cases cannot be determined by the provisions of the contract sought to be rescinded but must be determined as a question of fact by the jury. It is inconsistent to apply a disclaimer provision of a contract in a tort action brought to determine whether the entire contract is invalid because of alleged prior fraud which induced the execution of the contract. If the contract is invalid because of the antecedent fraud, then the disclaimer provision therein is ineffectual since, in legal contemplation, there is no contract between the parties. ... We hold ... that such a tort action cannot be controlled by the terms of the contract itself.

Id. at 770. At least 27 cases follow City Dodge in recognizing that antecedent fraud about the quality of the goods would justify rescinding the contract, **despite disclaimers in the contract**. Under these cases, the contractual disclaimer does not defeat rescission as a matter of law; instead, the disclaimer is part of the overall evidence that the jury considers in determining whether the plaintiff justifiably relied on the antecedent fraudulent statement. City Dodge at 770.

This court should find that the affirmative statements attributed to Southtowne by Benders and the claim of the clean Carfax document created material facts for jury determination. R-180; R-248

(stating that unless displaced, common law principles supplement the U.C.C.) and § 11-2-721 (recognizing a rescission remedy for fraud).

III. THE TRIAL COURT ERRED IN FINDING THE BENDERS FAILED TO STATE A CLAIM FOR REVOCATION OF ACCEPTANCE UNDER O.C.G.A. ' 11-2-608

A buyer who has accepted goods may revoke his acceptance of goods where those goods have a nonconformity which substantially impair their value to him, and he either (a) accepted the goods on the reasonable assumption that their nonconformity would be cured and it has not been cured, or he (b) accepted the goods without discovery of the nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurance of conformity or repair.

In order to be effective, revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the grounds for revocation and before any substantia change in condition of the goods which is not caused by their own defects.

Revocation is not effective until the buyer notifies the seller of it.

O.C.G.A. § 11-2-608.

An as is clause does not prevent a claim for revocation of acceptance. Advanced Computer Sales v. Sizemore, 186 Ga. App. 10 (1988); Esquire Mobile Homes v. Arrendale, 182 Ga. App. 528, 529 (356 S.E.2d 250)(as is clause does not prevent revocation of acceptance).

Here, the plaintiff has established:

1) Non-conformities in the Vehicle substantially impairs its value to Benders, who did not know of these non-conformities prior to purchase and were **misled by Southtowne's salesman assurances and by failure to disclose as required by law;**

2) Although Benders revoked their acceptance of the vehicle by written letter on October 24, 2012, Southtowne has failed and refused to honor Benders' revocation of acceptance;

3) As a result of Southtowne's failure to honor Benders' revocation of acceptance, Benders sustained the losses and damages set forth above.

Comment 3 to the Uniform Commercial Code 2-608¹⁵ explains that assurances can rest on the circumstances of the contract and explicit language used at the time of delivery. Such assurance may induce the buyer to delay discovery. *See Reeb v. Daniels Lincoln-Mercury Co.*, 193 Ga. App. 817 (1989)(failed promise to repair provided extended time to revoke).

Issues of the reasonableness of time for revocation and use of the car are not

¹⁵ In order to determine the meaning and purpose behind the enactment of a Georgia Commercial Code provision that is taken verbatim from the UCC, courts look to the UCC Official Comments for assistance. *Gerber & Gerber, P.C. v. Regions Bank*, 266 Ga. App. 8,11 (2), n. 1 (596 SE2d 174) (2004).

susceptible of summary adjudication. Indeed, the Courts of Georgia have held that "issues such as whether an effective revocation of acceptance was made . . . are ordinarily matters for determination by the trier of fact, even where the buyer has continued to use nonconforming goods after an alleged revocation of acceptance."^[fn8] This is so because "[a]voidance of an absolute rule against continued use is counseled by the overriding requirement of reasonableness which permeates the [UCC]." Franklin v. Augusta Dodge, 287 Ga. App 818, 821 (2007). Cf. Trailmobile Div. of Pullman, Inc. v. Jones, 164 SE2d 346 (1968). See Mauk v. Pioneer Ford Mercury, 308 Ga. App. 864 (2011), This is not such a case that would justify summary adjudication.

WHEREFORE, Appellants pray that this Court reverse the erroneous order of the trial court and remand this matter for further proceedings.

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CERTIFICATE OF SERVICE

I, T. Michael Flinn, Counsel for the Plaintiff, in the within entitled matter, do hereby certify that I have this day served a copy of the foregoing **APPELLANTS' BRIEF** in the above matter by depositing in the United States mail a copy of same in a properly addressed envelope with adequate postage affixed thereon to assure delivery to:

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This _____ day of January, 2016.

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