

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM BERKELEY COUNTY

SC Court of Appeals

Master In Equity

The Honorable Dale E. Van Slambrook, Master In Equity

Appellate Case No.: 2022-001611

Steve Cumbee and Palmetto Kitchen & Remodeling, LLC.....Appellants,

v.

Bernard Milligan.....Respondent.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE ISSUE ON APPEAL

- I. BECAUSE THERE WAS NO EVIDENCE THAT THE APPELLANTS' ACTIONS HAD POTENTIAL FOR REPETITION OR THAT THEY WILLFULLY OR KNOWINGLY VIOLATED THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT (S.C. CODE §39-5-20), THE COURT ERRED IN GRANTING TREBLE DAMAGES AND ATTORNEY'S FEES.

STATEMENT OF THE CASE

The Appellants filed a lawsuit alleging a mechanic's lien foreclosure and breach of contract in the Berkeley County Court of Common Pleas on May 15, 2018, later assigned Case No. 2018-CP-08-889. On May 16, 2018, the Respondent filed a separate action against the Appellants alleging breach of contract, breach of implied and express warranties and violation of the South Carolina Unfair Trade Practices Act (hereinafter "SCUTPA"), among other claims which was later assigned Case No. 2018-CP-08-904.

As both cases arose out of the same occurrence and shared common parties and the same question of law, the Appellants filed a Motion to Consolidate the two above-referenced matters on July 27, 2018. An order was entered on March 28, 2019 granting the consolidation of the two cases into Civil Action No. 2018-CP-08-889. All issues were eventually tried in front of the Honorable Dale E. Van Slambrook on July 11, 2022.

This appeal results from Judge Van Slambrook's Order finding in favor of the Respondent and the Order denying Appellants' Motion for Reconsideration issued on October 21, 2022. Specifically, Appellants assert that Judge Van Slambrook erred granting Respondent treble damages and attorney's fees, as the Respondent failed to admit any evidence to establish that the Plaintiff's actions demonstrated potential for repetition or that he willfully or knowingly violated the SCUTPA (S.C. Code §39-5-20).

FACTS

On or about September 25, 2017, Appellants entered into a contract with the Respondent wherein the Appellants would perform repairs and restoration on the Respondent's property located at 306 A. Live Oak Drive, Moncks Corner, South Carolina in exchange for Thirty-Six Thousand Five Hundred Dollars (\$36,500.00). The Respondent made an initial down payment of Eighteen Thousand Two Hundred and Fifty Dollars (\$18,250.00) for the project to begin with the anticipation that draws would be needed as work progressed. Once the project began, the Respondent approached the Appellants requesting more work that was not included in the original contract. The parties agreed to a work change order that added the additional work at an additional charge of Twenty-Two Thousand Seven Hundred Dollars (\$22,700.00), resulting in a total obligation of the Respondent to pay Fifty-Nine Thousand Two Hundred Dollars (\$59,200.00).

In or about the end of November 2017, the Appellants approached the Respondent about another draw on the project as he had regularly done throughout the previous two (2) months. The Respondent refused to make this payment and as a result, the Appellants no longer had funds to continue with the project. Work ceased thereafter.

Among other allegations, the Respondent claims that Appellants violated the SCUTPA based on the theory that Appellants' work was incomplete and inferior. The Respondent further alleges that Appellants' actions were capable of repetition, and therefore have an impact on public interest. At trial, following the conclusion of Appellants' case in chief, the Respondent called six (6) witnesses: Respondent, David Johnson (home remodeling expert), James Warren Henson (home repair expert), Chad Kelly (Chief Building Official for the Town of Moncks Corner), Mary Cumbee (Appellant Cumbee's Wife) and Tony Wren (past client of Appellants).

The first four testified only to condition of the property and opinions regarding Appellants' work quality and Mary Cumbee briefly testified regarding her knowledge of Appellants' business. None of the witnesses were able to offer any details regarding past jobs or provide any testimony regarding repetitive conduct, nor did they present any evidence tending to show a willful or knowing violation of the SCUPTA. Through Tony Wren, the Respondent attempted to show illustrate that Appellants' conduct somehow affected the public interest by discussing a past construction job Mr. Wren thought Appellants performed. However, on cross-examination, Mr. Wren confirmed that he didn't even know if Appellants were the ones who performed the work with which he took issue.

ARGUMENT

I. BECAUSE THERE WAS NO EVIDENCE THAT THE APPELLANTS' ACTIONS HAD POTENTIAL FOR REPITITION OR THAT THEY WILLFULLY OR KNOWINGLY VIOLATED THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT (S.C. CODE § 39-5-20), THE COURT ERRED IN GRANTING TREBLE DAMAGES AND ATTORNEY'S FEES.

To prevail under the SCUTPA, a Plaintiff must show that: the Defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; the unfair or deceptive act affected the public interest, and the Plaintiff suffered monetary or property loss as a result of the unfair or deceptive act(s). *RFT Management Co., LLC v. Tinsely & Adams LLP*, 399 S.C. 322, at 337, 732 S.E.2d 166, at 174 (2012). "To be actionable under the Unfair Trade Practices Act, the unfair or deceptive act or practice in the conduct of trade or commerce must have an impact upon the public interest; the act is unavailable to redress a private wrong where the public interest is not affected." *Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, (S.C. App. 1986) 290 S.C. 475, 351 S.E.2d 347. "Unfair deceptive acts or practices in the conduct of trade and or commerce have an impact upon the public interest if the acts and or practices have

the potential for repetition.” *Id.* “South Carolina Unfair Trade Practices Act’s ‘public interest’ requirement may be satisfied if the alleged unfair or deceptive acts or practices have the potential for reputation; potential for repetition may be shown (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence, or (2) by showing the company’s procedures create a potential for repetition of the unfair and deceptive acts.” *Liberty Mut. Ins. Co. v. Employee Resource Management, Inc.*, 2001, 176 F.Supp.2d 510.

The SCUTPA allows for the recovery of actual damages. *Global Prot. Corp. v. Halbersberg*, 332 S.C. 149, 159, 503 S.E.2d 483, 488 (Ct.App.1998) (citing S.C. Code Ann. § 39-5-140(a) (1976)). “Actual damages under the UTPA include special or consequential damages that are a natural and proximate result of deceptive conduct.” *Id.* (citing *Taylor v. Medenica*, 324 S.C. 200, 479 S.E.2d 35 (1996)). Further, if the court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of Section 39-5-20, the court shall award three times the actual damages sustained and may provide such other relief as it deems necessary or proper. S.C. Code § 39-5-140(a).

In the instant matter, the Respondent failed to provide evidence proving that the alleged unfair and deceptive actions taken by the Appellants had any impact on public interest, that those actions were capable of repetition, or that the Appellants willfully or knowingly violated the SCUTPA. Specifically, Mr. Wren testified that he was a client of the Appellants in 2018. (R. p. __ line __). He then testified though, that he was unaware it if was the Appellants who had actually performed the work on the project at his home. (R. p. __ line __). He further testified that Appellant Cumbee “wasn’t at [his] house doing the work.” (R. p. __ line 17).

Even if the Respondent could prove through Mr. Wren that the Appellants were the ones who performed the construction job in 2018, the Respondent set forth no evidence to show that

the work was insufficient, inadequate, or otherwise parallel to Respondent's allegations. In fact, Mr. Wren testified that he stopped the job before it was able to be completed. (R. p. __ line __). Thus, even if Appellants had performed the work and even if it was unsatisfactory, they were unable to complete, fix, finalize, or otherwise rectify any deficiency.

CONCLUSION

Because there was no evidence to establish that the actions taken by the Appellants were capable of repetition or that Appellants willfully or knowingly violated the SCUTPA, the trial court erred in granting the Respondent treble damages and attorney's fees. For this reason, the undersigned respectfully submits that the order of the trial court be reversed.

Respectfully submitted,



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December 29, 2022.

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v.

Bernard Milligan.....Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Brief of the Appellants and Appellants' Designation of Matter to be included in the Record on Appeal on Bernard Milligan, by depositing a copy of it in the United States Mail, postage prepaid, on December 29, 2022, addressed to Respondents' Attorney of record, John B. Williams, Esquire, Williams and Hulst, LLC, 209 P.O. Box 1288, Moncks Corner, SC 29461.

December 29, 2022



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December 29, 2022

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SC Court of Appeals

Jenny Abbott Kitchings, Clerk
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Re: Steve Cumbee and Palmetto Kitchen & Remodeling, LLC, Appellant v.
Bernard Milligan, Respondent.
Appellate Case No. 2022-001611

Dear Ms. Kitchings:

Enclosed please find the Initial Brief of Appellant and Appellants' Designation of Matter. Additionally, I have enclosed the Proof of Service of same upon Counsel for the Respondent.

Thank you for your continued attention to this matter. Should you have any questions, please feel free to give me a call.

Respectfully,



Kindrea N. Wilson

KNW/vi

cc:

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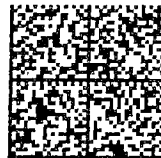
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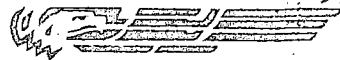
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