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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
Court of Common Pleas

Honorable Mark J. Hayes, Circuit Court Judge

Appellate Case Number 2022-001826

Carolina Real Estate Holdings, LLCAppellant,

v.

Brilin Electric, LLC and W & L Services, LLC Defendants,

of which, Brilin Electric, LLC is Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT

I. **RESPONDENT'S FAILURE TO PROVE ANY UTPA ACTUAL DAMAGES WAS ARGUED AND RULED ON BELOW, AND RESPONDENT FAILED TO OBJECT TO THE LOWER COURT'S CONSIDERATION OF THE ARGUMENT IN THE MOTION FOR JNOV AND HEARING.**

Respondent contends that Appellant cannot argue that the UTPA claim fails for lack of actual damages because it was not specifically argued in the motion for directed verdict.

However, the issue was fully argued in the Motion for JNOV and the hearing on the motion without objection from Respondent. Accordingly, Respondent waived the objection, and the issue was fully argued and decided below, providing for a full record for appellate review.

A. **Respondent Cannot Raise the Argument for the First Time on Appeal.**

The failure of the UTPA claim for lack of actual damages was fully argued in the motion for JNOV and at the hearing thereon without objection from Respondent. Therefore, Respondent waived the argument regarding Appellant's failure to make the specific argument in the motion for directed verdict. Respondent cannot make the argument for the first time on appeal when it should have been made to the trial court. Because Respondent failed to make the argument below and failed to object to the lower court's consideration of the arguments at the hearing on post-judgment motions, it cannot be raised on appeal. *See, Creech v. South Carolina Wildlife and Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997) (It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review). Imposing such a requirement "is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); *Herron v.*

Century BMW, 719 S.E.2d 640, 395 S.C. 461 (2011).

Appellant argued that Respondent failed to prove any UTPA damages in its Motion for JNOV. [Plaintiff's Post-Trial Motions pp. 11-12](R.p.__). However, Respondent failed to make an objection, and the issue of the failure to prove any actual damages was fully argued in the hearing on post-judgment motions. "Failure to object at trial waives the right to object on appeal." *Ball v. Canadian American Exp. Co., Inc.*, 442 S.E.2d 620, 314 S.C. 272 (Ct. App. 1993); *Webb v. CSX Transp., Inc.*, 364 S.C. 639, 655, 615 S.E.2d 440, 449 (2005) (failure to object to argument made at trial level precluded the defendant from raising the issue on appeal).

Respondent not only failed to object, but in fact argued the matter at the hearing in post-trial motions. [Hearing Tr. at pp. 8, 10, 14-16] (R.p.__). It is a litigant's duty to bring to the court's attention to any perceived error, and the failure to do so amounts to a waiver of the alleged error. *Parks v. Morris Homes Corp.*, 245 S.C. 461, 471, 141 S.E.2d 129, 134 (1965).

B. The Issue of the Failure to Prove Any UTPA Actual Damages was Fully Argued Below.

In any event, as set forth above, Appellant argued the issue of Respondent's failure to prove any actual damages for the UTPA claim, and the lower court ruled on the issue. The purpose of error preservation requirements is "to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *I'On*, 338 S.C. at 422, 526 S.E.2d at 724; *see also State v. Nelson*, 331 S.C. 1, 5 n. 6, 501 S.E.2d 716, 718 n. 6 (1998) ("the ultimate goal behind preservation of error rules is to insure that an issue raised on appeal has first been addressed to and ruled on by the trial court."). An initial ruling by the trial court allows a reviewing court to be able to evaluate whether the trial court committed error. *Staubes v. City of Folly Beach*, 529 S.E.2d 543, 339 S.C. 406 (2000).

In its Motion for JNOV, Appellant's arguments included, "In this case, Brilin [Respondent] did not present any evidence of any actual damages that it suffered as a result of any alleged unfair or deceptive act by CREH," and the motion continued to specify the evidentiary failures and set forth legal argument on the issue. [Plaintiff's Post-Trial Motions at pp. 11-12].

Throughout the hearing on post-trial motions, the issue of lack of actual damages was repeatedly argued and discussed among the trial judge and counsel for each party. [Hearing Tr. at pp. 8, 10, 14-16, 36-38, 41-42, 51-54, 73]. (R. pp. ____). The lower court ruled on the issue as the JNOV sought by Appellant was not granted in the Order on Post-Trial Motions.(R. p. ____).

Therefore, *every* requirement for this Court to have a meaningful review of the arguments and ruling on this issue below is present for this Court to evaluate, and the matter is preserved for appellate review. "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct.App.2006).

Respondent's contention is illogical and puts form over substance. In this case, Respondent failed to object to the issue being raised in the Motion for JNOV, and therefore the arguments were fully considered and ruled upon. This scenario is distinguishable from cases wherein an issue is not raised in a motion for directed verdict, and then is not argued on motion for JNOV because a timely objection was made. Here, the preservation requirements are satisfied, and this Court can review the arguments and ruling.

II. RESPONDENT'S UTPA CLAIM ALSO FAILS BECAUSE MULTIPLE ACTS BY THE SAME PARTY TO THE TRANSACTION DOES NOT SATISFY THE POTENTIAL FOR REPETITION REQUIREMENT.

As set forth in the initial briefs, our Supreme Court has identified two categories for a party to demonstrate that the “public interest” element of an UTPA claim has been satisfied by showing potential for repetition: “(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.” *Wright v. Craft*, 372 S.C. 1, 30, 640 S.E.2d 486, 502 (Ct. App. 2006).

Respondent concedes that it failed to prove that Appellant’s procedures created a potential for repetition. [Resp. Br. p. 19]. Instead, it argues that the higher estimates¹ that Appellant obtained on multiple occasions for various repairs under the Lease with Respondent are the “same kinds of actions that occurred in the past.” [Resp. Br. p. 19]. However, this attempt to use acts of the same party to the litigation to satisfy this requirement has been repeatedly rejected by the South Carolina courts, which hold that if the conduct involves only the parties to the litigation, then the “public interest” requirement is not met.

"An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the [UTPA]’s embrace.” *Turner v. Kellett*, 824 S.E.2d 466 (Ct. App. 2019) citing *Noack Enters., Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 479, 351 S.E.2d 347, 349–50 (Ct. App. 1986). In *Jefferies v. Phillips*, 316 S.C. 523, 451 S.E.2d 21, 23 (Ct. App. 1994), the court held that “conduct which only affects the parties to the transaction provides no basis for a UTPA claim.”

¹ Respondent disingenuously refers to the higher quotes as “fraudulent invoices” in Respondent’s brief.

A nearly identical argument was rejected in *T-Zone Health, Inc. v. SouthStar Capital, LLC*, No. 2:20-cv-02519-DCN (D.S.C. Sept. 1, 2021). “The court is not persuaded by T-Zone’s argument that by alleging that SouthStar failed to pay six separate invoices, T-Zone has sufficiently pled that SouthStar’s unfair conduct is capable of repetition. The court will not find public impact simply because T-Zone alleges multiple breaches of the same contractual agreement between it and SouthStar.” *Id.* at p.4. The court continued: “[H]ere, even though T-Zone alleges that SouthStar failed to remit payments due under multiple invoices, these allegations relate to the same breach of contract claim and do not show that SouthStar engaged in similar improper conduct with any party other than T-Zone.” *Id.* (citing *Prince Payne Enterprises, Inc. v. Tigua Enterprises, Inc.*, 2019 WL 5394197, at *6 (D.S.C. Oct. 22, 2019)) (because “[t]here [we]re no factual allegations that [the contractor] ha[d] engaged in improper conduct with any party other than [the subcontractor], the court found that the subcontractor failed to sufficiently allege an adverse impact on public interest); *Bessinger v. Food Lion, Inc.*, 305 F.Supp.2d 574, 581 (D.S.C. 2003) (“Conduct that affects only the parties to the transaction and not the public interest provides no basis for a SCUTPA claim”).

It is also noteworthy that the lower court’s jury charge, without objection, stated: “In addition, the defendant must prove that the unfair trade practice or act affected persons other than the parties to the transaction.” [Trial Tr. p. 637] (R.p. __).

III. RESPONDENT WAS NOT THE PREVAILING PARTY UNDER ANY REASONABLE ANALYSIS.

Here, the determination of the prevailing party is straightforward. The parties' contract is the Lease, which includes a provision providing that the prevailing party in a lawsuit *involving the provisions of the Lease* shall be entitled to recover its attorneys' fees. There was a breach of contract (Lease) claim by the Appellant, and a breach of contract (Lease) counterclaim by the Respondent. The jury determined the "prevailing party" on the competing breach of contract claims by awarding Appellant \$10,513.88 and by awarding Respondent \$4,424.75. It cannot be any more straightforward than that, and any holding or contention otherwise is simply saying that up is down or that black is white. Appellant was the prevailing party on the breach of contract claim, which was the main issue in the case. *Seckinger v. Vessel Excaliber*, 326 S.C. 382, 388, 483 S.E.2d 775, 777-78 (Ct. App. 1997).

The jury did (erroneously) award Respondent \$6,089.13 on its UTPA claim. Attorneys' fees also are available under the UTPA statute, specifically under S.C. Code §39-5-140(a), but only if a violation of UTPA has occurred. However, as set forth herein and in Appellant's Initial Brief (and herein), the UTPA award to Respondent must be reversed for failure to prove any actual damages and failure to satisfy the public interest requirement. Because the UTPA claim fails as a matter of law, the award of attorneys' fees under UTPA also must be reversed. *See*, S.C. Code §39-5-140(a) (requiring a violation of UTPA to award attorneys' fees under the Act).

For the reasons set forth in Appellant's Initial Brief, the award of attorneys' fees to Respondent should be reversed, and the case should be remanded with instructions to award Appellant its attorneys' fees.

IV. THE LOWER COURT COULD ONLY AWARD ATTORNEYS' FEES FOR THE SUCCESSFUL CLAIM.

If any attorneys' fees could be awarded to Respondent, the trial court was required to limit such attorneys' fees to only the successful claim, and not the unsuccessful claims. *Efco v. Renaissance On Charleston Harbor*, 370 S.C. 612, 635 S.E.2d 922 at fn 26 (Ct. App. 2006), citing 20 C.J.S. Costs § 126 (1990) ("Where a party is successful on some claims but not others, he may be considered a prevailing party, but is entitled to an award only for fees generated in connection with the successful claims"); see also, *Cedar Creek Props. v. Cantelou Assocs.*, 320 S.C. 483, 487, 465 S.E.2d 774, 776 (Ct. App. 1995) (stating the amount of attorney fees should be limited to those actions specifically involving the mechanic's lien, and not the other claims in the case).

Here, the lower court failed to reduce the attorney fee award based on the unsuccessful portions of Respondent's case. This was error.

As set forth in Appellant's Initial Brief, the lower court miscalculated the amount of the total verdict in the Form 4 Order, and this must be corrected. The Form 4 Order ending the case erroneously lists the judgment amount to be enrolled as \$80,700.59, which includes the amounts awarded to Respondent for the trebling of the UTPA award and attorneys' fees, but fails to include the amount awarded to Appellant by the jury verdict for \$10,513.88 and to Respondent for \$6,089.13 for the breach of contract claims. (R.p. __).

CONCLUSION

The trial court's errors require reversal of the lower court's order in favor of Respondent on the UTPA claim and its award of attorneys' fees, and a remand for an award of attorneys' fees to Appellant.

This the 24h day of August, 2023.

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PROOF OF SERVICE

I hereby certify that I served the Appellant’s Initial Reply Brief on the attorney for Respondent, Nathan A. White, Esq., of the firm Taylor English Duma, LLP, by email to: nwhite@taylorenghish.com, on August 24, 2023, simultaneously with filing it with the clerk of the court of appeals.

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