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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, LLC ……..….Appellant,

v.

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

of which, Brilin Electric, LLC is ……..……... Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant filed its Complaint on March 27, 2020 alleging that its tenant, Respondent, breached the parties' lease and other causes of action. (R.p.0020). The Complaint also asserted claims against W&L Services, LLC, which is not a party to this appeal. Respondent filed its Answer and Counterclaims on May 29, 2020, asserting claims that Appellant breached the parties' lease and violated the Unfair Trade Practices Act ("UTPA"). (R.p.0039). Appellant filed an Amended Complaint on June 25, 2020 (R.p.0062), and Respondent filed an Answer to Amended Complaint and Counterclaims on July 27, 2020. (R.p.0085). Appellant filed a Reply to Counterclaims on August 25, 2020. (R. p. 0108). On January 27, 2022, a consent order of dismissal was filed dismissing W&L Service, LLC from the case.

A jury trial was held on July 18 – 21, 2022 before the Hon. J. Mark Hayes, II in York, South Carolina. At the conclusion of the trial on July 21, 2022, the jury rendered a verdict as follows: (1) In favor of the Appellant on the breach of contract claim in the amount of $10,513.88; (2) for the Respondent on its breach of contract counterclaim in the amount of $4,424.75, and (3) in favor of the Respondent on its UTPA counterclaim in the amount of $6,089.13. The result was a net award to Appellant on the breach of contract claim in the amount of $6,089.13, which was the same amount awarded on the UTPA claim. (R. p. 0016).

Respondent filed post-trial motions and attorneys' fees affidavit on August 2, 2022. (R. p. 0120; 0142). Appellant filed post-trial motions and attorneys' fees affidavit on August 17, 2022. (R. p. 0126; 0147). A hearing was held on the post-trial motions on September 13, 2022. The Order on Post-Trial Motions was filed on December 9, 2022. (R. p. 0018-0019).

A Notice of Appeal was timely filed on December 30, 2022, and an Amended and Supplemental Notice of Appeal was filed on March 9, 2023 to include the jury verdict, which was

filed after the Notice of Appeal.

STATEMENT OF FACTS

The Parties' Lease.

On or about April 17, 2017, Carolina Real Estate Holdings, LLC ("Appellant"), as landlord, entered into a Lease Agreement (the "Lease") with Brilin Electric, LLC ("Respondent"), as tenant, for commercial property located at 2180 Carolina Place, Suite 111, Fort Mill, SC 29708. (R.p.0071-0084). The Lease provided for a three-year term, commencing on May 1, 2017, and ending on April 30, 2020.

The Lease includes numerous provisions relating to the relative responsibilities of the landlord and the tenant to indemnify the other relating to conduct that causes property damage (see paragraph 9(c)); the responsibilities of repairs by the landlord (see paragraph 10); the responsibilities of repairs by the tenant (see paragraphs 11(a) and 11(b)); and the financial responsibilities for alterations to the leased premises (see paragraph 12). These provisions of the Lease were the basis of the dispute, with each party arguing that the other breached the contract relating to damages, the repairs, and quotes and invoices related thereto.

In the early portion of Lease term, interactions and dealings between the landlord and tenant were, for the most part, normal and without incident. (R.p.0218-0219).[Trial Tr[1]. pp. 69-70] However, in 2019, the parties' relationship began to take a turn in a negative direction. (R. p. 0219-0220).[Trial Tr. pp. 70-71] Appellant became concerned about damages to the premises

[1] The word "transcript" will be abbreviated as "Tr." throughout.

caused by Respondent and problems at the premises, and had its counsel send a letter to Respondent on September 24, 2019 stating the concerns. (R.p.0894).[Pl.[2]Trial Ex. 3].

Following some e-mail correspondence between counsel regarding the issues addressed in the September 24 letter, the parties and their counsel met at the premises on October 31, 2019, to discuss the issues. The parties walked through the premises, discussed the issues, and reached an informal understanding to address the concerns (R.p.0255-0260).[Trial Tr. pp. 106-11].

The Filing of the Lawsuit and the Trial.

Unfortunately, not long after the meeting, the disputes regarding damage to the premises and responsibility for repairs thereto began again, and Appellant filed its lawsuit against Respondent on March 27, 2020. (R.p.0020). Respondent answered and filed Counterclaims, asserting claims for breach of contract a violation of the South Carolina Unfair Trade Practices Act ("UTPA"). (R.p.0039). Amended pleadings were filed by each party. (R.p.0062; 0085).

The case was called for jury trial on July 18, 2022 before the Hon. J. Mark Hayes, II. During Appellant's case-in-chief and cross-examination, it introduced photographs of the damages caused by Respondent, and introduced quotes and invoices relating to the cost of repairs of the damages. (R.p.0894-0953). [Pl. Trial Exs. 3-27]. Appellant called witnesses to testify about the Lease and damages to the premises caused by Respondent that constituted breaches of the Lease. The witnesses included the principal of Appellant (Brad Decker), an employee of Appellant (Wayne Schulte), a structural engineer that examined the premises (John Abernathy), and an expert witness general contractor who performed repairs on the premises (Mark Robinson).

[2] Exhibit will be abbreviated as "Ex."; Plaintiff will be abbreviated as "Pl." and Defendant will be abbreviated as "Def." throughout.

The Appellant's Case at Trial.

The Appellant's witnesses testified about the issues that arose with the Respondent's tenancy under the Lease, and focused on damages and repairs (or required repairs) to a demising wall that separates the warehouse portion of the leased premises from an adjoining warehouse portion of another tenant, and engineering expenses and rentals/supplies required to repair. (R.p. 0269-0277; 0934; 0935; 0952; 0953) [See e.g. Trial Tr. pp. 120-28; Pl. Trial Exs. 17, 18, 26, 27]. The demising wall was the primary element of damage for the Appellant's case. Appellant also presented evidence for damages to the asphalt outside of the leased premises, for damages to two overhead doors in the leased premises, for damages for alteration to a portion of the ductwork in the warehouse portion of the leased premises, for damage to bricks in the leased premises, and for carpet cleaning in the office portion of the leased premises. (R.p.0919; 0924; 0925; 0928; 0937) [E.g., Pl. Trial Exs. 6, 9, 10, 12, 20].

The Respondent's Case at Trial.

During Respondent's case-in-chief and cross-examination, it introduced photographs of the leased premises and quotes and invoices relating to the cost of repairs to the leased premises during its lease term. (R.p.0954-01002). [See Def. Trial Exs. 1-19]. The Respondent called witnesses who also testified about the tenancy issues during the Lease term. The witnesses included the principal of Respondent (Byron Russell), an employee of Respondent (Craig King), a person whose company was retained to perform brick repair to the premises (Bill Broadway), and a person whose company was retained to perform overhead door replacement/repair to the premises (Jim Hemphill).

The Higher Estimates Alleged to be Unfair Trade Practices.

Throughout its cross-examination and case-in-chief, Respondent challenged the repair damages sought by Appellant. As part of this effort, Respondent attempted to demonstrate that Appellant had presented quotations or invoices from its "preferred vendors" with higher prices[3] than the quotes/invoices that Respondent received for some of the repairs to the same category of damage. Specifically, the items involving higher estimates or quotes are as follows:

(1) Asphalt Quotes. In February 2020, Appellant obtained a quote from Countrywide Commercial to patch the parking lot in an area that was damaged by the use of Respondent's forklift. (R.p.0239). [Transcript p. 90; Pl. Trial Ex. 6]

Respondent introduced an exhibit that is a previous Countrywide Commercial quote to Appellant dated April 2019 that reflected work when Appellant had had the entire parking lot repaved in April 2019. (R.p.0966) [Def. Trial Ex. 7]. In the April 2019 quote, the thickness of the asphalt was 2" thick, whereas in the quote for the patch in February 2020, the thickness of the asphalt was to be 3" thick.

The Appellant paid for the work on the asphalt patch reflected in the 2020 quote. Respondent did not pay anything for the Proposal or work referenced therein.

(2) Brick Work Quotes**.** Appellant obtained an "Estimate" from the company B. Philemon, LLC, dated February 20, 2020, to repair and replace certain brickwork above an overhead door in the leased premises damaged by Respondent. The total amount of the invoice was $1,600. (R.p.0924; 0245). [Pl. Ex. 9; Trial Tr. p. 96]. Respondent did not pay anything toward this invoice.

Respondent introduced an invoice dated May 15, 2020 from McGee Brothers Company, Inc. to repair broken brick. The total of the invoice was $280. (R.p.0962). [Def. Ex. 4]. Respondent paid the $280 invoice to repair the damage, which was refunded in the award of the jury verdict. Respondent did not pay anything toward the Appellant's higher estimate.

(3) Garage Door Repair Quotes. Appellant introduced a Quotation from Overhead Door Company of Charlotte dated March 5, 2020 to replace two damaged overhead doors in the premises. The total amount of the quotation is $7,913.51. (R.p.0925). [Pl. Ex. 10]. This work was not performed. Respondent did not pay anything toward this Quotation.

Respondent introduced an invoice from Southern Company to replace two damaged overhead doors in the premises. The total amount of the invoice is $4,943.00. The work was performed and Respondent paid the invoice to repair the damage it caused, as required by the Lease. (R.p.0954). [Def. Ex. 1].

(4) Ductwork Repair Quote. Appellant introduced a Quote from MTB Mechanical dated December 28, 2018 (and corresponding Invoice from Appellant to Respondent dated May 2, 2018) to repair damaged ductwork in the premises. The total amount of the Quote is $2,625.00. (R.p.0928; 0259-0263). [Pl. Ex. 12; Trial Tr. p. 110-114]. On cross-examination, the witness for

[3] Or, in the case of the asphalt, was a higher quality than previously existed.

Appellant (Mr. Brad Decker) was asked about the fact that the date on the invoice from Appellant to Respondent was several months before the Quotation to Appellant. (R.p.0358-0361) [Trial Tr. pp.209-12]. Mr. Decker explained that Appellant asked MTB to revise or confirm the quote that had been previously provided to Appellant due to the passage of time since the quote was provided. (R.p.0362) [Trial Tr. p. 213].

This work has not yet been performed, but Mr. Decker testified that it will be done and paid for by Appellant. (R.p.0363-0364) [Transcript pp. 214-15]. Respondent did not pay anything toward this Quotation.

Respondent did not get a quote to repair the ductwork or pay an invoice to have it repaired/repositioned. Respondent's manager (Byron Russell) testified that the ductwork that was in issue was fixed (presumably by employees of Respondent). (R.p.0650). [Trial Tr. p. 501].

(5) Drywall/Paint Estimate. A document was produced by Appellant during discovery that Respondent contends was a "fraudulent invoice." Appellant did not introduce the Estimate or seek recovery for the amount set forth in the Estimate. Respondent introduced Defendant's Exhibit 9, which is an "Estimate" dated March 13, 2020 from Decker Inspections and Contracting Services, Inc. for "Repair of drywall in warehouse area" and "Painting of office area" for a total amount of $2,700. (R. p. 0971). [Def. Trial Ex. 9]. Appellant did not seek to recover the amount on the Estimate from the Respondent. (R.p.0371). [Trial Tr. p. 222]. Respondent did not pay anything with respect to this Estimate.

These five items (the Asphalt Quotes, the Brickwork Quotes, the Garage Door Repair Quotes, the Ductwork Repair Quote, and the Drywall/Paint Estimate) are collectively referred to herein as the "Higher Estimates." The Higher Estimates[4] constitute the evidence that the Respondent argued supported Respondent's claim of violation of the Unfair Trade Practices Act. (R.p.0695; 0773; 0105) [Trial Tr. pp. 546, 624; Counterclaim ¶¶ 106-107]. Significantly, *Respondent did not actually pay any money at all with respect to the Higher Estimates.*

Closing Arguments.

At the conclusion of Respondent's case-in-chief, but before the parties presented closing arguments to the jury, the parties stipulated that Respondent did not receive its $3,000.00 security deposit back from Appellant. (R.p.0712; 0880) [Trial Tr. p. 563; Pl. Trial Ex. 2 (Lease ¶ 5)].

[4] Of course, Appellant presented testimony explaining the differences in the quote amounts and the other issues, and showed that nothing nefarious was involved. Because the explanations are not material to the appeal, those explanations are not detailed herein.

At closing, Appellant specified the damages it sought for its breach of contract claim. (R.p.0741-0745) [Trial Tr. pp. 592-96]. For the repairs to the demising wall, Appellant sought to recover $6,121.00 for the repairs performed by Benchmark Flooring (R.p.0935) [Pl. Trial Ex. 18], and $1,757.50 to Integrity Consulting for the engineering work for the damaged wall, (R.p.0934) [Pl. Trial Ex. 17] and $1,861.13 for supplies related to the wall repair (R.p.0952) [Pl. Trial Ex. 26], and $723.37 for the scissor lift required for the wall repair (R.p.0953) [Pl. Trial Ex. 27].

For the patch to the damaged asphalt, Appellant sought $5,950.00 (R.p.0919) [Pl. Trial Ex. 6]. It sought to recover $1,600.00 for the brick work (R.p.0924) [Pl. Trial Ex. 9]. And Appellant sought to recover $2,625.00 for the repair to the ductwork. (R.p.0928) [Pl. Trial Ex. 12].

The total amount the Appellant asked in closing argument for the jury to award for the breach of contract claim was $20,638.

Respondent's closing argument asked the jury to rule in its favor and award nothing on Appellant's breach of contract claim. Respondent asked the jury to rule in its favor on Respondent's breach of contract counterclaim in the amount of $3,000.00 for its security deposit (which was stipulated) (R.p.0712) [Trial Tr. p. 563], $1,144.75 for the rental of a "lull" for the time when the parking lot was closed for repaving (R.p.0630) [Trial Tr. p. 481], plus $280.00 for the refund of the amount paid for brick repairs. (R.p.0630) [Trial Tr. p. 481]. The total sought by Respondent for its breach of contract counterclaim was $4,424.75. With respect to its UTPA counterclaim, Respondent asked the jury to award one dollar ($1) in damages. (R.p.0772-0773) [Trial Tr. p.623-24]. The $1 was not for any actual damage, but was "to send a message." (R.p.0073) [Trial Tr. p. 624].

During its closing argument, Respondent's counsel referred to this case as a "bad movie," and referred to Mr. Decker as "Dr. Evil" and Appellant's property manager, Wayne Schulte, as a henchman. (R.p.0750). [Trial Tr. at p. 601].

The Jury Verdict.

Part I of the verdict form included a question as to the Appellant's claim of breach of contract (the Lease). The jury found for the Appellant and awarded $10,513.88. Part II of the verdict form included a question as to Respondent's counterclaim of breach of contract (the Lease). The jury found for the Respondent and awarded $4,424.75. Part III of the verdict form included a question as to Respondent's counterclaim for a violation of the Unfair Trade Practices Act. The jury found for the Respondent and awarded $6,089.13. (R.p.0018-0019).

Post-Trial Motions and Order.

Both parties filed post trial motions. Appellant filed (1) a Motion for Attorneys' Fees and Costs, contending that it was the prevailing party pursuant to paragraph 28(g) of the Lease (R.p.0132); (2) a Motion for JNOV on the UTPA claim (R.p.0135); and (3) a Motion for Remittitur on the UTPA claim[5] to reduce the award to either $0 or $1 (R.p.0138).

Respondent filed a Motion for Treble Damages and Attorney's Fees seeking to treble the damages awarded by the jury on the UTPA claim. The Motion also sought to recover attorney's fees under UTPA and as the prevailing party under the Lease. (R.p.0120).

The Order on Post-Trial Motions ordered the jury award in favor of Respondent on the UTPA claim be trebled to $18,267.99, and held that Respondent was the "prevailing party" under

[5] Appellant also filed a motion for remittitur on the breach of contract claim for $280, but that has been abandoned on appeal.

UTPA and pursuant to section 28(g) of the Lease, and awarded $58,879.55 in attorneys' fees and $3,553.05 in costs. (R.p.0008-0010) [Order on Post-trial Motions pp. 2-3]. The court held that the "same attorney's fees analysis accomplished herein related to the Lease Agreement can also apply to the award of attorneys fees for UTPA." (R.p.0010) [Order on Post-Trial Motions p. 3].

The total amount of the award in the Order on Post-Trial Motions to the Respondent after trebling and attorneys' fees is $80,700.59. (R.p.0011). 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 the jury verdict for Respondent for $6,089.13 for the breach of contract counterclaim. (R.p.0008-0011; 0018-0019).

STANDARD OF REVIEW

When reviewing the denial of a motion for directed verdict or JNOV, this Court applies the same standard as the trial court. *Elam v. S.C. Dep't of Transp*., 361 S.C. 9, 602 S.E.2d 772 (2004). The Court is required to view the evidence and inferences that reasonably can be drawn therefrom in the light most favorable to the non-moving party. *Sabb v. S.C. State Univ*., 350 S.C. 416, 567 S.E.2d 231 (2002). An appellate court will reverse the lower court's ruling when there is no evidence to support the ruling or when the ruling is controlled by an error of law. *Steinke v. S.C. Dep't of Labor, Licensing and Regulation,* 336 S.C. 373, 520 S.E.2d 142 (1999). *Gadson v. Eco Services of South Carolina, Inc.*, 374 S.C. 171, 648 S.E. 2d 585 (2007).

The determination of who is a prevailing party for the purposes of an award of costs is committed to the sound discretion of the trial court. An abuse of discretion occurs either when a court is controlled by some error of law, or where the order is based upon findings of fact lacking

evidentiary support. *Efco v. Renaissance on Charleston Harbor*, 635 S.E.2d 922, 370 S.C. 612 (Ct. App. 2006).

ARGUMENT

At the trial, the Respondent failed to satisfy several required elements of an Unfair Trade Practices Act ("UTPA") claim. Specifically, it failed to prove any actual damages, which is fatal to an UTPA claim. Respondent failed to prove an impact to the public interest and produced no evidence of capability of repetition. Thus, the lower court erred in denying Appellant's Motion for Judgment JNOV on the UTPA claim, and in trebling the improper verdict amount, and awarding attorney's fees to Respondent under the UTPA statute.

Further, the lower court erred by failing to award Appellant its attorney's fees pursuant to the "prevailing party" provision in the Lease. Under South Carolina law and any logical analysis, Appellant was the prevailing party under the Lease claims and counterclaims. The jury verdict resulted in a net award to the Appellant on the parties' competing claims under the Lease. The lower court erred in failing to award attorneys' fees to Appellant pursuant to the mandatory terms of the "prevailing party" provision of the Lease.

I. THE LOWER COURT ERRED BY DENYING APPELLANT'S MOTION FOR JNOV ON THE UTPA CLAIM BECAUSE RESPONDENT FAILED TO PROVE ANY DAMAGES.

A party must prove the following elements to recover on an UTPA claim under S.C. Code §§39-5-10 *et seq*: "(1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected [the] public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s)." *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 638, 743 S.E.2d 808, 816 (2013).

Proof of actual damages is an element of an UTPA claim, and in the absence of proof of actual damages from the requisite unfair or deceptive conduct, the UTPA claim must fail. S.C. Code section 39-5-140(a) provides in relevant part: "Any person *who suffers any ascertainable loss of money or property* [as a result of an unfair or deceptive method] . . . may bring an action . . . to recover actual damages." (emphasis added). The courts have enforced the plain language of the statute in this regard, and an UTPA claim fails unless actual damages are proved from the unfair acts.

In this case, Respondent argued that the Higher Quotes constitute the unfair or deceptive acts. (R.p.0695-0773) [Trial Tr. pp. 546, 624]. However, the undisputed facts are that Respondent did not actually pay *any* of the Higher Quotes, and therefore suffered *no* actual damages from them. Respondent in closing argument essentially conceded this by stating regarding the UTPA claim: "We don't want any money for it. We want that one dollar. We want you to send a message." (R.p.0773) [Trial Tr. p. 624]. The concession is clear, although though an unproven nominal award of even one dollar is not appropriate under UTPA. *See*, S.C. Code section 39-5-140(a) (requiring an "ascertainable loss of money or property").

In *Wogan v. Kunze*, 366 S.C. 583, 623 S.E.2d 107 (Ct. App. 2005), the plaintiff alleged the defendant physician provided an inaccurate and deceptive bill for services to her husband, which constituted a violation of UTPA. But the Court held that summary judgment was appropriate because there was no evidence that plaintiff paid the bill, and UTPA requires an "ascertainable loss of money or property." *Id*. at 121.

In *Fields v. Yarborough Ford, Inc*., 307 S.C. 207, 414 S.E.2d 164 (1992), the lower court ruled in favor of the plaintiffs on their UTPA claim. On appeal, the Supreme Court held: "In sum, we hold that the [plaintiffs] have failed to prove that they suffered any actual damages as a

result of the deceptive act. Accordingly, the trial judge erred in refusing to grant [defendant]'s motion for j.n.o.v." *Id*. at 167. *See also, Schnellmann v. Roettger*, 368 S.C. 17, 627 S.E.2d 742 (Ct. App. 2006), *aff'd* 373 S.C. 379, 645 S.E. 2d 239 (2007) (summary judgment proper where plaintiff suffered no pecuniary loss); *Collins Holding Corp. v. Defibaugh*, 373 S.C. 446, 646 S.E.2d 147 (Ct. App. 2007) ("UTPA only creates causes of action in those suffering loss as a result of deceptive act"); *Charleston Lumber Co. v. Miller Housing Corp.*, 318 S.C.471, 458 S.E.2d 431, 438 (Ct. App. 1995) ("Although the jury found the actions of Charleston Lumber constituted an unfair or deceptive act or practice in the conduct of trade or commerce, it further found the Millers suffered no actual damages as a proximate result of the unfair act. Therefore, adhering to the plain language of the statute, the Millers failed to prove the elements necessary to be awarded attorney fees").

In this case, it is undisputed that none of the Higher Quotes was actually paid by Respondent. Thus, Respondent failed to prove any damages[6] related to an UTPA violation. In these circumstances, Respondent failed to prove an element of the UTPA claim, and it must be reversed, and the trebling and award of attorneys' fees under UTPA must be reversed.

II. THE LOWER COURT ERRED BY DENYING APPELLANT'S MOTION FOR JNOV ON THE UTPA CLAIM BECAUSE RESPONDENT FAILED TO PROVE AN IMPACT ON THE PUBLIC INTEREST.

[6] The amount of damages awarded by the jury for the UTPA claim ($6,089.13) was completely unrelated to any alleged unfair or deceptive act of Appellant and was apparently conjured up to equal the net amount that Appellant was awarded on the breach of contract claim. It is error for a jury to "make up" damages in this manner. *See, Hutson v. Cummins Carolinas, Inc*., 280 S.C. 552, 314 S.E.2d 19 (1984) (jury verdict set aside and case remanded on damages when amount of jury award was not based on evidence). An explanation for the jury's strange UTPA verdict is the inflammatory and personal remarks during closing argument referring to Mr. Decker as "Dr. Evil" and Mr. Schulte as a "henchman." (R.p.0750) [Trial Tr. at p. 601]. These remarks are the basis for a new trial, even in the absence of a contemporaneous objection. *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 442 S.E.2d 611, 615 (1994) (ordering new trial based on inflammatory remarks during closing argument even though no contemporaneous objection was made).

Another element of an UTPA claim is that it impacts the public interest. "To be actionable under the UTPA, therefore, 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 not available to redress a private wrong where the public interest is unaffected." *Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 351 S.E.2d 347, 290 S.C. 475 (Ct. App. 1986).

Our Supreme Court has explained that the public interest requirement can be shown by proving that the unfair act has the potential for repetition. In general, potential for repetition can be proven by plaintiffs in two ways: (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. *Daisy Outdoor Advertising Co., Inc. v. Abbott*, 322 S.C. 489, 473 S.E.2d 47 (1996).

Here, Respondent produced *no evidence* of the same kind of actions by Appellant in the past, and it produced *no evidence* of Appellant's procedures. Thus, the Respondent's UTPA claim failed, and the lower court should have granted the Appellant's motion for directed verdict and motion for JNOV.

Again, the alleged unfair or deceptive conduct of Appellant was the Higher Quotes for repairs under the parties' Lease. Such conduct does not impact the public interest. *See, Columbia East Associates v. Bi-Lo,* Inc., 299 S.C. 515, 386 S.E. 2d 259 (Ct. App. 1989) (even though the conduct of Bi-Lo suppressed competition, the commercial lease dispute did not have an impact on the public interest and "the Act is not available to redress a private wrong where the public interest is unaffected"); *Schnellmann*, 368 S.C. 17, 627 S.E.2d 742, at 746 (summary judgment was appropriate on UTPA claim where real estate agent misstated square footage of home, but no evidence was presented that the agent had misstated square footage in the past or of any procedures

of the real estate agent); *Turner v. Kellett*, 824 S.E.2d 466 (Ct. App. 2019) (despite very nefarious conduct by the defendant, plaintiff could not show the same kind of actions had occurred in the past or that company's procedures create a potential for repetition, and therefore failed to meet the public interest prong of the Act").

In a case with similar facts to the allegations here, this Court held the public interest was not impacted. In *Jeffries v. Phillips*, 316 S.C. 523, 451 S.E.2d 21 (Ct. App. 1994), the lower court ruled in favor of a plaintiff in finding an UTPA violation based on the padding of a bill for termite repair work. The court of appeals reversed because there was no evidence that the conduct affected the public interest. *Id.* The Court reasoned:

> This adverse effect on the public must be proved by specific facts. . . 'Without proof of specific facts disclosing that . . . members of the public were adversely affected by [the unfair conduct] or that they were likely to be, all we are left with is a 'speculative [claim] of adverse public impact' and that will not suffice for a recovery under the UTPA . . . Without this showing, [the] conduct cannot be said to affect anyone other than the parties to this controversy, in which case the conduct falls outside the scope of the UTPA.

Id. 451 S.E.2d at 23. The court reversed because there was no evidence of prior similar acts to establish or infer the conduct had potential for repetition. *Id.*

It is not sufficient for Respondent to argue that the action is capable of repetition because Appellant is still a commercial landlord with current tenants and possible future tenants. This argument has been rejected by our appellate courts. In *Jefferies*, the Court stated: "In the course of human endeavor, every action has some potential for repetition. The mere proof that the actor is still alive and engaged in the same business is not sufficient to establish this element." 451 S.E.2d at 24. *See also, Sinclair & Associates of Greenville, LLC v. Crescom Bank*, No. 2:16-CV-00465-DCN, 2016 WL 6804326 at *3-7 (D.S.C. Nov. 17 2016) (merely alleging the defendant's continued business does indicate similar actions happened in the past and is unduly speculative).

It also is not sufficient for Respondent to assert that unfair acts were repeated in the landlord-tenant relationship between Appellant and Respondent, i.e. multiple Higher Estimates. "An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the act's embrace and we so hold." *Noack Enterprises, Inc*, 351 S.E.2d at 350, 290 S.C. 475 (Ct. App. 1986); *See also, Jefferies*, 316 S.C. 523, 451 S.E.2d 21 at 23 (conduct that does not affect anyone other than the parties falls outside the scope of UTPA).[7]

Because the Respondent failed to prove specific facts showing impact to the public interest or capability of repetition, the UTPA claim fails. Therefore, the verdict must be reversed and the trebling and award of attorneys' fees under UTPA must be reversed.

III. THE LOWER COURT ERRED BY AWARDING ATTORNEYS' FEES TO RESPONDENT INSTEAD OF TO APPELLANT BECAUSE APPELLANT WAS THE PREVAILING PARTY UNDER THE LEASE.

Paragraph 28(g) of the parties' Lease reads: "If legal proceedings are instituted to enforce any provision of this Lease, the prevailing party in the proceeding shall be entitled to recover from the non-prevailing party reasonable attorney's fees and costs incurred in connection with the proceeding." Importantly, this contractual provision specifically ties the prevailing party to the proceeding to enforce the provisions of the Lease, which include the repair provisions.

The jury awarded the Appellant $10,513.88 on its breach of contract claim. The jury awarded the Respondent $4,424.75 on its breach of contract counterclaim.[8] The jury's verdicts of a net award to Appellant of $6,089.13 plainly reveal that the prevailing party in the proceeding to

[7] Notably, the lower court's jury charge, without objection, stated this requirement: "In addition, the defendant must prove that the unfair trade practice or act affected persons other than the parties to the transaction." (R.p.0786) [Trial Tr. p. 637].

[8] The award to Respondent included the $3,000 deposit, which is not a proper element of damage since Appellant was permitted to apply the deposit to damage expenses, pursuant to paragraph 5 of the Lease. The deposit would be credited to the damages, so it essentially is a wash.

enforce the provisions of the Lease is the Appellant. This is a plain-language interpretation of paragraph 28(g) of the Lease.

Despite this, the lower court awarded attorneys' fees to Respondent. (R.p.0011). The lower court held that the jury "did not want the Plaintiff [Appellant] to leave the courtroom with an award of money" because the jury separately awarded Respondent an identical total award when the fabricated amount ($6,089.13) awarded for the UTPA claim is considered.[9] (R.p.0009) [Order on Post-Trial Motions p.2]. The lower court mysteriously concluded that even though the jury awarded an equal amount to each side, in total, that somehow the jury "accepted the Defendant's factual theory of the case" and "the Defendant prevailed in convincing the jury of the truth of the matters it asserted to them." (R.p.0009-0010) [Order on Post-Trial Motions p.2-3]. These conclusions are puzzling and incorrect. The faulty conclusions are based on the inaccurate statement that "the jury gave the Defendant a sum that was more than what was argued in the Defendant's closing." (R.p.0009) [Order on Post-Trial Motions p.2]. In reality, the Respondent in closing asked the jury to find for the Respondent and award nothing to the Appellant on its contract claim (R.p.0771) [Trial Tr. p. 622]. Instead, the jury found for the Appellant and awarded it $10,513.88 on that claim. Thus, the actual net recovery for Respondent was *less* than what it asked for in closing.

The lower court's holding that Respondent was the prevailing party was error because (i) the UTPA award is invalid, must be dismissed, and should not be considered; and (ii) the

[9] By this reasoning, the jury also did not want Respondent to leave the courtroom with an award of money, and certainly did not want or expect a trebling of its fabricated UTPA award plus an award of Respondent's attorneys' fees. The attempt to discern the wants of this jury based on its awards is baseless speculation.

evaluation of the prevailing party pursuant to the Lease provision should focus on the respective breach of contract awards for enforcing the Lease provisions.

The South Carolina Supreme Court has defined a "prevailing party" as '[t]he one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered.'" *Seckinger v. Vessel Excaliber*, 326 S.C. 382, 388, 483 S.E.2d 775, 777-78 (Ct. App. 1997) (quoting *Heath v. County of Aiken*, 302 S.C. 178, 182-83, 394 S.E.2d 709, 711 (1990)). A party does not need to be successful as to all issues in order to be found to be a prevailing party. *Id.*

In this case, the main issue involved the allegations of each party that the other party breached provisions of the Lease. In its verdict, the jury held that Respondent breached the Lease, and awarded Appellant $10,513.88 in actual damages, and it held that Appellant breached the Lease, and awarded Respondent $4,424.75 in actual damages. A comparison of the respective awards relating to the main issue reveals that the prevailing party is Appellant.

This is true even though the jury did not award Appellant the full amount of actual damages that it requested during its closing argument because the definition of "prevailing party" recited in *Seckinger* expressly does not require a party to prevail "to the extent of the original contention" in order to be deemed the prevailing party in the action. *Id.* Even though other claims asserted by Appellant were dismissed on directed verdict, the court in *Seckinger* also made clear that "a party need not be successful as to all issues in order to be found to be a prevailing party." *Id.*

In fact, because the language of the prevailing party provision in the Lease specifically refers to the prevailing party regarding enforcement of provisions of the Lease, the competing breach of contract claims are the only relevant inquiry for the award of attorneys' fees pursuant to

that provision. Consequently, Appellant was awarded a net recovery with respect to the enforcement of the Lease, and therefore is entitled to an award of its attorney's fees and costs pursuant to Paragraph 28(g) of the Lease. This Court should award Appellant its attorneys' fees as set forth in the Appellant's affidavit of attorneys' fees and itemized time sheets submitted below (R.p.0147-0148), or remand with instructions to the lower court to award Appellant a reasonable amount of fees and costs.

Alternatively, even if the fabricated $6,089.13 awarded by the jury for the UTPA claim is considered, then neither party was the prevailing party, and the attorneys' fees award should be reversed and neither party awarded fees. *Cf.* S.C. Code Ann. § 29-5-10(b) (under mechanic's lien scheme for awarding attorneys' fees, if the difference between both offers and the verdict is equal, neither party is considered to be the prevailing party).

IV. THE LOWER COURT ERRED IN ITS DETERMINATION OF THE AMOUNT OF ATTORNEYS' FEES IT AWARDED TO RESPONDENT.

In the alternative, if this court affirms the lower court's holding that the Respondent is entitled to attorney's fees, the lower court erred in its determination of the amount thereof. If the award of attorneys' fees to Respondent is upheld, and it is based on the UTPA claim and the attorneys' fees provision in the UTPA statute,[10] then the amount of attorneys' fees awarded should have been limited to those fees attributable to time spent prosecuting the UTPA claim. *See, Horton v. Jasper County School Dist.*, 423 S.C. 325, 815 S.E.2d 442, 444 (2018) (one of the factors that a court must consider in an award of attorneys' fees is the "beneficial results obtained"); *cf., Ducharme v. Madewell Concrete, LLC,* C.A. No. 6:20-1620-HMH, at p. 8 (D.S.C. 2021)

[10] As set forth above, however, because the UTPA claim fails, attorneys' fees pursuant to that statute cannot be awarded.

(attorney's fees reduced for time spent on unsuccessful claims). Similarly, if the award was based on the prevailing-party provision in the Lease, then the fees should exclude the time spent on the invalid UTPA claim. *Id.*

The lower court failed to undertake this analysis. It should have scrutinized the time sheets submitted by counsel and determined which time entries were dedicated to the successful claim and which were dedicated to unsuccessful claims. "We have previously held that a court should consider all six factors in making its decision . . . [and] the trial court should make specific findings of fact on the record for each of these factors." *Horton,* 423 S.C. 325, 815 S.E.2d 442, 444-45.

Indeed, the trial judge expressly recognized this requirement at the hearing on post-trial motions. "Then doesn't the attorney's fees part have to relate to the damages that were awarded in regards to the Unfair Trade Practices claim and not related to the overall litigation itself, but just relates to the unfair trade, that parts of the litigation that are related to the unfair trade practices?" (R.p.0817-0819). [Hearing Tr. pp. 18-19]. The trial judge later repeated the question and noted, "And so, based upon the information that you [Respondent's counsel] submitted to me thus far, I cannot determine what amount of your bill that you would contend is related to an unfair trade practices claim versus what is just the broader contract claim." (R.p.0818) [Hearing Tr. p. 21]. Although the trial judge noted the requirements, he failed to undertake the analysis, make the required specific findings, and reduce the award to account for only the successful claims.

Respondent argued that the attorney time spent on the contract claims as opposed to the UTPA claims do not need to be separated because the UTPA claim is "intertwined" with the contract claims. (R.p.0818-0819) [Hearing Tr. p. 21 and p. 22]. However, under this theory, Respondent failed to prove unfair or deceptive acts or practices because breaches of contract are not unfair acts for purposes of UTPA. If the Higher Estimates are really breaches of contract by

the Appellant, then there were no unfair or deceptive acts. South Carolina courts have repeatedly held that allegations of breach of contract cannot support an UTPA claim. *See, Columbia East Associates v. Bi-Lo*, Inc., 299 S.C. 515, 386 S.E. 2d 259 (Ct. App. 1989) ("a deliberate or intentional breach of a valid contract, without more, does not constitute a violation of the Unfair Trade Practices Act"). *S.C. Nat'l Bank v. Silks*, 295 S.C. 107, 367 S.E.2d 421, 423 (Ct. App. 1988) ("A mere breach of contract does not constitute a violation of the UTPA"); *Key Company, Inc. v. Fameco Distributors, Inc*., 292 S.C. 524, 357 S.E.2d 476, 478 (Ct. App. 1987) (Court reversed a jury verdict in favor of the plaintiff on an UTPA claim because the claim amounted to nothing more than an assertion that defendant breached the parties' contract).

Here, as the trial judge noted, the vast majority of the attorney time spent on this matter involved the "broader" contract claims and counterclaims involving the respective arguments that the other party had breached the Lease. To the extent the attorneys' fees award in favor of Respondent survives the appeal, the amount awarded should be vacated and the case remanded to the lower court to scrutinize the attorneys' fees statements (or have counsel do so) and award only those attributable to the claim on which Respondent was successful.[11] *See, Horton, Ducharme, supra.*

CONCLUSION

The trial court committed error by failing to grant the motions for JNOV or Remittitur on the failed UTPA claim, and in determining that Respondent was the prevailing party instead of Appellant. These errors should be reversed.

[11] The lower court also erred by considering settlement discussions in its award of attorneys' fees. From a policy standpoint, if permitted this will have a chilling effect on settlement discussions between parties and the disclosures of same made to the trial judge upon inquiry.

This the 12th day of October, 2023.

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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, LLC……..…….….Appellant,

v.

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

of which, Brilin Electric, LLC is ……..……... Respondent.

CERTIFICATE OF COUNSEL – FINAL BRIEF OF APPELLANT

The undersigned certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.

Submitted October 12, 2023.

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