

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) CASE NO.: 2012-CP-22-00889

ALEXANDER MANGIALARDO,
and AUDRA MANGIALARDO,

Plaintiffs,

vs.

BLUE RIDGE VENTURES, LLC,
GERALD W. KELLY,
ELIZABETH L. KELLY,
SOUTH CAROLINA BANK & TRUST,
NA, CENTURY 21-- THE BEACH
COMPANY, LLC, CAISON
ENGINEERING COMPANY, INC.,
KEITH DUNCAN, ATTORNEYS'
TITLE INSURANCE FUND, INC.,
G. TURNER PERROW, JR., and
TIDELANDS LAW, LLC.

Defendants.

ORDER GRANTING MOTION OF
GERALD W. KELLY and
ELIZABETH L. KELLY FOR
SUMMARY JUDGMENT

FILED
GEORGETOWN COUNTY, S.C.
2013 SEP 12 AM 10:37
ALMA Y. WHITE
CLERK OF COURT

TRIAL COURT: BENJAMIN H. CULBERTSON

DATE OF HEARING: AUGUST 16, 2013

PLACE OF HEARING: GEORGETOWN, S.C.

COURT REPORTER: NATALIE DAHL

PLAINTIFFS' ATTORNEYS: JEFFREY E. JOHNSON, ESQ

KAREN A. SAULS, ESQ.

ATTORNEY FOR THE KELLYS: JACK M. SCOVILLE, JR.

ATTORNEY FOR G. TURNER PERROW: PRO SE

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SC Court of Appeals

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A hearing was held in this matter on the above date. Present were the listed attorneys. The attorney for Attorneys' Title Insurance Fund, Inc., Michael Chambers, was not present but was aware of the hearing. The other parties are either in default or appear pro se, but did not attend the hearing.

The Defendants, Gerald W. Kelly and Elizabeth L. Kelly, (hereafter "the Kellys"), moved for summary judgment on various grounds. After considering the arguments of counsel, the submitted briefs and evidence, and the applicable law, this Court grants the motion on the following grounds.

GROUND FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. *Id*; Rule 56(c), SCRPC. *Knight v. Austin*, 396 S.C. 518, 522, 722 S.E.2d 802, 804 (S.C., 2012). The moving party need not support its motion with affidavits or other similar materials negating the opponent's claims but rather must clearly establish by the record the absence of a triable issue of fact. With respect to an issue upon which the non-moving party bears the burden of proof, the moving party may discharge his initial responsibility by pointing out to the Court the absence of evidence to support the non-moving party's case. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 115,410 S.E.2d 537, 545 (1991).

EXPERT TESTIMONY

The general rule in South Carolina is that where a subject is beyond the common knowledge of the jury, expert testimony is required. See *Green v. Lilliewood*, 272 S.C. 186, 192-93, 249 S.E.2d 910, 913 (1978). A party must

present affidavits from experts to support claims based on matters beyond the common knowledge of lay persons to avoid summary judgment. *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, et al*, 351 S.C. 459, 570 S.E.2d 197, (S.C.App., 2002).

UNDISPUTED FACTS

This case arises out of a real estate boundary dispute in which Plaintiffs allege that Defendants caused them to purchase a residence (hereinafter, "Property") that encroached into a Santee Cooper power line easement. (**Exhibit A, Plat**) The Property derived from the subdivision of a larger tract of land in Pawleys Island in the early 2000's. In 2004, Caledonia Development Company of SC sold the Property, an unimproved lot at that time, to Keith Duncan for \$97,700.00. Then in 2006, Duncan sold the Property to Blue Ridge Ventures, LLC, and Gerald and Elizabeth Kelly, who held title as tenants-in-common. The Kellys' credit was used to obtain a construction loan to build a "spec" house on the lot.

After negotiations, the Plaintiffs and Duncan agreed upon a sale price of \$452,900, which they memorialized in a purchase and sale agreement dated September 30, 2007. (**Exhibit B, Buy Sell Agreement**) The Kellys were not parties to this agreement.

The Plaintiffs were represented by their own attorney at the closing, defendant Perrow. The deed was recorded October 23, 2007. (**Exhibit C, Deed**) The Plaintiffs moved into the house shortly thereafter.

A conspicuous above-ground power line operated by Santee Cooper runs immediately adjacent to the home. Santee Cooper owns a 50-foot utility easement in connection therewith. The plat, Exhibit A, indicates the house encroaches less than two and one half feet into the easement. Santee Cooper also tested the

Property for Electric and Magnetic Fields (EMF) emissions, and the results showed the presence of levels of electromagnetic fields (EMFs). Apparently in response to anxieties about the EMF readings, Plaintiffs vacated the Property in April, 2010, soon after speaking with Santee Cooper. In August of 2011, after Plaintiffs stopped making payments, Bank of America, the assignee of the mortgage, foreclosed on the loan and sold the Property at public auction in September of 2011. A standard foreclosure deed was issued by the Special Referee conveying the property to the Federal National Mortgage Association, which was the assignee of the successful bidder. The bank waived the right to a deficiency judgment.

In addition to the legal description of the lot, the foreclosure deed contains the following paragraph:

Together, with all and singular the hereditaments, rights, members and appurtenances whatsoever to the said property belonging or in anywise incident or appertaining, and the reversions and remainders, rents, issues, and profits thereof; and also any estate, right, title, interest, dower, possession, benefit, claim or demand therein whatsoever of all parties to the said suit and of all other persons who might rightfully claim the same or any part thereof, by, from, or under them, or either of them....

CAUSES OF ACTION AGAINST THE KELLYS

In Plaintiffs' Third Amended Complaint, Plaintiffs allege the following causes of action against the Kellys:

- A. Breach of a general warranty, breach of a warranty of fitness for its intended use, and breach of a warranty of good and workmanlike service;
- B. Breach of contract; and,
- C. Violation of the S.C. Unfair Trade Practices Act.

The Kellys are entitled to summary judgment on all causes of action for the following reasons.

PLAINTIFFS HAVE NOT PROVEN ANY DAMAGES

The basic damages claimed by Plaintiffs under all causes of action are injury caused by the EMFs and the costs associated with the house being located within the right of way. Specifically, Plaintiffs claim:

- A. Plaintiffs were unknowingly exposed to extreme levels of EMF emissions;
- B. Plaintiffs' home must be partially or fully demolished to remove it from the easement and setback areas;
- C. Plaintiffs' home is uninhabitable;
- D. Plaintiffs' home has diminished value;
- E. Plaintiffs' home and title are rendered unmarketable. (Third Amended Complaint)

(MHC) *Nothing has been presented to show*
~~Expert testimony would be required to prove~~ that EMFs cause any health hazard. *in this case.* None was offered by plaintiffs. Furthermore, Plaintiffs have testified that nobody in their family has been diagnosed with any condition or illness related to the EMFs. Audra Mangialardo's Dep. pp. 102:24-108:22. The Kellys are entitled to summary judgment on all claims for damages related to the EMFs.

The basis for each other claim is simply that the house was built inside the Santee Cooper easement by about two feet and one-half feet. No evidence has been presented that there is any defect in the house other than being within the Santee Cooper right of way. No evidence was presented that Santee Cooper ever

demanded the house be moved, commenced any action to require same, denied a variance or encroachment permit to the Plaintiffs, or otherwise took any action to affect the Plaintiffs' use and enjoyment of the property while they still owned it.

Now that the property has been sold in foreclosure, the Plaintiffs have no obligation to move or demolish it if Santee Cooper requires same. Plaintiffs have no obligation as grantors under the foreclosure deed to the present owner. The mortgagee waived deficiency judgment. Any damages from the encroachment are due to the present owner, not Plaintiffs. There are no damages flowing to the

Plaintiffs as a result of the encroachment. *Since the plaintiffs no longer own the property.*

(MHC)

Additionally, Plaintiffs ~~failed to produce any expert evidence that the~~ *cannot recover even if the* property is unmarketable, is uninhabitable, or has diminished value, ~~These issues~~ *since they no longer own the property, nor have they* also require expert testimony to establish. ~~While a landowner may testify about~~

~~the value of his property under South Carolina law, State v. Brown 402 S.C. 119, 129, 740 S.E.2d 493, 498 (S.C., 2013), in this case expert testimony is required to establish the diminution in value caused by the encroachment or EMFs.~~

Finally, the Plaintiffs lack standing to assert claims arising out of the ownership of the house and the same are mooted as a result of the foreclosure sale.

THE SCUTPA DOES NOT APPLY TO THE KELLYS

“An unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive.” *Wogan v. Kunze*, 366 S.C. 583, 606, 623 S.E.2d 107, 120 (Ct.App.2005) (citing *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 269, 536 S.E.2d 399, 407 (Ct.App.2000)). To recover in an action under the UTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered

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monetary or property loss as a result of the defendant's unfair or deceptive act(s). *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (S.C.App., 2006).

It is well established that “there can be no liability for casual statements, representations as to matters of law, or matters which plaintiff could ascertain on his own in the exercise of due diligence.” *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 348, 565 S.E.2d 309, 314 (Ct.App.2002) (quoting *West v. Gladney*, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct.App.2000)).

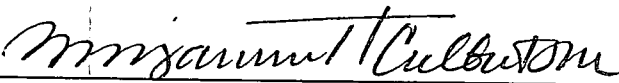
In *Schnellmann v. Roettger*, 368 S.C. 17, 23, 627 S.E.2d 742, 745 - 746 (S.C.App.,2006), the trial court granted summary judgment in favor of the defendant on the unfair trade practices claim because the acts complained of did not affect the public interest nor result in a pecuniary injury to the plaintiffs. “The statute clearly requires that in order to recover pursuant to the UTPA one must prove ...: 1) a violation of the Act [by the commission of an unfair or deceptive act in trade or commerce], 2) proximate cause, and 3) damages.” *Charleston Lumber Co. v. Miller Housing Corp.*, 318 S.C. 471, 482, 458 S.E.2d 431, 438 (Ct.App.1995). To be associated with trade or commerce, a defendant's acts must impact the public interest. *Daisy Outdoor Adver. Co. v. Abbott*, 322 S.C. 489, 493, 473 S.E.2d 47, 49 (1996). An impact on the public interest may be shown if the acts or practices have the potential for repetition. *Crary v. Djebelli*, 329 S.C. 385, 387, 496 S.E.2d 21, 23 (1998). The potential for repetition may be shown by proving that the same kind of actions occurred in the past or by showing that the procedures employed by the defendant create a potential for repetition of the deceptive practices. *Id.* at 388, 496 S.E.2d at 23. In the present case, there is no evidence that the Kellys, or anyone else, had misstated or misled anyone about the location of this or any other house in the past or that any procedure regularly employed by them would cause this to be done again. As far as the Kellys are

concerned, this case involves a single house that two and one half feet into a right of way. There is no evidence that the Kellys engaged in any unfair or deceptive act that affected the public in any way. They are entitled to summary judgment on the SCUTPA cause of action.

CONCLUSION

There is simply no evidence to support the claims against the Kellys. They are entitled to summary judgment as a matter of law.

THEREFORE, IT IS ORDERD, ADJUDGED, AND DECREED that the Kellys' motion for summary judgment is granted.



Benjamin H. Culbertson
Judge of the Fifteenth Judicial Circuit

September 9, 2013