THE STATE OF SOUTH CAROLINA

In the Supreme Court

RECEIVED
JUL 11 2014
S.C. Supreme Court

APPEAL FROM PICKENS COUNTY

Court of Common Pleas

Doyet A. Early, Circuit Court Judge

Case No. 2012-CP-39-01554

Appellate Case No. 2014 - 000642

Julie Freeman..Appellant – Respondent

v.

J.L.H. Investments, LP, a/k/a Hendrick Honda of Easley....................Respondent – Appellant

---

INTIAL BRIEF OF APPELLANT-RESPONDENT

Terry E. Richardson, Esq.
David Butler, Esq.
Brady R. Thomas, Esq.
RICHARDSON, PATRICK, WESTBROOK & BRICKMAN, LLC
1750 Jackson Street
Barnwell, SC 29812
803.541.7850

Michael E. Spears, Esq.
MICHAEL E. SPEARS, PA
Post Office Box 5806
Spartanburg, SC
864.583.3535

A. Camden Lewis, Esq.
LEWIS, BABCOCK & GRIFFIN, LLP
1513 Hampton Street
Post Office Box 11208
Columbia, SC 29211
803.771.8000

Gedney M. Howe, III, Esq.
GEDNEY M. HOWE, III, PA
Post Office Box 1034
Charleston, SC 29402
843-722-8048

Attorneys for Appellant-Respondents

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES...ii

STATEMENT OF ISSUES ON APPEAL...1

STATEMENT OF THE CASE...2

FACTS...3

ARGUMENT...6

1. THE TOTAL CLOSING FEES COLLECTED WAS A SUM CERTAIN CAPABLE OF ASCERTAINMENT BY COMPUTATION...6

2. CLOSING FEES ILLEGALLY COLLECTED BY HENDRICK WERE DEMANDABLE BY OPERATION OF LAW...9

CONCLUSION...11

TABLE OF AUTHORITIES

Page

CASES

Adams v. G.J. Creel and Sons, Inc., 320 S.C. 274, 465 S.E.2d 84 (1995)..........................3

Beckmann Concrete Contractors, Inc. v. United Fire and Cas. Co., 360 S.C. 127, 600 S.E.2d 76, (Ct.App.2004)..8

Butler Contracting, Inc. v. Court St., LLC, 369 S.C. 121, 631 S.E.2d 252 (2006)..........8 and 9

Dixie Bell, Inc. v. Redd, 376 S.C. 361, 656 S.E.2d 765 (Ct. App. 2007)..............6, 8, and 10

Fanning v. Fritz Pontiac-Cadillac Buick 322 S.C. 399, 472 S.E.2d 242 (1996).....................3

STATUTES

S.C. Code Ann. § 34-31-20...6

S.C. Code Ann. § 37-2-307...2, 3, and 4

S.C. Code Ann. § 56-15-10...2

S.C. Code Ann. §56-15-30

S.C. Code Ann. § 56-15-40(5)...3

STATEMENT OF ISSUE ON APPEAL

1. **Did the Trial Court err in Failing to Award Prejudgment Interest when the measure of recovery was fixed at the time that Plaintiff filed her complaint seeking return of all illegally collected closing fees?**

STATEMENT OF THE CASE

This action was initiated on August 29, 2006. [R.p. __ Complaint.]. Ms. Freeman pled that she was entitled to prejudgment interest in the Complaint. Id. Ms. Freeman filed an Amended Complaint on June 16, 2013. [R.p. __ Amended Complaint]. Ms. Freeman alleged that J.L.H. Investments, LP, a/k/a Hendrick Honda of Easley ("Hendrick") was charging illegal closing fees in violation of S.C. Code Ann. § 37-2-307 and § 56-15-10, *et seq.* because Hendrick's closing fees were not for reimbursing itself for its closing costs. [Id.]. Ms. Freeman brought this case individually and on behalf of all others who were charged illegal closing fees in the four years prior to the filing of the Complaint. [Id.].

This case was tried in Pickens County in September 2013 and twelve Pickens County jurors unanimously found that Hendrick Honda had arbitrarily and unfairly charged closing fees that were not levied for the purpose of reimbursing closing costs. [R.p. __, jury verdict form.]. The jury found that all of the illegally collected closing fees must be returned and awarded $1,445,786.00 to Ms. Freeman and the affected customers. [Id.].

On September 30, 2013, Ms. Freeman filed a post-trial motion requesting that prejudgment interest be added to the returned closing fees. [R.p. __ Motion Requesting Prejudgment Interest.]. On March 13, 2014, the Honorable Doyet A. Early denied Ms. Freeman's motion to add prejudgment interest. [R.p. __ Order denying Motion for Prejudgment Interest.]. On March 19, 2014, Ms. Freeman served the Notice of Appeal on Hendrick.

FACTS

This case arises from Hendrick's charging "closing fees" to its customers that were in no way calculated to reimburse Hendrick for its closing costs. In this case, Hedrick charged Julie Freeman a $299.00 closing fee that was on some paperwork referred to as a "PROCUREMENT FEE" and on other paperwork referred to as an "Administration Fee." [R.p. __, Plaintiffs' Exhibit 3a, Worksheet and R.p. __, Plaintiffs' Exhibit 5, Bill of Sale].

Ms. Freeman alleged that Hendrick violated the law by charging a closing fee to its customers that were not done to reimburse itself for closing costs. [R.p. __ Amended Complaint]. Ms. Freeman alleged that this was an "unfair" act in violation of S.C. Code Ann. §56-15-30[12]; and an "arbitrary" act in violation of S.C. Code Ann. § 56-15-40 (a).[3] [Id.]. Ms. Freeman also alleged that the fees did not fall within the protections of S.C. Code Ann. § 37-2-

[1] S.C. Code Ann. § 56-15-30(a) provides: "(a) Unfair methods of competition and unfair or deceptive acts or practices as defined in § 56-15-40 are hereby declared to be unlawful."

[2]The term "unfair" is not defined in the Dealers Act. However, the term has been defined in cases interpreting the similar Unfair Trade Practices Act as including an act which is "offensive to public policy." *See* Adams v. G.J. Creel and Sons, Inc., 320 S.C. 274, 465 S.E.2d 84 (1995). Charging closing fees in violation of S.C. Code Ann. § 37-2-307 fits this definition and is therefore an unfair act. This finding is consistent with the Supreme Court's suggestion in Fanning that the charging of closing fees prior to the protections afforded in § 37-2-307 was an unfair trade practice. *See* Fanning v. Fritz Pontiac-Cadillac Buick 322 S.C. 399, n. 8, 472 S.E.2d 242, n. 8 (1996).

[3] S.C. Code Ann. § 56-15-40 provides: "(1) It shall be deemed a violation of paragraph (a) of § 56-15-30 for any manufacturer, factory branch, factory representative, distributor, or wholesaler, distributor branch, distributor representative or motor vehicle dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public."

307[4] (the "Closing Fee Statute") because the fee was not charged to reimburse the dealer for its closing costs. [Id.].

At trial, Hendrick admitted that had known since 2001 that closing fees under S.C. Code Ann. § 37-2-307 could only be charged to reimburse Hendrick for closing costs such as document preparation, document retrieval, and document storage. [R.p. ___, trial transcript, p. 303, ll. 2-6; p. 303, ll. 10-15, p. 305, ll. 9-17, p. 307, ll. 7-24, p. 467, ll. 8-22, p. 538, ll. 16-20]. Hendrick posted signs in "multiple conspicuous places" "throughout the dealership" stating that Hendrick's purpose behind charging closing fees was as follows: "This dealership charges a $299 closing fee as a means of reimbursing itself for certain overhead costs, such as document retrieval and document preparation." [R.p.__, trial transcript, pp. 299, ll. 11-22; p. 386, ll. 4-15 and R.p. _, Plaintiff's Exhibit 2]. Hendrick also instructed its employees to tell customers that the fees were being charged to reimburse Hendrick for closing costs such as document preparation, document storage, and document retrieval. [R.p. __, trial transcript, p. 368, ll. 4-11 (salesman's standard explanation of fee); p. 404, ll. 5-18 (F&I manager's standard explanation of fee), p. 405, ll. 9-13 and 17-21].

Significantly, Hendrick admitted that it would be unfair to charge closing fees that were not tied to reimbursing their actual closing costs. Hendrick's Vice President in charge of making sure they complied with statutes, including the Closing Fee statute[5], testified as follows:

---

[4] S.C. Code Ann. § 37-2-307 provides: "Every motor vehicle dealer charging closing fees on a motor vehicle sales contract shall pay a one-time registration fee of ten dollars during each state fiscal year to the Department of Consumer Affairs. The closing fee must be included in the advertised price of the motor vehicle, disclosed on the sales contract, and displayed in a conspicuous location in the motor vehicle dealership."

[5] [Rp. __, trial transcript p. 303, ll. 16-23, p. 301, l. 12 to p. 302, l. 23 (job responsibilities).

Q: [I]f you're going to name a fee an administrative fee, that fee should be for the administrative costs associated with the closing; is that correct?
A: Of document retrieval and document preparation.
Q: Now, with that being said, in order to be for a reimbursement of a document retrieval, a document preparation, shouldn't the dealership figure out how much it cost to do those items before they seek reimbursement for them?
A: I would say that's fair.
Q: Would it be fair for a dealership to charge a closing fee that is not tied to their actual closing costs?
A: I would say no.

[R.p. __, trial transcript, p. 308, l. 17 to p. 309, l. 6].

Despite the above admissions, in testimony published at trial, it was established that Hendrick's closing fees was not tied to reimbursing Hendrick for its closing costs, that Hendrick never calculated its closing costs, and that Hendrick Honda "didn't sit there and do the math" to figure out what costs the closing fee covered before they set the fee. [R.p. __ trial transcript, p. 124, ll. 6-16; p. 125, l. 13 to p. 126, l. 1; p. 126, l. 9 to p. 127, l. 13]. Similarly, Hendrick's expert witness admitted that he did not see anything to suggest that Hendrick did any kind of analysis at the time Hendrick set the closing fee. [R.p. __, trial transcript, p. 763, l. 25 to p. 764, l. 11.]. In other words, Hendrick Honda unfairly and arbitrarily pulled a number out of the air and called it a closing fee.

Additionally, on cross-examination, Hendrick's general manager admitted that Hendrick raised its closing fees fifty dollars per car in years after its total costs went down and the costs per car sold had stayed essentially the same. [R.p., ___, trial transcript, p. 551, l. 13 to p 555, l. 22; p. 561, ll. 4-15; and p. 564, ll. 1-7]. Thus, the closing fees were not tied to reimbursing closing costs but were padding profits for Hendrick.

The testimony further revealed that Hendrick's increase in the amount of its closing fees correlated, not with an increase in closing costs, but instead with Hendrick increasing senior management pay. [R.p. trial transcript, p. 564, ll. 8-21; p. 565, ll. 1 to p. 568, l. 7)].

In summary, the evidence showed that the closing fees were charged not for the permissible purpose of reimbursing Hendrick for actual closing costs such as document preparation and document retrieval but, instead, Hendrick charged unsupported closing fees to increase profit and senior management pay.

After hearing the aforementioned evidence, the jury found that all the closing fees collected, including the closing fee paid by Ms. Freeman, were unfair and arbitrarily set and returned a verdict returning the fees to Freeman and the impacted customers. [R.p. __, Verdict form].

ARGUMENT

The trial court erred in failing to award Ms. Freeman and the customers she represents prejudgment interest in addition to the returned closing fees. Prejudgment interest is governed by S.C. Code Ann. § 34-31-20 which provides in part:

> (A) In all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum.

S.C. Code Ann. § 34-31-20. "Prejudgment interest is allowed on liabilities to pay money from the time when, either by agreement of the parties or operation of law, the payment was demandable, if the sum is certain or capable of being reduced to certainty." Dixie Bell, Inc. v. Redd, 376 S.C. 361, 371, 656 S.E.2d 765, 770 (Ct. App. 2007). As shown below, the trial court erred by failing to properly apply the above test.

1. The Total Closing Fees Collected Was a Sum Certain Capable of Ascertainment by Computation

The trial court erred in finding that "the damages were not ascertainable." See Order, p. 3. The damages at issue were ascertainable because they were set forth on the face of each customer's closing documents. For example, Julie Freeman's buyer's order states:

CASH PRICE OF VEHICLE & ACCESSORIES	$	17975.	00
TRADE-IN ALLOWANCE	$	900.	00
DIFFERENCE	$	17075.	00
PROCUREMENT FEE	$	299	00
STATE TAXES	$	300.	00
LICENSE, LICENSE TRANSFER, TITLE, REGISTRATION FEE	$	39.	00
TOTAL PRICE OF UNIT	$	17713.	00
LIEN PAYOFF OWED CUSTOMER GUARANTEES	$	377.	57
DOWN PAYMENT	$	N	A
BALANCE	$	18090.	57

[R.p. ___, Plaintiff's Exhibit 5, bill of sale]. As shown above, the $299.00 procurement fee, which is a closing fee, was ascertainable because it was stated on the face of the closing documents. The trial court's finding that this amount was not ascertainable was wrong and should be rejected.

Similarly, the trial court's finding that the damages at issue were unliquidated is erroneous. See Order, p. 3. The damages at issue were liquidated because the total fees collected by Hendrick were a sum certain capable of ascertainment by computation.

> In *Lewis v. Congress of Racial Equality,* 275 S.C. 556, 274 S.E.2d 287 (1981), our Supreme Court declared: "**In liquidated-damages cases, the amount is** usually a sum certain, or at least the amount is **capable of ascertainment by computation**." *Id.* at 560, 274 S.E.2d at 289. *Black's Law Dictionary* defines liquidated damages as "[a]n amount contractually stipulated" in contrast to unliquidated damages ***371** which are "[d]amages that ... cannot be determined by a fixed formula, so they are left to the discretion of the judge or jury." *Black's Law Dictionary* 395-97 (7th ed.1999). **Liquidated damages** "are damages the amount of which has been made certain and fixed either by the act and agreement of the parties or by operation of law to a sum which cannot be changed by the proof." 22 Am.Jur.2d *Damages* § 489 (2003). "They are also defined as damages the amount of which has been ascertained by judgment or by the specific agreement of the parties or which **are susceptible of being made certain by mathematical calculation from known factors.**" *Id.* "In general, damages are unliquidated where they are an uncertain quantity, depending on no fixed standard, referred to the wise discretion of a jury, and can never be made certain except by accord or verdict." *Id*

Dixie Bell, Inc. v. Redd, 376 S.C. 361, 370-71, 656 S.E.2d 765, 770 (Ct. App. 2007) *quoting* Beckmann Concrete Contractors, Inc. v. United Fire and Cas. Co., 360 S.C. 127, 131-132, 600 S.E.2d 76, 78-79 (Ct.App.2004). The damages at issue were "susceptible of being made certain by mathematical calculation from known factors" because the mathematical calculation necessary to return the closing fees was a simple multiplier of the amount of customers times the amount of closing fees collected. The known factors necessary for this award were the dollar amounts collected in the applicable time period and the total number of customers who paid these fees. This amount was ascertainable by looking at the face of each buyer's closing statement and by looking at the total number of customers who paid the fees. The illegally collected fees could be made certain by mathematical calculation at that time Ms. Freeman filed the Complaint. Thus, the trial court erred in failing to find that the damages at issue were liquidated.

The trial court's statements regarding the ability of the jury to return lesser amounts than the entire closing fees collected should not have defeated Ms. Freeman's right to prejudgment interest. See Order, pp. 3-4. This section of the trial court's order is in error because it wrongly focuses on the defenses at issue and not the claims made by Ms. Freeman. As explained by this Court in Butler Contracting,

> The proper test for determining whether prejudgment interest may be awarded is whether the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose. The right of a party to prejudgment interest is not affected by rights of discount or offset claimed by the opposing party. **It is the character of the claim and not the defense to it that determines whether prejudgment interest is allowable.**

Butler Contracting, Inc. v. Court St., LLC, 369 S.C. 121, 133-34, 631 S.E.2d 252, 259 (2006) (emphasis added). Here "the character of the claim" was that Hendrick had collected illegal closing fees from its customers and that the entire amount collected should be returned. Ms.

Freeman consistently sought the return of the entire amount of the illegally collected closing fees. [R.p. __, Amended Complaint and R.p. __, trial transcript, p. 883, l. 8-9 (closing argument)("And they should have to give all the money back.")]. Hendrick, at trial, asked for a jury charge and presented argument that the amount collected should not be the damages in the case and essentially argued that Hendrick was entitled to an offset by any amount the jury found to be Hendrick's actual closing costs. [R.p. __, trial transcript, p. 752, l. 19 to p. 753, l. 12]. Accordingly, the trial judge at Hendrick's request charged the jury that they could return a lesser amount. [R.p. __, Id.]. Hendrick's defenses and arguments that the damages could be less than the entire amount collected are irrelevant to determining whether prejudgment interest was recoverable. *See* Butler Contracting, 369 S.C. 121, 133-34, 631 S.E.2d 252, 259 (2006) ("It is the character of the claim and not the defense to it that determines whether prejudgment interest is allowable."). Accordingly, the trial court's focus on Hendrick's defenses and not the claim at issue in his Order (pp. 3-4) was in error and should be rejected. The "character of the claim" was a request that the entire amount of the closing fees collected be returned and thus an award of prejudgment interest should have been granted.

2. Closing Fees Illegally Collected Were Demandable by Operation of Law.

The trial court erred in finding that "Plaintiff had no right by operation of law to demand damage prior to the entry of judgment." See Order, p. 2. In this case, Hendrick charged a closing fee that was pulled out of the air and not calculated to reimburse Hendrick for closing costs. This was an illegal closing fee that they were not allowed to take from the impacted customers. This amount was demandable by operation of law at the time Hendrick violated the law by taking the illegal closing fees.

The trial court's statements focusing on when Ms. Freeman could collect damages misses the point. The trial court's order states: "The Dealers Act does not entitle a plaintiff to monetary recovery *unless and until* a judge or jury determines liability." This statement wrongly focuses on when a Plaintiff may collect on a judgment and not when Plaintiff may demand damages by operation of law. The test for prejudgment interest focuses on when damages are demandable by operation of law not when a plaintiff may collect on a judgment. See Dixie Bell, Inc. v. Redd, 376 S.C. 361, 371, 656 S.E.2d 765, 770 (Ct. App. 2007) ("Prejudgment interest is allowed on liabilities to pay money from the time when, either by agreement of the parties or operation of law, the payment was **demandable**, if the sum is certain or capable of being reduced to certainty.") (emphasis added). Quite simply, if someone violates a law by taking money from another person, then the aggrieved party has the right to demand that they get their money back by operation of that same law.

There simply is no requirement that a jury verdict and judgment be entered in order to make damages demandable by operation of law.[6] The name "prejudgment interest" in and of itself shows the fallacy of this finding. After judgment, a plaintiff is entitled to recover "post judgment interest." The name "prejudgment interest" necessarily means that the phrase "demandable" "by operation of law" as a prerequisite to recovering prejudgment interest does not require a judgment. Instead, demandable by operation of law means that when someone violates a law and takes another person's property, the aggrieved person has the legal right to demand return of their property by operation of that same law.

[6] For example, courts often award prejudgment interest in conversion cases even though there has been no prior judgment.

Defendants are simply not afforded the benefit of keeping the interest on sum certain amounts that are taken in violation of the law. A prejudgment interest award insures that the plaintiff is made whole in this setting. The trial court's imposition of a requirement that damages be collectable instead of demandable at the time the complaint is filed is inconsistent with this purpose. Accordingly, this Court should find that the trial court erred by finding that illegally taken closing fees were not demandable by operation of law.

CONCLUSION

Ms. Freeman requests that the Court find that the damages at issue were a sum certain that was capable of mathematical calculation and that the amount illegally taken was demandable by operation of law. As such, Ms. Freeman respectfully requests that the trial court's Order denying the Motion for Prejudgment Interest be reversed and that this case be remanded back for a determination of the total amount of prejudgment interest owed to Ms. Freeman and all of the impacted customers.

Respectfully submitted,

RICHARDSON, PATRICK, WESTBROOK
& BRICKMAN, LLC
Terry E. Richardson
J. David Butler
Brady R. Thomas
1730 Jackson Street
Post Office Box 1368
Barnwell, SC 29812
Telephone: 803-541-7850
Facsimile: 803-541-9625

A. Camden Lewis
LEWIS, BABCOCK & GRIFFIN, LLP
1513 Hampton Street
Post Office Box 11208
Columbia, SC 29211

803.771.8000

Gedney M. Howe, III, Esq.
GEDNEY M. HOWE, III, PA
Post Office Box 1034
Charleston, SC 29402
843-722-8048

Michael E. Spears, Esq.
MICHAEL E. SPEARS, PA
Post Office Box 5806
Spartanburg, SC
864.583.3535

ATTORNEYS FOR THE APPELLANT-RESPONDENT

July 8, 2014

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM PICKENS COUNTY

Court of Common Pleas

Doyet A. Early, Circuit Court Judge

Case No. 2012-CP-39-01554

Appellate Case No. 2014 - 000642

Julie Freeman..Appellant – Respondent

v.

J.L.H. Investments, LP, a/k/a Hendrick Honda of Easley.....................Respondent – Appellant

---

PROOF OF SERVICE

The undersigned employee of the law offices of Richardson, Patrick, Westbrook & Brickman, LLC attorneys for the Respondent, do hereby certify that service of the Initial Brief of Respondent was made on all counsel of record, specified below, by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

James Y. Becker, Esq.
Sarah P. Spruill, Esq.
Mary M. Caskey, Esq.
Haynsworth, Sinkler, Boyd, PA
Post Office Box 11889
Columbia, SC 29211

John T. Lay, Jr., Esq.
Gallivan White & Boyd, P.A.
1201 Main Street- Ste. 1200
Columbia, SC 29201

Marvin D. Infinger, Esq.
Nexsen Pruet, LLC
Post Office Box 486
Charleston, SC 29402

By:

RICHARDSON, PATRICK, WESTBROOK &
BRICKMAN, LLC
Terry E. Richardson, Esq.
J. David Butler, Esq.
Brady R. Thomas, Esq.
1750 Jackson Street
Barnwell, SC 29812
803.541.7850

July 8, 2014

Attorneys for Appellant-Respondent.