

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2010-CP-40-8155
Appellate Case No. 2014-000272

Howard Nankin and Nancy Nankin.....Appellants,

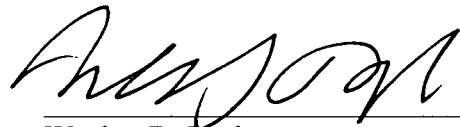
v.

Donald M. Danford d/b/a Don Danford Interiors.....Respondent.

APPELLANTS' RETURN TO RESPONDENT'S MOTION TO DISMISS APPEAL

Appellants Howard Nankin and Nancy Nankin hereby file this Return to Respondent's Motion for an Order Dismissing the Appeal. Appellants' supporting arguments in opposition to this motion are set forth in the attached memorandum. Appellants have yet to recover any of the lower Court's judgment and there was no alternative remedy to elect at the time of filing the appeal.

July 18, 2014



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SC Court of Appeals

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v.

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**APPELLANTS' MEMORANDUM IN OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS APPEAL**

FACTS

The facts leading to this appeal are not in dispute. In 2010 Appellants asserted five separate causes of action against the Respondent relation to a failed renovation project. The claims were based on breach of contract, negligence, negligent misrepresentation, fraud, and breach of the South Carolina Unfair Trade Practices Act ("SCUPTA"). After a bench trial, the Trial Court entered judgment for the Appellants on their breach of contract claim. Damages were calculated based on a combination of remedial expenses and anticipated additional repairs. In addition, at trial the Appellants established that the Respondent engaged in the practice of construction without being properly licensed. (Order).

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The Trial Court held that Appellants had not met their burden of proof regarding the claims of negligence, negligent misrepresentation, fraud, and breach of the SCUPTA. Appellants filed a notice of appeal as to the denial of those claims.

The Respondent moved to dismiss Appellants' appeal. Respondent argued that the Appellants had elected their remedy because the Trial Court had already entered an order finding for the Appellants on the breach of contract claim in the amount of \$12,927.00. In his motion, the Respondent states that the Court should not waste its time because the Appellants have already recovered a judgment for their loss. Respondent omits the fact that he has not paid any of the judgment to the Appellants. Respondent also confuses the doctrine of "election of remedies" with the election of a verdict.

ARGUMENT

Appellant's pursuit of a judgment for its claims is appropriate because of the grounds on which recovery is demanded. Appellant's right to recover on its SCUTPA claims is grounded in statutory authority. In contrast, Appellant's breach of contract claim is found in common law. Electing to collect from these two different judgments does not constitute a double recovery. The Court in Austin v. Stokes-Craven Holding Corp., found ample support for allowing the plaintiff to recover attorney fees under a statutory claim in addition to punitive damages under a common law claim. 387 S.C. 22, 56-67, 691 S.E.2d 135, 153 (2010). Relying on cases from Tennessee and Virginia with similar holdings, the Court stated that "[t]he rationale for this position is that an award for both does not amount to double recovery for a single wrong given attorney's fees are intended to make such claims economically viable for private citizens whereas an award of punitive damages is designed to punish wrongful conduct . . ." Id. at 56, 691 S.E.2d 153. Similarly, the Appellants' claims have both statutory and common law foundations. Thus,

collection of the statutory punitive damages and attorney's fees would not amount to a double recovery. Therefore, the Trial Court's ruling should be reversed, the damages trebled, and attorney's fees awarded.

Respondent's motion cites a litany of facts, and incomplete case law to support his position that the appeal should be dismissed. However, Respondent fails to paint an accurate picture of the law. A remedy is not elected until payment has been accepted and the underlying judgment has been satisfied. Inman v. Imperial Chrysler-Plymouth, Inc., 303 S.C. 10, 397 S.E.2d 774 (Ct. App. 1990). The purpose of the election of remedies is to preclude double recovery for a single wrong. In the present case, there has been no recovery. "The restriction is not on the potential theories of recovery a plaintiff might pursue, but instead, on the recovery itself." Id. at 776. Thus, until one form of recovery has been received, there can be no claim that Appellants are seeking double recovery. Therefore, the argument that the Appellants are seeking double recovery is not plausible because they have not collected a single dime and do not intend to accept partial payment.

Additionally, in order to elect a remedy there must be choice of remedies at the time of election. If remedies are alternate and concurrent, there is no bar until satisfaction has been obtained. Where remedies are concurrent and consistent, whether against the same person or different persons, "a party may pursue one or all of such remedies until satisfaction is had." Finn v. Employers' Liability Assurance Co., 141 So.2d 852, 863 (La.App. 2nd Cir. 1962). The Court in Finn further explained that:

Where the law furnishes a party with two or more concurrent and consistent remedies he may prosecute one or all until satisfaction is had; but a satisfaction of one is a satisfaction of all. *He may select and adopt one as better adapted than the others to work out his purpose, but his choice is not compulsory or final.* Where the remedies afforded are inconsistent, it is the election of one of such remedies

which operates as a bar; but *where the remedies afforded are consistent, it is the satisfaction of the claim which operates as a bar.* (Emphasis supplied.)

Id.; See also, Manuel Tire Co., Inc. v. J.W. Herpin, Inc., 620 So.2d 526, 531-32 (La. Ct. App. 1993); Gulf Shipping Co. v. McQuilling, 430 So.2d 1322 (La.App. 5th Cir. 1983). These authorities make it obvious that there can be no justified allegation of double recovery until the satisfaction of a judgment has been received.

The Respondent also alleges that the remedies sought by the Appellants arise out of the same set of facts. However, no election of remedies is required because different conduct supports the SCUTPA claim compared with the breach of contract claim. Election of remedies is not applicable where there are two separate causes of action, each based on different facts. Taylor v. Medenica, 324 S.C. 200, 218, 479 S.E.2d 35, 45 (1996) (citing Jones v. Winn-Dixie Greenville, 318 S.C. 171, 456 S.E.2d 429 (Ct. App. 1995)). The SCUTPA claim in is based upon the fact that the Respondent engaged in residential home building without a proper license whereas the breach of contract claim is based on the Respondent's failure to satisfactorily complete the renovation. The former behavior has nothing to do with the breach of contract claim. Therefore, Appellants are not seeking double recovery because the SCUTPA claims are not based on the same facts or injuries as Appellants' other claims.

Furthermore, "election of remedies involves a choice between different forms of redress afforded by law for the same injury.... It is the act of choosing between inconsistent remedies allowed by law on the same set of facts." Keeter v. Alpine Towers Int'l, Inc., 399 S.C. 179, 197-98, 730 S.E.2d 890, 899-900 (Ct. App. 2012). In Keeter, the Plaintiff asserted several causes of action, but only sought one remedy for his broken back: damages. "When a plaintiff seeks only one remedy, there is nothing to elect." See Adams v. Grant, 292 S.C. 581, 586, 358 S.E.2d 142, 144 (Ct. App. 1986) ("Where a plaintiff presents two causes of action because he is uncertain of

which he will be able to prove, but seeks a single recovery, he will not be required to elect.”). Id. “As its name states, the doctrine applies to the election of ‘remedies’ not the election of ‘verdicts.’” Austin, 387 S.C. at 57, 691 S.E.2d at 153 (defining a “‘remedy’ as ‘[t]he means by which ... the violation of a right is ... compensated.’” (quoting *Black's Law Dictionary* 1163 (5th ed.1979))). Keeter, at 399 S.C. 197-98, 730 S.E.2d 899-900. Therefore, because the Appellants have only sought one remedy there can be no double recovery.

Based on the arguments made above, Appellants respectfully request that Respondent’s Motion to Dismiss Appeal be denied.

July 18, 2014



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Donald M. Danford d/b/a Don Danford Interiors.....Respondent.

PROOF OF SERVICE

I, Rita D. DeCarlis, an employee with the law firm of Bruner, Powell, Wall & Mullins, LLC, attorneys for Appellants, do hereby certify that on this 18th day of July 2014, I served the **Appellants' Return to Respondent's Motion to Dismiss Appeal and Appellants' Memorandum in Opposition to Respondent's Motion to Dismiss Appeal** upon the Respondent by depositing a copy of same in the U.S. Mail, first class, postage prepaid, addressed top his attorney of record as follows:

W. Duvall Spruill, Esquire
Turner Padget Graham & Laney, PA
PO Box 1473
Columbia, SC 29202


Rita D. DeCarlis

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July 18, 2014

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: *Howard and Nancy Nankin v. Donald M. Danford d/b/a Don Danford Interiors*
Appellate Case No.: 2014-000272
Case No.: 2010-CP-40-8155
Our File Number: 5-2169-100

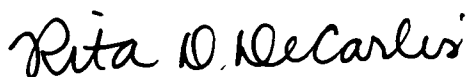
Dear Ms. Kitchings:

Please find enclosed the original and six (6) copies of the **Appellants' Return to Respondent's Motion to Dismiss Appeal and Appellants' Memorandum in Opposition to Respondent's Motion to Dismiss Appeal.**

Please note as evidenced in the enclosed **Proof of Service** we are copying counsel for the Respondent with a copy of the same.

With my best regards, I am

Sincerely yours,



Rita D. DeCarlis
Legal Assistant to Wesley D. Peel

/rdd

Enclosures

cc: W. Duvall Spruill, Esq.
Dr. & Mrs. Howard Nankin

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