

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2012-CP-22-00889
(SC Court of Appeals Case No.: 2014-001104)

Alexander Mangialardo and Audra MangialardoAppellants,

v.

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.

Of Whom Blue Ridge Ventures, LLC, Gerald W. Kelly, Elizabeth L. Kelly,
Caison Engineering Company, Inc., Keith Duncan,
Attorneys Title Insurance Fund, Inc., G. Turner Perrow, Jr. and Tidelands Law, LLC
are the Respondents.

APPELLANT'S INITIAL BRIEF

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in granting Summary judgment in favor of the Kellys on the grounds the Mangialardos are precluded from recovering damages because they no longer own the Property despite the existence of facts showing the Mangialardos suffered damages and continue to suffer damages as a result of the Kellys' actions?

2. Did the trial court err finding the Kellys are entitled to summary judgment for damage claims related to EMFs when the Mangialardos presented evidence they suffered damages as a result of the high levels of EMFs?

3. Did the trial court err in finding the Unfair Trade Practices Act does not apply when a scintilla of evidence of to satisfy each prong of the UFTPA is present?

4. Did the trial court err in failing to allow the Mangialardos to amend their Complaint even though the opposing parties established no prejudice?

STATEMENT OF THE CASE

This appeal arises from the trial court's granting of summary judgment in favor of the Respondents Gerald W. Kelly and Elizabeth L. Kelly (the "**Kellys**") for the claims brought against them by Appellants Alexander and Audra Mangialardo (the "**Mangialardos**"). (**Order Granting Motion of Gerald W. Kelly and Elizabeth L. Kelly for Summary Judgment**).

The Mangialardos initiated the instant action by filing a Summons and Complaint on October 22, 2010, alleging causes of action against multiple defendants who were involved with the construction, financing, and sale of a house and lot located in Pawleys Island (the "**Property**"). (**Complaint filed October 22, 2010**). Prior to serving the Complaint on the named defendants, the Mangialardos filed an Amended Complaint on December 28, 2010, which alleges causes of action against the Kellys for breach of contract, breach of warranties, and violation of the Unfair Trade Practices Act. (**Amended Complaint**). The Mangialardos filed two further amended complaints. The Second Amended Complaint, filed on August 5, 2012, added Attorneys' Title Insurance Fund, Inc. as a party and substituted Caisson Engineering Company, Inc. for Al Caisson individually (**Second Amended Complaint**). The Third Amended Complaint, filed on September 11, 2012, added the closing attorney and law firm, G. Turner Perrow, Jr. and Tideland Law, LLC, as parties pursuant to a Consent Order dated August 22, 2012. (**Third Amended Complaint; Consent Order to Add a Party**). The allegations against the Kellys remained the same in the subsequent Complaints.

The Kellys filed their Answer to the Third Amended Complaint on October 16, 2012, denying liability and making claims against their co-defendants. (**Kelly Answer to**

Third Amended Complaint). The Kellys' co-defendants Century 21- The Beach Company, LLC, Attorneys' Title Insurance Fund, Inc., G. Turner Perrow, Jr. and Tidelands Law, LLC also all filed Answers and are current parties to the underlying action.

The Kellys filed their "Motion for Summary Judgment by Gerald W. Kelly and Elizabeth Kelly" on July 16, 2013. **(Kelly Motion for Summary Judgment).** After hearing the matter on August 16, 2013, the court entered an order, dated September 9, 2013, granting summary judgment in favor of the Kellys on the grounds that because the Property has been foreclosed, that the Mangialardos no longer have any damages, have no standing to pursue the case, the case is moot, and the Unfair Trade Practices Act does not apply (hereinafter "**Order Granting Summary Judgment**"). **(Order Granting Motion of Gerald W. Kelly and Elizabeth L. Kelly for Summary Judgment).** The Mangialardos filed their "Motion to Alter, Amend and/or Reconsider the Order Granting Defendants Kellys Motion for Summary Judgment" on September 20, 2013. **(Motion to Alter or Amend).**

On October 10, 2013, prior to the trial court issuing an Order in response to the Mangialardos' Motion to Alter or Amend, the trial court heard arguments relating to the Mangialardos' "Motion to File Fourth Amended Complaint.," filed on September 20, 2013. **(Transcript of Record; Motion to File Fourth Amended Complaint).** The trial court denied the motion by a Form 4 order, dated October 10, 2013 (hereinafter "**Order Denying Amendment**"). **(Form 4).** The Mangialardos' filed a "Motion to Alter and/or Reconsider the Order denying Plaintiff's Motion to File a Fourth Amended Complaint" on October 31, 2013. **(Motion).** The trial court denied both of the Mangialardos' Motion

to Alter or Amend the Order Granting Summary judgment to the Kellys and the Order Denying Amendment by Form 4 order dated April 30, 2014. **(Form 4)**.

The Mangialardos filed their “Notice of Appeal” on May 23, 2014 and their “Amended Notice of Appeal” on June 13, 2014. **(Notice of Appeal)**. This appeal of both orders follows.

STATEMENT OF THE FACTS

In September 2007, the Mangialardos entered in to a contract to purchase a house and lot (the “**Property**”) from Blue Ridge Ventures, LLC (the “**Contract**”). (**Agreement to Buy and Sell Real Estate**). Although the Kellys were not named on the face of the Contract, they owned an undivided one-half interest in the Property. (**Gerald W. Kelly Deposition pp.67, ll.20-23; pp. 66, ll.16-19; Deed dated April 18, 2006**). The Kellys had previously entered into a business relationship with Keith Duncan and his company Blue Ridge Ventures, LLC. (**Kelly Deposition pp.32, ll.9-10**). The Kellys would procure financing from a lending institution for the purpose of purchasing real property and constructing “spec houses” thereon with Keith Duncan and Blue Ridge Ventures, LLC supervising construction. (**Gerald W. Kelly Deposition pp.36, ll.13-24; pp.37; pp.38, ll.14-24; pp.42 ll.2-9; pp.45**). When a spec house sold, the Kellys and Blue Ridge Ventures, LLC would divide any profit. (**Gerald W. Kelly Deposition pp.70 ll.21-25**). The Kellys and Blue Ridge Ventures, LLC engaged in constructing no fewer than seven such spec houses during the course of their business arrangement. (**Gerald W. Kelly Deposition pp.50-51**).

The Property at issue in the underlying case is one of the spec houses the Kellys and Blue Ridge Ventures, LLC built. (**Gerald W. Kelly Deposition pp.50-51**). The Mangialardos purchased the Property as a home for themselves and their three young children. (**Deposition of Audra S. Mangialardo pp.36, ll.4; Contract; Warranty Deed dated October 22, 2007**). The Mangialardos procured a loan from South Carolina Bank & Trust in the amount of \$300,000.00 (the “**First Mortgage**”), with G. Turner Perrow and his firm Tideland Law, LLC (collectively “**Perrow**”) acting as the closing agent.

(HUD-1; Deposition of G. Turner Perrow). The Mangialardos paid a purchase price of \$452,900.00 for the Property and contributed \$152,900.00 of their own funds to the purchase at the time of closing. **(BAC Home Loans Serv., LP f/k/a Countywide Home Loans Servicing, LP v. Alexander Mangialardo, Audra Mangialardo and Branch Banking and Trust Company, Ca. No. 2010-CP-22-160).** Attorneys' Title Insurance Fund, Inc. ("Attorneys' Title") underwrote the "Owners' Title Insurance Policy" the Mangialardos purchased from Perrow and Attorneys' Title in connection with the closing. **(Title Insurance Policy).** All of the closing requirements on behalf of Attorneys' Title were conducted and completed by Perrow, as its agent. **(G. Turner Perrow pp.30, ll.20-25; ll.17-24; Lewis Deposition pp. 35, ll. 5-36).**

Although Perrow was aware of an easement in favor of Santee Cooper a/k/a South Carolina Public Service Authority that ran across the Property, he failed to advise the Mangialardos of the benefit or need for an "as-built" survey, which would reveal any encroachments of the structure into the easement. **(G. Turner Perrow Deposition pp.85, ll.21-25; pp. 5, ll.1-4).** Additionally, Perrow included language on the Owners' Title Policy excepting matters that could be discovered with a valid survey without informing the Mangialardos. **(Owners' Title Policy).**

After purchasing and occupying their Property for more than two years, the Mangialardos discovered in April 2010 their house substantially encroached within an easement in favor of Santee Cooper a/k/a South Carolina Public Service Authority. **(Order Granting Summary Judgment; Audra S. Mangialardo Deposition pp.28, ll.5-25).** This encroachment not only greatly diminished the value of the Property, it subjected the Appellants to levels of electric and magnetic field radiation ("EMF") in substantial

excess of the average home from the proximity of the overhead high-tension power lines. **(O.J. Jansky Deposition Exhibits 1 and 2, pp.37, ll.14-16; pp.40 ll.22-24; pp.41, ll.9-12).** In fear of the safety and health of their children with respect to substantially high EMF readings, the Mangialardos vacated the home and moved into a rental. **(Deposition of Audra S. Mangialardo pp.30, ll.20-25; pp.31, ll.1-2).**

Unable to pay both rent and the mortgage payment on the Property and with no option to sell the house as-built within a utility easement, the Mangialardos stopped paying the payment on the Property and it was foreclosed by the lender who waived any deficiency. **(BAC Home Loans Serv., LP f/k/a Countywide Home Loans Servicing, LP v. Alexander Mangialardo, Audra Mangialardo and Branch Banking and Trust Company, Ca. No. 2010-CP-22-160).**

In addition to the first mortgage which was foreclosed as described above, the Mangialardos took out a second mortgage in the principle amount of \$62,000.00 on the Property in 2008 (the "Equity Line"). **(BAC Home Loans Serv., LP f/k/a Countywide Home Loans Servicing, LP v. Alexander Mangialardo, Audra Mangialardo and Branch Banking and Trust Company, Ca. No. 2010-CP-22-160).** Despite the foreclosure of the Property by the first mortgage holder, the Mangialardos are still liable for the Equity Line and continue to make the payments. **(Transcript of Record pp.38, ll. 22-25; pp.39, ll.1-8).**

STANDARD OF REVIEW

When reviewing the trial court's decision to grant summary judgment, an appellate court applies the same standard applied by the circuit court. Evening Post Publ. Co. v. Berkeley County Sch. Dist., 392 S.C. 76, 81, 708 S.E.2d 745, 748 (2011). A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC; Regions Bank v. Schmauch, 354 S.C. 648, 659, 582 S.E.2d 432, 438 (Ct. App. 2003). In determining whether any triable issue of fact exists, the evidence and all inferences, which can reasonably be drawn therefrom, must be viewed in the light most favorable to the nonmoving party. Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 324, 566 S.E.2d 536, 539 (2002). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 376, 597 S.E.2d 181, 183 (Ct. App. 2004). Summary judgment is inappropriate when facts are presented on which reasonable minds could differ. Allen v. Long Mfg. NC, Inc., 332 S.C. 422, 428-29, 505 S.E.2d 354, 357-58 (Ct. App. 1998). "In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

ARGUMENT

1. Did the trial court err in granting Summary judgment in favor of the Kellys on the grounds the Mangialardos are precluded from recovering damages because they no longer own the Property despite the existence of facts showing the Mangialardos suffered damages and continue to suffer damages as a result of the Kellys' actions?

In its Order, the trial court noted that although the building envelope of the house encroached into Santee Cooper's easement by about two and one-half feet, Santee Cooper has not yet demanded the house be moved, and that the Mangialardos no longer own the Property. **(Order Granting Summary Judgment pp.5-6)**. The Mangialardos agree these are the undisputed facts of the case. However, the trial courts assertion that there are no longer any damages flowing to the Mangialardos as a result of those facts is contrary to the evidence presented.

In their Motion for Summary Judgment and at the hearing on the matter, the Kellys argued they had no contract or duties and supplied no warranties to the Mangialardos because they had no direct contact with the Mangialardos and did not execute the Contract. **(Transcript of Hearing)**. The Kellys also argued they were merely acting as a lender in the underlying transaction and were not engaged in any kind of partnership or joint venture with Blue Ridge Ventures. **(Transcript of Hearing)**. Although the trial court made no mention of these finding its Order, the court specifically rejected this argument at the hearing and in its letter to the parties after the hearing. **(Transcript of Hearing; Letter dated August 19, 2013)**. Evidence exists demonstrating the Kellys were in a partnership or joint venture with Blue Ridge Ventures, LLC as

alleged by the Mangialardos. **(Gerald Kelly Deposition pp.44, ll. 23-25; pp.45, ll.2, 16-20; pp.50, ll. 9-12; pp.72, ll.18-23).**

Moreover the Kellys reliance on case law holding lenders making construction loans are not liable for construction defects is untenable. See Roundtree Villas Ass'n v. 4701 Kings Corp., 282 S.C. 415, 422, 321 S.E. 2d 46, 50 (1984)(holding lending institutions are not liable for construction defects). The Kellys were not in the regular business of making loans as contemplated by RoundtreeVillas, and, unlike a lender, they spilt any profits realized from the sale of the Property fifty-fifty. Id.; See also Kennedy v. Columbia Lumber and Mfg. Co., Inc., 299 S.C. 335, 340, 384 S.E.2d 730, 734 (1989)(stating a lender may incur implied warranty liability if he is also a developer). **(Gerald Kelly Deposition pp.44, ll.23-25; pp.45, ll.2,16-20; pp.50, ll.9-12; pp.72, ll.18-23).**

Because there is evidence of a partnership or joint venture between the Kellys and Blue Ridge Ventures, LLC, there is a genuine issue of material fact regarding whether the Kellys are liable to the Mangialardos for the allegations contained in the Third Amended Complaint, including breach of contract and breach of warranties. See Peoples Federal Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 147, 425 S.E.2d 764, 774 (Ct. App. 1992)(citing Long v. Carolina Baking Co., 190 S.C. 367, 3 S.E.2d 46 (1939).) (“A joint enterprise exists where there are two or more persons united in the joint prosecution of a common purpose under such circumstances that each has authority, express or implied, to act for all in respect to the control of the means and the agencies employed to execute such common purpose.”).

In South Carolina, damages recoverable for a breach of contract are those which “follow as a natural consequence of the breach, or which may reasonably be supposed to have been within the contemplation of the parties at the time the contract was entered into.” Manios v. Nelson, Mullins, Riley & Scarborough, LLP, 389 S.C. 126, 146, 697 S.E.2d 644, 654 (Ct. App. 2010). “The proper measure of damages for breach of contract is the loss that was actually suffered as a result of the breach.” Id. (citation omitted).

The Mangialardos purchased the Property for \$452,900.00, and contributed more than \$150,000.00 of their own funds to the purchase price. **(Contract; Order pp.3; Transcript of Record pp.23, ll.16-25; pp.38, ll.13-25; pp.39, ll.1-8)**. When they sold the Property to the Mangialardos, the Kellys knew or should have known the house was constructed so that it encroached on Santee Cooper’s easement because they were owners of the Property and their partner, Blue Ridge Ventures, LLC, oversaw construction of the house. **(Gerald Kelly Deposition pp.66, ll.16-17)**.

Although they would not discover the Kellys’ breach for more than two years when Santee Cooper showed up on their Property and informed them of the encroachment, the Mangialardos actually suffered damages at the time they purchased the Property. **(Audra S. Mangialardo Deposition pp.28, ll.6-25)**. The Kellys conveyed the Property to the Mangialardos in a defective condition. They immediately lost the more than \$150,000.00 equity they thought they had in the Property because the encroachment into the easement diminished the value of the Property and rendered the house unsalable. **(G. Turner Perrow Deposition, pp.86, ll.1-25; pp.87, ll.1-4; Audra S. Mangialardo Deposition pp.4, ll.7-10; pp.57, ll.18-22; pp.168, ll.6-11; Alexander Mangialardo Deposition pp.101, ll.13-15)**.

The Mangialardos were further damaged when, believing they had equity in the Property, they received monies from an Equity Line they placed on the Property in 2008. Although the Property was foreclosed and the First Mortgage holder waived any right to pursue a deficiency judgment against the Mangialardos, the Mangialardos lost their equity in the Property before the foreclosure occurred. The foreclosure merely served to reduce the Mangialardos' damages by the amount they are no longer required to repay to the lender. They lost their equity and the money they paid for the house due to the condition of the Property, not because the foreclosure action divested them of ownership. South Carolina Dept. of Highways and Public Transp. v. Manning, 283 S.C. 394, 400, 323 S.E.2d 775, 779 (1984)(stating a landowner is competent to testify as to the value of his or her own property and the damages thereto).¹

Additionally, the Mangialardos are currently obligated to repay the Equity Line, even though they no longer own the Property or have an equitable interest in the Property. **(Transcript of Record pp.38 ll.22-25; pp.39 ll.1-8)**. These facts present at least a scintilla of evidence raising a fact question as to whether the actions of the Kellys or the foreclosure action caused the Mangialardos to lose their equity as suffer damages.

Additionally, these arguments illustrate there is evidence on the record showing the Mangialardos have standing to pursue their case and that the case is not moot.

¹ In making these arguments, the Mangialardos are not suggesting the original lender who contributed \$300,000.00 to the purchase price and whose successor in interest now holds title to the Property did not suffer damages. In fact, both parties suffered damages, the Mangialardos lost the money they put in to the purchase of the Property, and the lender lost at least a portion of the money it loaned the Mangialardos to put toward the purchase price of the Property. The lender's damages are not the merely the result of the foreclosure, but of the Kelly's actions in selling the Property in a defective condition. The defective condition, not the foreclosure action, reduced the Property's value at the time of purchase and continues to reduce its marketability and value today.

Standing requires an interest in the subject matter of the action, and the interest must be a personal stake. Duke Power Co. v. South Carolina Public Service Common, 284 S.C. 81, 96, 326 S.E.2d 395, 404 (1985). “A case is moot where a judgment rendered by the Court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the Court.” South Carolina Retirement System Inv. Com’n v. Loftis, 402 S.C. 382, 384, 741 S.E.2d 757, 758 - 759 (2013)(citations omitted). As discussed herein, there is evidence the Mangialardos have damages as a result of the Kellys’ actions that were not cut off by the foreclosure action, and the court has the ability to grant relief to them in the form of payment of damages.

A question may arise as to whether the Mangialardos could receive a variance from Santee Copper, allowing the house to stay within the easement. The Mangialardos presented evidence in the form of deposition testimony from Jeffery L. Lane suggesting a variance would not be possible under the circumstances. (**Jeffery L. Lane Deposition pp.34, ll.23-25; pp.35, ll.1-23; pp.39, ll.22-25; pp.40, ll.1-5**). A fact question exists as to whether a variance is possible and whether the value of the Property is diminished by its proximity to the power lines and because of the presence of high levels of EMFs.

2. Did the trial court err finding the Kellys are entitled to summary judgment for all claims related to damages related to EMFs when the Mangialardos presented evidence they suffered damages as a result of the high level EMFs?

The trial court found there was no evidence presented that the high levels of EMFs caused the Mangialardos health hazards and granted summary judgment to the Kellys for all damages related to EMFs. (**Order pp.5**). However, this finding overlooks

evidence presented by the Mangialardos that the high levels of EMFs have the potential to be harmful and to affect the value of the Property and its marketability.

Due to the home's encroachment into the Santee Cooper Easement and the resulting proximity of the power lines, the house contains excessively high levels of EMFs. **(O.J. Jansky Deposition pp.57, ll.19-25; pp.58, ll.1-9; pp.41, ll.9-16)**. O.J. Jansky, an employee of Santee Cooper who routinely conducts EMF measurements and provides information to customers, conducted tests on the Property showing the EMF emission ranging from 16.1 to 37.5 milliGauss. **(O.J. Jansky Deposition, Exhibit 1)**. According to the EMF literature Jansky provided to the Mangialardos, ninety percent of American households contain EMF readings between .6 and 2.1 milliGauss. **(O.J. Jansky Deposition, Exhibit 2, p.32)**. Additionally, the literature Santee Cooper provided to the Mangialardos indicates studies have shown a connection between excessive exposure to EMF emissions and childhood leukemia, other forms of cancer, increased heart rates, sleep problems, hormonal imbalances and immune system problems. **(O.J. Jansky Deposition, Exhibit 2, pp. 16-27; Audra S. Mangialardo Deposition pp.35, ll.2-7)**. Additionally, Mr. Jansky testified that he has never seen reading as high as those located on the Property. **(O.J. Jansky Deposition, pp.41, ll.21-25)**.

EMF emissions rapidly dissipate with distance, so the farther away a structure is located from an emission source, the lower the EMF readings. **(O.J. Jansky Deposition, Exhibit 2)**. Because the house is located within the Santee Cooper easements, the home is closer to the power lines, causing the EMF reading to be higher.

Whether the excessive EMF emissions found on the Property is a health and safety concern is a question of fact for the jury. The Mangialardos believe the EMFs pose

a health and safety concern for their family based on the literature given to them by Santee Cooper, and Ms. Mangialardo testified those concerns affect the value of the Property. (**Audra S. Mangialardo Deposition pp.4, ll.7-10**). A question of material fact exists as to whether the excessive EMF readings pose a health and safety risk or diminish the value of the Property.

3. Did the trial court err in finding the South Carolina Unfair Trade Practices Act does not apply when a scintilla of evidence of to satisfy each prong of the SCUTPA is present?

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 [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. South Carolina Bd. of Dentistry, 403 S.C. 623, 638, 743 S.E.2d 808, 816 (2013)(citing Wright v. Craft, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006). "An act is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive." Gentry v. Yonce, 337 S.C. 1, 12, 522 S.E.2d 137, 143 (1999). "An act is 'deceptive' when it has a tendency to deceive." Id. "Unfair or deceptive acts or practices have an impact upon the public interest 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)(citation omitted).

Here, the Kellys through their agent/partner engaged in an unfair or deceptive act by constructing the house within a utility easement, by failing to inform the buyers of the defective construction, and by selling the Property in such condition.

The Kellys' actions affect the public interest because the record shows the Kellys were engaged in the business of constructing and selling spec houses. (**Gerald W. Kelly Deposition pp.50-51**). In connection with this practice, the Kellys through their agent/partner filed a drawing with Georgetown County depicting the house constructed on the Property thirty-five feet from the property boundary line, which is ten feet outside of Santee Cooper's easement. (**Gerald W. Kelly Deposition, Exhibit 1**). The drawing unfairly and deceptively informs the public as well as the Mangialardos the house is not constructed within the easement. The act is capable of being repeated as the Kellys have a history of engaging in these types of transactions, having done so at least five or six times. (**Gerald W. Kelly Deposition pp.50-51**). Additionally, the Mangialardos suffered damages as discussed above.

Because at least a scintilla of evidence exists to satisfy each prong of the UFTPA's requirements for liability, the trial court erred in granting summary judgment in favor of the Kellys.

4. Did the trial court err in failing to allow the Mangialardos to amend their Complaint even though the opposing parties established no prejudice?

Rule 15, SCRCF, provides that: "A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party."Rule 15(a), SCRCF. "A motion to

amend is within the sound discretion of the trial judge and the opposing party has the burden of establishing prejudice.” Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry, 403 S.C. 623, 632, 743 S.E.2d 808, 812 (2013)(citing Foggie v. CSX Transp., Inc., 315 S.C. 17, 431 S.E.2d 587 (1993)).“Delay in seeking leave to amend pleadings regardless of the length of the delay, will not ordinarily be held to bar an amendment in the absence of a finding of prejudice.” Forrester v. Smith & Steele Builders, Inc., 295 S.C. 504, 508, 369 S.E.2d, 156, 159 (Ct. App. 1988)(citation omitted).

The Mangialardos filed a “Motion to File a Fourth Amended Complaint” (“**Motion**”) on September 20, 2013 to add causes of action and language to the Complaint prior to trial to conform to the evidence the Mangialardos gleaned through the discovery process. (**Transcript of Hearing**).²The Mangialardos sought to add the Kellys to the first cause of action for negligence based on the evidence of a partnership or joint venture between the Kellys and Blue Ridge Ventures, LLC. (**Transcript of Hearing**). The Mangialardos sought to add causes of action against Attorneys’ Title related to the agency relationship between Perrow and Attorneys’ Title based on Matthew Lewis’ deposition testimony on August 1, 2013. (**Transcript of Hearing**).

²At the time the court heard the Mangialardos’ Motion the Order Granting Summary Judgment had been filed, but the Motion to Alter or Amend was still pending before the trial court. (**Transcript of Hearing pp.12, ll.15-25**). The Mangialardos acknowledge any causes of action dismissed by the Order Granting Summary Judgment would be removed prior to filing and serving the Fourth Amended Complaint. (**Transcript of Hearing pp.12, ll.15-25**).

The trial court gives no reason in its written order for denying the motion to amend the complaint, and made no finding the amendment would prejudice the Kellys, Attorneys' Title, or any other party to the action. See Id. 295 S.C. at 507, 369 S.E.2d, at 158 (stating refusal to grant a motion without making a finding of prejudice, undue delay, or injustice may be sufficient basis to reverse the decision).

Because evidence of damages creating a triable issues of facts is extant on the record, there is no prejudice to the Kellys by allowing the Mangialardos to amend their Complaint to include the Kellys in the cause of action for negligence. Additionally, there is no prejudice to Attorneys' Title in allowing the Mangialardos to amend their Complaint to include causes of action relating to agency. The underlying transaction and facts relating to all of the causes of action in the proposed Fourth Amended Complaint are identical to the transaction and facts relating to the causes of action currently alleged in the Third Amended Complaint. No new parties will be added, no new discovery will be needed prior to trial, and no facts other than those already alleged will be presented.

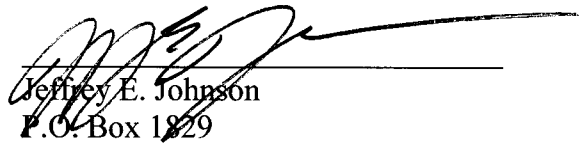
If the case goes to trial, the addition of the causes of action for negligence and those relating to agency will not change the evidence presented to the jury. The causes of action and information the Mangialardos propose to allege in the Fourth Amended Complaint and those alleged in the Third Amended Complaint are so interrelated it would be next to impossible to try the case without implicitly including those issues. In light of these facts, there is no evidence that any perceived delay in making the motion to amend will cause any party prejudice.

Because the opposing parties have not established any prejudice, the trial court abused its discretion in denying the Mangialardos' motion to amend the complaint, and the decision should be reversed.

CONCLUSION

Based upon the foregoing, the Order Granting Summary Judgment should be reversed and the case remanded to the trial court for trial on the merits of the case. Additionally, the Order Denying Amendment should be reversed as an abuse of the trial court's discretion, and the Mangialardos should be given leave to amend the complaint.

Respectfully Submitted,



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Attorneys for Appellant

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

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SEP 15 2014

SC Court of Appeals

Case No. 2012-CP-22-00889
(SC Court of Appeals Case No.: 2014-001104)

Alexander Mangialardo and Audra MangialardoAppellants,

v.

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.

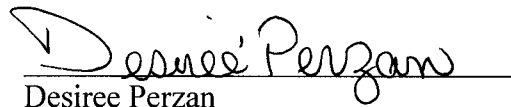
Of Whom Blue Ridge Ventures, LLC, Gerald W. Kelly, Elizabeth L. Kelly,
Caison Engineering Company, Inc., Keith Duncan,
Attorneys Title Insurance Fund, Inc., G. Turner Perrow, Jr. and Tidelands Law, LLC
are the Respondents.

PROOF OF SERVICE

I certify that I have served the Appellant's Initial Brief Designation of Matter on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on September 10, 2014, addressed to Jack Scoville, P.O. Drawer 1228, Georgetown, SC 29442, Michael S. Chambers, 121 Manly Street, Greenville, SC 29601, and G. Turner Perrow 606 Front Street, Georgetown, SC 29440, Keith Duncan as Registered Agent for Blue Ridge Ventures, LLC, 647 Little Tony Avenue, Murrells Inlet, SC 29576, Albert A. Caison as Registered Agent for Caison Engineering Company, Inc., 4034 Bayfield Loop, Murrells

Inlet, SC 29576-4806, and Keith Duncan at 635 Little Tony Avenue Murrells Inlet, SC 29576.

September 10, 2014

A handwritten signature in black ink that reads "Desiree Perzan". The signature is written in a cursive style and is positioned above a horizontal line.

Desiree Perzan

Paralegal to Jeffrey E. Johnson

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S.C. Certified Civil Court Mediator

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September 10, 2014

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

RE: Alexander Mangialardo and Audra Mangialardo v. Blue Ridge Ventures, LLC et. al.
Case Number: 2012-CP-22-00889
SC Court of Appeals Case No.: 2014-001104

Dear Ms. Kitchings:

Please find enclosed for filing in the above-referenced case the original and three (3) copies of copies of the following:

1. Appellant's Initial Brief;
2. Designation of Matter to be Included in the Record on Appeal; and
3. Proof of Service.

Please file the original with your office and return the clocked copies to me in the self addressed stamped envelope enclosed. By copy of this correspondence I am hereby serving all counsel of record with same.

With kind regards, I am

Sincerely,



Jeffrey E. Johnson

JEJ/dp
Enclosures

cc: Jack Scoville, Esq.
Michael S. Chambers, Esq.
G. Turner Perrrow, Esq.
Keith Duncan
Blue Ridge Ventures, LLC
Caison Engineering Company, Inc.
Karen Sauls, Esq.
Clients

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SEP 15 2014

SC Court of Appeals