

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

RECEIVED
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SC Court of Appeals

Howard Nankin and Nancy Nankin Appellants,

v.

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

INITIAL BRIEF OF RESPONDENT

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October 7, 2014

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STATEMENT OF THE ISSUES ON APPEAL

I. BECAUSE APPELLANTS HAVE ELECTED TO ACCEPT THE AWARD AGAINST RESPONDENT FOR BREACH OF CONTRACT, THE APPELLANTS HAVE NO FURTHER CLAIM WHICH CAN BE ASSERTED AGAINST THE RESPONDENT.

II. THE TRIAL COURT DID NOT ERR IN HOLDING THAT APPELLANTS NOT RECOVER UNDER THEIR CAUSE OF ACTION FOR UNFAIR TRADE PRACTICES.

III. THE TRIAL COURT DID NOT ERR IN HOLDING THAT APPELLANTS NOT RECOVER UNDER THEIR CAUSES OF ACTION FOR FRAUD OR MISREPRESENTATION.

STATEMENT OF THE CASE

Appellants, Howard and Nancy Nankin, filed this action against Respondent, Donald M. Danford, on November 29, 2010. The Nankins' alleged causes of action for breach of contract, negligence, negligent misrepresentation, fraud, and violation of the South Carolina Unfair Trade Practices Act, all arising from the renovation of a bathroom in their home. On December 29, 2010, Danford filed his Answer, Counterclaim, and Third Party Complaint against Jeff Stahl. On January 12, 2011, the Nankins filed their Reply. On June 16, 2011, Third Party Defendant Jeff Stahl answered the Third Party Complaint denying liability.

Since no party asked for a jury trial, the parties tried this action without a jury before the Honorable Edgar W. Dickson on October 4, 2012. The Court issued its order in the matter on April 18, 2013, finding that the plaintiffs were entitled to \$12,927.00 on their breach of contract claim and that the defendant

Danford was entitled to \$6,400 on his third party complaint against Stahl. The order denied any other relief to the plaintiffs. It also denied any relief to defendant Danford on the counterclaim.

On May 9, 2013, the Nankins filed a motion to alter or amend the judgment pursuant to Rule 59(e) SCRPC. They asked that the Court reconsider its denial of relief under the South Carolina Unfair Trade Practices Act and that he made clear his ruling denying relief to the Nankins for negligence, negligent misrepresentation, and fraud. Judge Dickson denied the motion to reconsider by his order dated January 17, 2014, in which he offered further explanation or support for his initial order. The Nankins filed their notice of intent to appeal on February 18, 2014. Defendant Danford has not appealed. Neither has the Third Party Defendant Stahl.

STATEMENT OF FACTS

The Appellants, on this appeal, would ask that the Court consider the facts and inferences which were before the trial court only according to the view which is most favorable to their case. While they admit that such is not the appropriate test in the case of a legal matter tried by the Court without a jury, they continue to suggest to this Court in their Statement of the Facts their own view as if the Court had nothing else before it. We thus state some additional facts which were omitted by the Appellants in their presentation.

The relationship between the Appellants and the Respondent were not accurately portrayed in the Appellants' argument. The following additional information was before the Court. The Appellants are highly educated people. Yet, the Respondent had only a high school education. (T. p. 60) Prior to the spring of 2010 when he first met with the Appellants, Respondent had worked for about ten years as a furniture salesman and designer for Whit-Ash Furniture in Columbia, South Carolina. (T. p. 60) In the spring of 2010, Respondent opened his own interior design business. It was in that capacity that the Appellants engaged him to assist them in the redesign of a bathroom in their home. In that connection, Respondent met with Appellants, reviewed the scope of their project, and sought for them prices from a general contractor, David Noss, with whom the Respondent had previously worked. (T. p. 18) After receiving prices from contractor Noss, those were presented to Appellants who said they were too high. Respondent discussed the matter further with David Noss and presented a list of reduced prices for the Appellants' consideration. (Plaintiffs' exhibit 6; T. p.

68) While this was on a piece of stationery reflecting Respondent's business, he explained that these were still David Noss's figures resulting from Respondent's continuing negotiations with Mr. Noss. (T. pp. 22, 31) In fact, Mr. Noss, a licensed contractor, did work on the project, installing the structural studs, the cabinet work, the glass door and surround, and the window replacement. (Plaintiffs' exhibits 8 and 9; T. pp. 73, 76) In addition, it was Mr. Noss's nephew who had previously worked for him who performed the sheetrock work. (T. p. 46)

The principal complaint from the Appellants regarded the quality of the tile work which was initially performed by Jeff Stahl. Mr. Stahl had been brought in to do the tile work at the specific instruction of the Appellants since Mr. Stahl's parents were friends of the Appellants and he had gone to school with Mrs. Nankin's daughters. (T. pp. 38 and 77) In fact, the Appellants provided a house key for Jeff Stahl so that he could come and go, but they never provided a key for the Respondent's use. (T. p. 77)

Much is made in this case about the fact that the Respondent did, in fact, pay for much of the work. Respondent's explanation was simple enough.

A: Because they wanted me to be the banker, take care of everything, pay everything.

Q: And you did that?

A: Because they asked me to. I didn't know I was doing anything wrong.

(T. p. 42, ll. 17-21; also stated at T. pp. 73-74) He explained that the Nankins were sometimes out of town and that they requested that he go ahead and make

payments. He also explained that, as an interior designer, he received sales commissions from some of the suppliers, such as the tile company, and that the Appellants were anxious for him to receive that credit so that he could pass it on to them. (T. p. 63) The suggestion that until the very end of the project they did not understand just what it was that Respondent was doing for them is brought into question by the very fact that all of this was going on in their very own house for three months.

Much is made of the contention that the Appellants wanted a facility that was handicapped accessible. Yet, when asked by Respondent whether she wanted grab bars in the shower, Mrs. Nankin declined that option. (T. p. 93) Also, the home building expert, who testified on behalf of the Appellants to suggest that practically all of the work would have to be redone, confirmed that he had not made provision for handicapped accessibility since the very door to the bathroom would not have permitted such adaptation. (T. pp. 230-231) The Appellants' argument suggests that the testimony of the construction expert was "unopposed." Respondent disagrees with that contention. While Respondent did not present a construction expert to contradict the testimony of Appellants' expert, a great deal of what that expert contended about repair and replacement was put into serious question by looking at the photographs of the bathroom taken a year after the work was stopped (Defendant exhibit 2) and by noting that the Appellants had not undertaken the recommended repairs during the two years which had elapsed before trial. Further, the punchlist which Mrs. Nankin had been addressing before ousting Respondent from the job reflected very little

remaining work and that the few which had been identified were mostly corrected. (T. pp. 34, 81-85; Plaintiffs' Exhibit 12). Also, the home inspection report commissioned by the Appellants the week before the ouster also showed very few errors in work (Plaintiffs' Exhibit 23).

STANDARD OF REVIEW

The parties are in agreement on this one factor. The trial judge's finding of fact and the reasonable inferences to be drawn will not be second-guessed or disturbed on appeal so long as there was any evidence to support his conclusion. *Pope v. Gordon*, 369 S.C. 469, 633 S.E.2d 376 (Ct. App. 2000).

ARGUMENT

- I. **BECAUSE APPELLANTS HAVE ELECTED TO ACCEPT THE AWARD AGAINST RESPONDENT FOR BREACH OF CONTRACT, THE APPELLANTS HAVE NO FURTHER CLAIM WHICH CAN BE ASSERTED AGAINST THE RESPONDENT.**

Respondent first presents this additional sustaining ground since it effectively eliminates any requirement that the Court go further to consider Appellants' arguments on the merits.

The Appellants sued the Respondent claiming five separate causes of action, each arising out of the renovation of their existing bathroom. All of the allegations of the complaint arise from the very same set of facts. They were awarded relief by the Trial Court who gave them judgment for out-of-pocket remedial expenses and anticipated additional repairs. The court concluded that the Appellants had failed to prove their claims for negligence, negligent misrepresentation, fraud and unfair trade practices. Yet, if the court had found in favor of the Appellants on all five causes of action, the Appellants would have had to elect only one of those as the basis of their recovery. Their pursuit of the final judgment for breach of contract precludes their recovery on any other claim.

The doctrine of election of remedies involves choosing between “two or more different and coexisting forms of relief afforded by law for the same injury.” *Adams v. Grant*, 292 S.C. 581, 584, 358 S.E.2d 142, 144 (Ct. App. 1986). Election of remedies operates to prevent double redress of a single wrong. *Williams v. Riedman*, 339 S.C. 251, 275, 529 S.E.2d 28, 36 (Ct. App. 2000). Application of the doctrine should be confined to cases where double recovery of the plaintiff is threatened. *Save Charleston Found. v. Murray*, 286 S.C. 170, 175, 333 S.E.2d 60, 64 (Ct. App. 1985). “When an identical set of facts entitle the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both; however, the plaintiff may not recover both.” *Id.* Stated differently, election of remedies is the act of choosing between different remedies allowed by the law *on the same state of facts.*” *Barfield v. J.L. Coker & Co.*, 73 S.C. 181, 189, 53S.E.170, 173 (1906).

The five recoveries under which Plaintiffs proceed in the present case represent the same actual damages or conduct under differing theories of recovery, thus requiring Plaintiffs to elect which theory will be the basis of recovery. South Carolina cases applying or commenting upon the doctrine of election of remedies do not allow a plaintiff to recover damages for multiple causes of action based on the same conduct. *Williams v. Riedman*, 339 S.C. 251, 529 S.E.2d 28 (Ct. App. 2000) (prohibiting double recovery where the breach of contract and the breach of implied covenant of good faith and fair dealing claims resulted from employees improper termination); *Cowart v. Poore*, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999) (requiring election among breach

of contract, negligence, and violations of the Unfair Trade Practices Act had the action been brought to trial where all the causes of action arose out of a fee dispute.); *Carolina Chem. Equip Co. v. Muckenfuss*, 322 S.C. 289, 471 S.E.2d 721 (Ct. App. 1996) (prohibiting double recovery on bad faith and misappropriation causes of actions where both concerned the misappropriation of trade secrets); *Sorin Equip. Co. v. Firm, Inc.*, 323 S.C. 359, 474 S.E.2d 819 (Ct. App. 1996) (disallowing plaintiff to recover damages on both quantum meruit and fraud causes of action involving manufacturing rights if plaintiff prevailed on both causes of action at trial); *Brown v. Felkel*, 320 S.C. 292, 295, 465 S.E.2d 93, 95 (Ct. App. 1995) (barring recovery on a tort claim arising under identical facts involving accountants' breach of fiduciary duties under which plaintiff had already received a judgment based on contract); *Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 450 S.E.2d 66; (Ct. App. 1994)(electing to recover on negligence claim over contract claim where insurer refused to pay insurance proceeds for damaged frozen goods). In *Perry v. Green*, 313 S.C. 250, 250, 437 S.E.2d 150, 151 (Ct. App. 1993) the plaintiffs proceeded on similar dual theories of breach of contract and breach of contract accompanied by a fraudulent act in addition to the cause of action for specific performance when a seller refused to transfer registration papers on a registered Arabian mare. . The jury returned verdicts in favor of the plaintiff on both causes of action. *Id.* The trial judge sua sponte allowed only one recovery of actual damages, recognizing that "the breach of contract and the breach of contract accompanied by a fraudulent act causes of action necessarily arose out of the same transaction." *Id.* The trial

judge corrected the double recovery and thereafter granted specific performance. *Id.*, 437 S.E.2d at 152. On appeal, the Court of Appeals affirmed this portion of the result, finding no error by the trial judge. *Id.*

Judgment has now been entered against the Respondent on the breach of contract claim according to Judge Dickson's orders. In spite of the fact that the Appellants appealed his refusal to find in their favor on any of the other causes of action, the Appellants have elected to recover the damages awarded for breach of contract. While our Court has established that election is not required at early stages of litigation, this is not such a situation. Appellants have, in fact, made such an election by pursuing collection of the existing judgment for breach of contract. Are Appellants willing to give that claim up in order to press their appeal for fraud and unfair trade practices? We think not. Even at this late date in the proceedings they want to have their cake and eat it too. Even if the Court of Appeals were to conclude that there was a gap in the decision of Judge Dickson, the matter would be moot since the Appellants have elected to collect for their bathroom under the award for breach of contract. Therefore, the Court need go no further in evaluating the Appellants' additional claims.

II. THE TRIAL COURT DID NOT ERR IN HOLDING THAT APPELLANTS NOT RECOVER UNDER THEIR CAUSE OF ACTION FOR UNFAIR TRADE PRACTICES.

The trial judge decided that the Appellants had failed to carry their burden of proof with respect to the South Carolina Unfair Trade Practices Act. When he reached that conclusion, he had all of the following facts and more before him. He did not have to accept all of the Appellants' contentions at face value. He

was able to listen to the witnesses, both Respondent and Dr. Nankin. We note that Mrs. Nankin never testified. The parties agreed that the Appellants hired the Respondent to be an interior designer. He was new in the business. He had only a high school education. He certainly began his dealings with the Appellants as nothing more than an interior designer. As the Court concluded, this relationship “evolved” into something more as the work began, and David Noss, the licensed contractor, took a reduced role. Respondent repeatedly testified that he did not know that what he was doing when he paid the bills or otherwise helped the Appellants was wrong in any respect. Respondent did, in fact, first seek out a licensed contractor, David Noss, to undertake all of the work, and, in the process, submitted a bill to the Appellants for his hours as an interior designer. (T. p. 70)(Defendant’s Exhibit 1)

The Trial Court concluded that the Appellants had failed to prove that any unfair or deceptive act on the part of the Respondent had affected the public interest as is essential under the statute. The Appellants, in their argument, turn one Court decision on its head by arguing that anything which may be subject to repetition is, by definition, affecting public interest. That is not at all what the case law holds. Instead, our Court has repeatedly held that a potential for repetition may be evidence to establish the public interest element. At no point, however, has our court indicated that that potential for repetition establishes public interest. That is just one factor which may be considered by a trier of fact.

Our courts have continued to remind the bar and lower courts that a mere allegation about the possibility of some potential repetition is not sufficient to

elevate a private dispute to an unfair trade practices violation. First, in *Scheloschnellmann v. Roetteger*, 368 S.C. 17, 627 S.E.2d 742 (Ct. App. 2006), modified on other grounds, 373 S.C. 379, 645 S.E.2d 239 (S.C. 2007), our Court dealt with a real estate agent. In spite of the fact that the real estate agent was dealing with the public rather than with an individual, the Court concluded that no claim was stated for an unfair trade practice. In that case, the real estate agent had listed a property as having approximately 3,350 square feet. A couple bought the property and later learned that there were only 2,987 square feet in the building. In dismissing the claim, the Court found that there was no evidence that the real estate agent had misstated the square footage in any other listings in the past or that “any procedure regularly employed by her would cause [the] misstatement to be made again.” *Id.*, at 23, 627 S.E.2d at 746.

In *Jeffries v. Phillips*, 316 S.C. 523, 451 S.E.2d 21 (Ct. App. 1994), there was a dispute over a repair to a home by a disgruntled homeowner. In dismissing the case, the Court of Appeals held that there was no evidence in the case that the Defendant had engaged in similar acts or that he would repeat his acts, and that therefore it did not affect the public interest. The court stated more explicitly that, “in the course of human endeavor, every action has some potential for repetition. The mere proof that an actor is still alive and engaged in the same business is not sufficient to establish this element.” *Id.*, at 529. This private dispute is nothing more than that.

Even after hearing the same argument in the Appellants’ motion for reconsideration, the Trial Court again concluded that the case was simply over

the Respondent's failure to repair and to renovate a bathroom in the Appellants' home. The Appellants complained about the look of the tile and some of the jets in the bathtub not working. We suggest that this Court just look at the punchlist and the home inspection report which outlined all of the remaining questions before they engaged an attorney. (Plaintiffs' exhibits 12 and 23) Only later did the Nankins take the position that major renovations were necessary. No contention was ever made that they had been injured as a result of the work or that it was dangerous to them. Trial exhibit Defendant's 2 shows photographs of the bathroom from all directions. The Appellants opposed Respondent's request to have the trial court actually go look at the bathroom. This was, as concluded by the court, a contract dispute, and nothing more.

The argument by the Appellants that the Respondent had undertaken similar actions on two other occasions is misleading. The facts show that in each instance, the Edelsons and the Warringtons, that there was a licensed general contractor who did all the work. (T. pp. 48 and 52) One of those contractors was David Noss, and the other one was Capital Kitchen & Bath. Each acquired the permit and did the work. (T. p. 102) The Respondent explained that he did not hire any subcontractors on his own to perform any of that work. He explained that the only compensation he received on the Edelson job was that specifically charged for ten hours at \$125 per hour, and whatever commissions he might have received from the fixture suppliers. (T. p. 62) Thus, in neither of those cases did the relationship with the Respondent evolve into that which could be

considered “contractor.” Neither of those parties has complained (T. p. 62), and neither was called as a witness at the trial.

III. THE TRIAL COURT DID NOT ERR IN HOLDING THAT APPELLANTS NOT RECOVER UNDER THEIR CAUSES OF ACTION FOR FRAUD AND MISREPRESENTATION.

The Appellants’ entire argument is based on one portion of one sentence in the court’s initial order that was to the effect that the Appellants terminated the Respondent (in early September 2010) as a result of unacceptable work and because of his “concealing of the fact that he was acting as general contractor for the Project . . .”. There was no question that in April 2010 when the discussions began, the Respondent did try to find a licensed contractor to perform the work. Even at the time of trial, he explained that he never considered himself a general contractor but that he was working with the Appellants to get the best prices and to get the work done, even with Jeff Stahl whom they selected. Appellants made much of the fact that in Plaintiffs’ Exhibit 1 there is a “contractor’s fee” reflected on the Respondent’s stationery and yet, now, they contend that they never knew what his role was to be. Well, Respondent did not either. The suggestion that he intended to mislead the Appellants by his silence as he worked in their home is not a position which the trial court had to accept. In fact, the trial court went to lengths to explain in the denial of the Rule 59(e), the Court gives the following assessment.


“The Defendant’s communications with the Plaintiffs in an effort to appease them and regarding the employment of a tile setter who was a family friend of Plaintiff Nankin and her children, were lax and not what might have been sufficient to avoid the misunderstandings which resulted, but Plaintiffs failed to convince the Court that these amounted to misrepresentations made to

mislead or that any of the other requirements for supporting such claims were met.” Page 3

As with Appellants’ argument regarding unfair trade practices, they acknowledge the very high bar which would be required to overturn the Trial Court’s conclusion, but then ignore it as they make their argument. They acknowledge that if there was any evidence to support the conclusion of the Trial Judge, they lose this appeal. Yet, they attempt to spin some of the evidence in such fashion to have this appellate court conclude that there was only one possible decision, including the determination of intent.

CONCLUSION

In conclusion, Respondent first asks the Court to deny any relief because the Appellants have elected their single recovery under the claim for breach of contract. That they would have no other rights to collect under any claims arising from the same bathroom renovation. Further, Respondent Danford asks that the Court affirm the order of the trial court in denying relief under the additional claims as set out in the briefs.


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PROOF OF SERVICE

I certify that I have served the **INITIAL BRIEF OF RESPONDENT AND DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** on Appellants by depositing a copy of the same in the United States Mail, postage prepaid, on October 7, 2014, addressed to their attorneys of record, Wesley D. Peel, Bruner, Powell, Wall & Mullins, LLC, Post Office Box 61110, Columbia, South Carolina 29260.



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