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.

REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES IN REPLY

1. APPELLANTS DID NOT MISCHARACTERIZE THE FACTS BEFORE THE COURT IN THEIR INITIAL BRIEF AS THE FINDINGS OF FACT OF THE COURT BELOW ARE NOT CHALLENGED AND ARE FINAL.

In his Statement of the Facts, Respondent asserts that Appellants "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" and that "[Appellants] continue to suggest to this Court in their Statement of the Facts their own view as if the Court had nothing else before it." Respondent then recites additional facts. The Respondent has not challenged the trial court's findings of fact.

Appellants Statement of the Facts is taken almost verbatim from the Findings of Fact in the trial court's Order dated April 18, 2013. Appellants include 3facts in their Statement of Facts that were not specific findings of the Trial Court, all of which are supported by the record:

1. Matthew Cooper testified at trial that he worked for and was paid by Danford for construction work on the Plaintiff's home. (Trial Tr. p.108, line 16- p.109 line 9.)
2. The defects in the construction were pointed out to, but not corrected by Danford. (Trial Tr. p.136, line 24- p.138, line 25; p. 140, line 6- p.141, line 9; p.142, lines 7-23; p.144, line 9- p.145, line 3.)
3. Danford offered testimony tending to downplay or contradict his role as the contractor, as well as evidence contradicting the Plaintiffs' understanding of agreement. (Trial Tr. p.50, line 18- p.51, line 22; p. 54, lines 11-13; p.101, line 21- p.103, line 5.)

Therefore, Appellants have not mischaracterized any facts or misled the Court in any way. In contrast, Respondent's brief is centered around facts that are not relevant to the issues

on appeal. A large portion of Respondent's brief is an attempt to re-try the case, which Appellants highlight in this Reply.

2. APPELLANTS HAVE NOT YET RECOVERED A JUDGMENT FOR THEIR BREACH OF CONTRACT CLAIM AND THIS COURT DISPOSED OF THE ELECTION OF REMEDIES ISSUE WHEN IT DENIED RESPONDENT'S MOTION TO DISMISS THE APPEAL

Respondent confuses the issues before this Court. First, Respondent argues that appellants are not entitled to pursue their claims for negligent misrepresentation, breach of the South Carolina Unfair Trade Practices Act ("SCUTPA"), and fraud because Appellants have elected remedies under their breach of contract action. This is the same argument that Respondent made in his Motion to Dismiss the Appeal, filed with this Court on July 10, 2014. In fact, the entire section devoted to Respondent's election of remedies argument in his Initial Brief is copied and pasted verbatim from his Motion to Dismiss the Appeal. Appellant filed a Return to Respondent's Motion to Dismiss the Appeal on July 18, 2014, setting fort, in detail, the reasons why Appellants have not yet elected a remedy and are entitled to damages under the SCUTPA. Respondent is attempting to re-argue his election of remedies defense, despite the fact that this Court disposed of this issue when it denied Respondent's Motion to Dismiss the Appeal in its order filed on August 13, 2014.

Because this issue was already considered and ruled upon by this Court, Appellants need not copy and paste its Return into this Reply. To the extent this Court is willing to reexamine the election of remedies issue, Appellants provide a concise summary of their Return to Respondent's Motion to Dismiss the Appeal below and incorporate the same by reference.

Appellants are entitled to recover damages for their claims for 3 reasons: (1) Because Appellants' claims have both statutory and common law foundations, collection of the statutory punitive damages and attorneys' fees does not amount to double recovery; (2) Appellants have

not yet elected a remedy because they have not accepted payment for the breach of contract claim and the judgment has not been satisfied; and (3) Appellants' SCUTPA claim is not based on the same facts or injuries as Appellants' other claims.

First, electing from there different judgments does not constitute double recovery where the claims are grounded in both statutory and common law and the Plaintiff is seeking statutory punitive damages and attorneys fees in addition to damages for common law breach of contract. Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 56-67, 691 S.E.2d 135, 153 (2010) (allowing the plaintiff to recover attorney fees under a statutory claim in addition to punitive damages under a common law claim).

Second, 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 744 (Ct. App. 1990). Notably, Respondent omits the fact that he has not paid any of the judgment to Appellants. Because Appellants have not accepted payment for the breach of contract claim, the judgment has not been satisfied.

Third, election of remedies is not applicable where there are two separate causes of action, each based on different facts. Taylor v. Medecina, 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). Here, the SCUTPA claim is not based on the same facts or injuries as Appellants' other claims. The SCUTPA claim is based upon the fact that Respondent engaged in residential home building without a proper license whereas the breach of contract claim is based on Respondent's failure to adequately complete the renovation.

3. RESPONDENT MISTATES THE RECORD AND PROVIDES NO LEGAL SUPPORT FOR HIS ARGUMENT THAT THE PUBLIC INTEREST ELEMENT WAS NOT MET

In his Initial Brief, Respondent mischaracterizes Appellants' argument, stating that "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." Respondent then summarizes two cases, Scheloschnellmann v. Roetteger, 368 S.C. 17, 627 S.E.2d 742 (Ct. App. 2006) and Jeffries v. Phillips, 316 S.C. 523, 451 S.E.2d 93, 95 (Ct. App. 1995) as authority to support the general rule that a mere allegation of possible or potential repetition is not sufficient to elevate a private dispute into an Unfair Trade Practices violation. Respondent points out that the public harm element of the UTPA claims was not met in those cases because there was ***no evidence*** the defendants engaged in unfair trade practices on other occasions.

While it is a correct statement of the law that mere allegations of potential repetition are insufficient, appellants do/did not challenge that fact and it is not germane to the issue before this court. Here, there ***is evidence*** of repetition, which was ignored by the trial court, and Appellants are not relying on mere allegations. Therefore, the question before this Court is whether the evidence before the trial court was ***sufficient*** to satisfy the public interest element of Appellant's Unfair Trade Practices claim, not whether there was any evidence of repetition at all.

At trial, Appellants established two separate occasions where Respondent engaged in the exact same unfair trade practices with other consumers as he did with Appellants. Proof of each instance is clearly supported in the record. Appellants presented an invoice from Danford to Rich and Mary Edelson dated July 12, 2012 and an invoice from Danford to Jackie Warrington dated November 23, 2010, both of which were for residential construction projects. In its Order dated April 18, 2013, the trial court specifically found that "Plaintiffs presented uncontested evidence that Danford has entered into similar arrangements with at least two other clients in the past, where he was performing the duties of a contractor without a license"; however, "[w]hile there

was evidence presented that Danford had acted in a similar capacity on two prior occasions, the Court feels the underlying dispute in this case was between two private parties and does not substantially affect the public at large." (Order, Apr. 18, 2013, p. 7.) The trial court's finding was improper and the test applied was in error.

Next, Respondent confusingly lists a litany of facts that in no way relate to the Unfair Trade Practices allegation or potential for repetition, or public harm. Respondent directs this Court to a punch list and photographs of the bathroom without connecting these facts to any relevant argument before this Court. Respondent's attempt to re-argue whether renovations were really necessary or whether the work was "dangerous" to Appellants is a red herring intended to confuse the issues. Respondent also continues to ignore the findings of the trial court that are final and have not been appealed.

Boldly, Respondent mischaracterizes the record, stating "[t]he facts show that in each instance, the Edelsons and the Warringtons, that there was a licensed general contractor who did all the work." (see p. 13 of Respondent's Initial Brief.) Respondent cites pages 48 and 52 of the Transcript in support. This is in contradiction to the trial court's finding and does not accurately reflect the record. Specifically, the Respondent was impeached by his own deposition testimony, conveniently not cited by Respondent. Pages 48-52 of the trial transcript establish that there was no general contractor for either the Edelson or the Warrington job. In fact, Respondent admitted to paying the sub-contractors on the Edelson job himself:

Q: Okay. Well, on the Edelson bill, can you still get to that, Tab 31, I believe?

Mr. Spruill: Thirty-two.
Mr. Peel: Thirty-two. Thank you.

Q: It's tab 32 on the last page of that bill, which is Bates stamped 10 through 12. They were paying you; right? All the payments went to you?

A: They were reimbursing me.

(Trial Tr. p. 50, line 18- p. 51, line 1.)

Q: Why didn't Mr. Noss just bill him?

A: Because Dr. and Ms. Edelson was never home. Once again, this one, the Warrington one and the Nankin one, is the ones that I made mistakes on. The clients have asked me to pay things that I didn't realize was wrong at the time. I was just starting my business. I didn't realize what the ramification for paying all these people were.

(Trial Tr. p.51, lines 14-22.)

General contractors are responsible for paying subcontractors. If there were indeed a general contractor on the Edelson job, there would be no need for Respondent to pay any subcontractor. The fact that Respondent had to pay subcontractors when the Edelsons were not home proves the absence of a general contractor.

Respondent was also asked about the work he did for the Warringtons. (Trial Tr. p.101-103.) At trial, Respondent testified that Capital Kitchens and Bath was the general contractor on the Warrington job. (Trial Tr. p.52.) Respondent testified that both he and the Warringtons hired Capital Kitchen and Bath; however, Respondent was later impeached by his deposition testimony in which he admitted to hiring Capital Kitchen and Bath himself:

Q: Let's go back to the Warrigntons. You said that was Capital Kitchen and Bath?

A: Uh-huh.

Q: They worked for you; right?

A: Me and the Warrigntons hired them.

Q: You hired them; right?

A: Me and the Warringtons hired them.

Q: Just you?

A: No.

Q: Okay. Turn to page 75 of your deposition then. Are you there?

A: I am on page 75.

Q: You can look back on 74. I'm asking you questions about Jackie Warrington. Does that appear to be correct?

A: Yes. Yes, sir.

Q: Okay. Page 75, line 7, I asked: Who pulled the building permit?
You answered: Capital Kitchens and Bath? Correct? Line 7 and 8.

A: On page 74 or 75?

Q: Page 75, please.

A: And line?

Q: Seven and 8. Who pulled the building permit?

A: Capital Kitchens and Bath.

Q: So then I asked you: Who did they work for?

A: And my answer was: Don Danford.

Q: "We hired them to do the kitchen remodel." Then I said: Don Danford hired Capital Kitchen and Bath? And you said?

A: I had answered: Correct. I didn't realize what you were asking for at the time.

Q: So you didn't understand when I asked: Who did that work for you, what I meant?

A: No.

(Trial Tr. p.101, line 21- p.103, line 5.)

Respondent hired Capital Kitchen and Bath himself to work as a subcontractor on the Warrington job. Respondent admitted that he paid the subcontractors for the tile and the plumbing and was reimbursed by the Warringtons. (Trial Tr. p.52, lines 12-15.) Respondent also admitted to summarizing what was on the Warrington's bill, which included bills for

subcontracted work. (Trial Tr. p.52-53.) This is the same behavior Respondent engaged in with the Appellants. When asked why an interior decorator was summarizing what work was done, Respondent replied: "Because I was asked to. Once again, I had just started my business. I didn't know all of this. I had no idea what I was doing." (Trial Tr. p.54, lines 11-13.) As such, the facts show that there was no general contractor on either the Edelson job or the Warrington job. The trial testimony and the invoices provided ample evidence to support the trial judge's finding to that effect in his order dated April 18, 2013.

Furthermore, the court's findings as to Respondent's role as a contractor are not on appeal. The sole issue before the Court is whether there is sufficient evidence to satisfy the public harm element of the SCUTPA. It is clear from the record is that Respondent engaged in the same unfair trade practices on at least two other occasions. Respondent was hired by the Edelsons and the Warringtons to provide interior design services, Respondent secretly worked on those jobs as a general contractor without a license, and Respondent billed and collected payment for that work using similar invoices. Because Appellants sufficiently demonstrated Respondent's potential to repeat the unfair behavior at trial, the trial court erred in denying Appellants relief under SCUTPA.

CONCLUSION

For the reasons stated above, this Court should reverse the trial court's holding that Appellants cannot recover under their SCUPTA cause of action, reverse the trail court's holding that Appellants did not satisfy the necessary elements to prevail on their negligent misrepresentation claim, and reverse the trial court's holding that Appellants should not recover under their fraud cause of action.

Respectfully submitted,

November 5, 2014

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