

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Natasha Turner,)
)
 Plaintiff,)
)
 vs.)
)
 Carmen Kellett and Michael T. Kellett,)
 f/d/b/a Buddy's Garage)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2014-CP-3197

AMENDED ORDER

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 SC Court of Appeals

ELECTRONICALLY FILED - 2016 Jun 07 4:53 PM GREENVILLE - COMMON PLEAS - CASE#2014CP2303197

This matter came before the Court on November 19, 2015 as a non-jury trial. The Court issued its order on December 11, 2015, awarding the Plaintiff damages of \$10,567.86 under the South Carolina Unfair Trade Practices Act (the "Act").

The Plaintiff has made a timely motion under Rule 52, SCRCPP, to amend the Order of December 11, to include separately stated findings of fact and conclusions of law. Rule 52 does provide for separately stated findings and conclusions; and while the Court believes the Order of December 11 to be sufficient, the Plaintiff's motion will be granted.

Plaintiff also seeks reasonable attorney fees and costs under § 39-5-140 of the Unfair Trade Practices Act; and in support of the motion Plaintiff's attorneys represented in their Brief that this case has required more time of the Plaintiff's attorneys than one would ordinarily expect. However, Plaintiff did not request an award for attorney fees in the complaint or at the conclusion of trial. Plaintiff only made such a request in its brief, therefore failing to allow time for the Court or the opposing party to evaluate the validity of the request. The court denies request for \$8,000 in attorney fees and costs.

Finally Plaintiff seeks alternative punitive damages in consequence of the willful

conversion, fraud and misrepresentation which the Court found the Defendants to have committed. Although the Unfair Trade Practices Act provides that the treble damages remedy under the Act is cumulative to all other remedies provided by law, the Court declines to award punitive damages.

Therefore, the Court shall separately state its findings and conclusions, and shall also address the matter of attorney fees under the Unfair Trade Practices Act.

FINDINGS OF FACT

Based upon the evidence, including the demeanor of witnesses and consistency or inconsistency of the testimony of the witnesses, the Court makes the following Findings of Fact:

1. The parties are residents of Greenville County, South Carolina, and the events set out in the pleading took place in that county.

2. At all times relevant to this case, the Defendants ("Mr. and Mrs. Kellett") were the co-owners and operators of an unincorporated business named Buddy's Garage ("Buddy's"), engaged in the mechanical and body repair of automobiles. Their employee, Finchem, was in charge of day to day operations, including determining repairs needed to customer's cars and amounts to be charged for the same, and contacts and communications with customers. It appears that Mr. and Mrs. Kellett were equal owners, equally entitled to control of the business and of its profits, and equally liable for its obligations.

3. On May 7, 2013, Plaintiff took her automobile for the repair of damage sustained in a car accident. Finchem prepared a proposal for repair and replacement of the front and rear bumper assemblies and replacement of the transmission, at charges totaling \$3,967.69 to be paid in advance. Turner accepted the proposal and shortly following delivered \$2,500.00, which she secured through a title loan from a finance company. Subsequently Buddy's requested and

received an additional \$1,815.26 from Plaintiff's collision insurer which was \$447.57 more than the estimate Buddy's had provided. Although Mrs. Kellett testified at trial that the additional payment was for storage of the car, there is no documentation supporting her testimony, and in her deposition Mrs. Kellett had denied knowledge of the basis for the additional payment and instead said that she imagined this was for other work. Neither is there any evidence that Plaintiff was advised of or agreed to such a charge. Therefore, the Court finds Mrs. Kellett's testimony to that effect to be untrue. All these funds were deposited in Buddy's bank account, under the control of Mr. and Mrs. Kellett. Finchem did not have access to that account.

4. Some time before July 15, 2013, Finchem was discharged by the Defendants. On July 15, 2013, Mrs. Kellett advised Plaintiff that the car was ready to be picked up and she represented that all work had been completed except installation of the front bumper assembly, the parts for which could be picked up from the former employee, Finchem. Mrs. Kellett tendered Plaintiff a return of \$130.00 for labor required on the bumper assembly. Defendants' check for that amount was received by Plaintiff, but never cashed.

5. The Court finds that neither the bumper assemblies nor the transmission were replaced, contrary to the Defendants' representations. The Defendants' pleadings and testimony are subject to a number of inconsistencies on this subject. In the Defendants' several answers in the case, they first alleged that the parts had been taken by their employee; later that Plaintiff's advance payments had been converted by their employee; and finally that the parts other than the front bumper had been installed. In her testimony, Mrs. Kellett testified under direct examination that a replacement transmission had been secured from a vehicle owned by and located at Buddy's Garage; but on cross examination, that their employee had bought a transmission in North Carolina. Indeed, the Defendants' Brief of April 18, 2016 states that their

employee “falsely represented that repair work was performed when it was, in fact, not performed.” The Court finds the testimony of the independent expert witness, Stansell, that the transmission had not been replaced to be consistent and persuasive.

6. The Plaintiff’s payments were received by the Defendants and remained under their exclusive control. With the exception of the small amount tendered for installation of the bumper, the Defendants have refused to return them to the Plaintiff, and instead have converted them to their own use, in knowing and intentional violation of Plaintiff’s rights. In the Defendants’ second Answer, they alleged that these funds had been taken by their employee with knowledge that they belonged to the Plaintiff. However, Mrs. Kellett admitted that her employee had no access to these funds, and they remained under the Defendants’ sole control. By her earlier pleading, she acknowledged that the funds belonged to the Plaintiff until the work was completed.

7. The Plaintiff secured the repair money from a finance company, and encumbered her car for that purpose. When the Defendants failed to make the necessary repairs and refused to return Plaintiff’s money to her, the Plaintiff was unable to pay for repairs elsewhere; she was unable to use her car, and therefore delivered it to the finance company, in cancellation of her debt. Based on the testimony of both finance company’s manager and the Plaintiff, the car, if properly repaired, would have had a reasonable retail value of \$6,000. The Court, however, declines to award damages based on the car’s value; but the Plaintiff’s loss of her car is properly considered in determination of the Unfair Trade Practices claim, and also would be appropriate for consideration if punitive damages were being awarded.

8. The Court finds from the pleadings and evidence that the Defendants’ retention of the Plaintiff’s payments was willful and intentional, and in knowing violation of the Plaintiff’s

rights.

9. The Court finds that the Defendants' representations, by both pleadings and testimony, that the transmission and rear bumper had been replaced were false; were known by the Defendants to be false; related to present or past matters of fact; were made with the intention that the Plaintiff act upon them; were ones that Plaintiff had a right to, and in fact, relied upon; were made with the knowledge of their falsity or with a reckless disregard for their truth; that they were made with the intention to deceive the Plaintiff; were ones that Plaintiff was ignorant as to the falsity of; and that the Plaintiff was damaged as a result thereby.

10. The Court finds that the acts of Mrs. Kellett in all dealings with the Plaintiff, including all acts and testimony in the course of this litigation, were in the ordinary course of the partnership business or were with the authority of her co-partner, Mr. Kellett. Mr. Kellett was in the courtroom during the trial of the case, and he did not offer any testimony disclaiming Mrs. Kellett's acts or authority.

11. Plaintiff has sustained actual damages in the amounts of \$447.37 overcharges, \$1,575.25 for uncompleted work to her automobile, and \$1,500.00 for a replacement transmission, for damages of \$3,522.62.

12. The Court finds that the Defendants' conduct constituted unfair and deceptive acts in the automobile repair business, which were capable of repetition. This entitled the Plaintiff to treble damages under the Unfair Trade Practices Act, resulting in damages of \$10,567.86.

13. The Court finds the Plaintiff is not entitled to recover attorney fees of \$8,000.00 to be reasonable under the circumstances of this case; Plaintiff did not request the award of attorney fees in its complaint or at the conclusion of trial. Plaintiff is not entitled to costs otherwise allowed by law.

14. Although an award of additional punitive damages would be allowable under § 39-5-160 of the Unfair Trade Practices Act, the Court declines to make a cumulative award.

CONCLUSIONS OF LAW

1. The intentional retention and refusal to return property to its rightful owner constitutes a tortious conversion entitling the owner to damages.

2. Representations constitute fraud when they are related to present or past matters of fact that are false and material; known by the maker to be false; made with the intention for the injured person to act upon them; as to which he has a right to rely upon and are in fact, relied upon; were made by maker either knowing of their falsity or possessing a reckless disregard for their truth; were made with the intention to deceive the injured person; were ones that the injured person was ignorant as to the falsity thereof; and result in damage.

3. Defendant's representations, by both pleadings and testimony, that the transmission and rear bumper had been replaced constitute misrepresentation in that they were false and material; were ones that the Defendants had a pecuniary interest in making; were ones that the Defendants had a duty of care to see were truthfully made to Plaintiff, but failed to do so; were ones that the Plaintiff justifiably relied upon; and that the Plaintiff was damaged as a result thereby.

4. The Defendants' conduct in this case constituted unfair and deceptive acts in conducting the business of Buddy's Garage and affected public policy in that they were capable of repetition and offensive to public policy. As a direct result of Defendants' unfair and deceptive acts, Plaintiff sustained a monetary loss, and she is entitled to treble damages, attorney fees, and costs.

5. Under the Uniform Partnership Act, § 33-41-350, "When, by any wrongful act or

omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners, loss or injury is caused to any person..., the partnership is liable therefor to the same extent as the partner so acting or omitting to act.”

6. Further, under § 33-41-360 of that Act, the partnership is liable when a partner receives money or property of a third person and misapplies it.

7. Further, under § 33-41-370 of that Act, all partners of a general partnership are liable jointly and severally for everything chargeable to the partnership. The Court therefore concludes that Mr. Kellett and Mrs. Kellett are liable jointly and severally to the Plaintiff.

8. Under the Unfair Trade Practices Act, § 39-5-10, when the offender knew or should have know that his conduct was a violation of the Act, such violation constitutes a willful violation and thus entitles the injured party to treble damages, and also attorney fees and costs, which remedies are provided to be cumulative and supplementary to all other powers and remedies provided by law. See §§ 39-5-140 and 39-5-160.

9. When attorney fees are awarded, the Court should consider the complexity of the case, the time involved in preparation and trial, the expertise of the attorneys and prevailing fees in the area for like services.

10. By only making a request for attorney's fees in the Plaintiff's brief, neither the court nor the opposing party had the opportunity to evaluate and determine if the request complies with the requirements for an attorney fee award as set forth in South Carolina case law.

IT IS THEREFORE ORDERED:

1. That the Plaintiff have judgment under the Unfair Trade Practices Act against the Defendants jointly and severally for treble damages of \$10,567.86.
2. The requested reward for \$8,000.00 in attorney fees and costs are denied.

3. That the Plaintiff's prayer for punitive damages is denied.

Letitia H. Verdin
Judge, Court of Common Pleas
for the 13th Judicial Circuit

Dated this ____ day of _____, 2016



Greenville Common Pleas

Case Caption: Natasha Turner vs. Carmen Kellett , defendant, et al

Case Number: 2014CP2303197

Type: Order/Judgment Amended

So Ordered

s/Letitia H. Verdin, SC Judge 2162

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