

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

2014-CP-23-03197

Letitia H. Verdin, Circuit Court Judge

Appellate Case No: 2016-001425

Natasha Turner.....Respondent/Appellant

Michael T. Kellett and Carmen Kellett.....Appellants/Respondent

INITIAL BRIEF OF THE APPELLANTS

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STATEMENT OF THE CASE

Carmen Kellett and Michael T. Kellett (Kelleetts) owned Buddy's Garage, a small auto repair shop located in a rural area outside of Travelers Rest. They had one employee, a Mike Fincham, who made estimates, ordered parts and performed the labor necessary for repairs.

Fincham made an estimate of the cost of repairs for a 2006 Mitsubishi Lancer automobile owned by Natasha Turner ("Turner") in amount of \$3867.89. Turner gave Fincham checks totaling \$4,341.36 to pay for the repairs.

The controversy between the parties involves whether the repairs were made by Fincham or whether Turner made payment for repairs that were not in fact made.

The Kelleetts became suspicious of the honesty of their sole employee, Mike Fincham, who seemed to be involved in a scam with a Mike Smith, the live in boyfriend of Turner. The Kelleetts believed that a car would be reported stolen, when the car was hidden, not stolen. The perpetrators would file a claim against an insurance company having insurance over the stolen vehicle. When Turner filed suit against the Kelleetts in Magistrate Court without first complaining that her car had not been repaired properly, they were suspicious of the good faith of Turner.

Turner sued the Kelleetts in Magistrate's Court. In her Complaint she alleging misrepresentation, fraud and a violation of the Unfair Trade Practice Act. She dismissed the suit and then filed a Complaint in the Court of Common Pleas alleging conversion, fraud, misrepresentation and

a violation of the Unfair Trade Practice Act. The Kelleths responded with a general denial.

The case came on for a non-jury trial before Circuit Judge Letitia H. Vernon on November 19, 2015. Judge Vernon issued her Order, dated December 11, 2015 awarding Turner damages of \$10,567.86 under the South Carolina Unfair Trade Practices Act (UTPA).

Turner filed a Motion under Rule 52, SCRCP, requesting that (1) that the Court amend the Order, dated December 11, 2015, by separately stating findings of fact and conclusions of law and (2) that the Court award reasonable attorney's fees and costs.

Following a hearing upon the Motion the Court issued an Amended Order, dated June 7, 2016 in which the Court made Findings of Fact and Conclusions of Law. The only fact found by the Court dealing with conversion was that the Kelleths converted to their own use the funds received from Turner. The Court made findings that the Kelleths committed the elements of fraud. Actual damages sustained by Turner were \$3,522.62. The Court found that the Kelleths violated the Unfair Trade Practice Act giving rise to treble damages. The Court awarded judgement in favor of Turner against the Kelleth's jointly and severally in the amount of \$10,567.86.

While Turner did not request attorney fees in her Complaint and did not request during the trial that attorney fees be awarded, in her Rule 52 Motion to Amend, Turner did request attorney fees. The Court found that under the circumstances that the request for attorney fees were denied.

On July 1, 2016 the Kelleth's served their Notice of Appeal to the Amended Order, dated June 7, 2016.

On July 6, 2016 Turner served her Notice of Appeal to the Amended Order, dated June 7, 2016.

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Statement of Issues on Appeal

Argument I

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Statement of Facts

On May 7, 2013 Natalie Turner ("Turner") had her 2006 Mitsubishi Lancer automobile transported to Buddy's Garage near Travelers Rest on May 7, 2013. She wanted to find out the cost of repairs.

Buddy's Garage was a mom and pop garage owned by Carmen Kellett and her husband, Michael Kellett ("Kellett's) who had purchased the garage several months earlier. It had one employee, a Mike Finchem, who made estimates, ordered parts needed for repairs and furnished the labor necessary to make repairs.

Finchem gave Turner an estimate for \$3,867.89 (recited in the order as \$3,967.89) which was introduced into evidence as Plaintiff's Exhibit 1. (R p __, Tr p20. Repairs did not begin until Turner gave Finchem the sum of \$4,315.26 which paid for the repairs in advance plus \$347.57 in additional charges. The evidence concerning the overage is conflicting. She gave Buddy's Garage a check from GEICO in the amount of \$1,815.26 and \$2,500.00 representing the proceeds of a loan obtained from Title Max of Berea where she borrowed funds by placing a security interest upon the 2006 Mitsubishi.

The Kellett's became aware that a Mike Smith who was the boyfriend of Turner had placed a car on the premises of Buddy's Garage. Finchem advised the Kellett's that the Mike Smith car and another car were stolen. Finchem told Michael Kellett that he had reported the theft to the Greenville County Sheriff's Office.

Upon Michael Kellett contacting the Sheriff's office to determine the status of its investigation concerning the theft, he learned that the purported theft was not reported. At the request of Michael Kellett an investigating

officer came to the premises. Smith's car was found at the home of Smith and Turner. (R__ Trp100-102) Around this time Carmen Kellett became aware that Buddy's Garage had paid for parts ordered by Mike Finchem that never were installed on cars.

From conversations with Finchem, Carmen knew that Finchem and Mike Smith were friends. Fearing a scam involving the disappearance of Smith's automobile and a claim being made that the automobile was stolen together with becoming aware that Finchem had ordered parts for other cars that did not get installed, the Kellett's decided that the Turner owned 2006 Mitsubishi Lancer should be picked up by Turner as soon as possible.

Carmen Kellett called Turner to come pick up her car. Turner came to Buddy's Garage, inspected her car in the presence of Carmen Kellett. The front bumper was not installed. After some discussion between Carmen Kellett and Turner that Mike Finchem would install the bumper away from the premises of Buddy's Garage, the front bumper was placed on the back seat of the 2006 Mitsubishi. Carmen Kellett gave Turner a check for \$130.00 which represented the cost of two hours labor at \$65.00 per hour as stated on the estimate (Plaintiff's Exhibit 1), Turner signed a memorandum that the repairs were satisfactory (Defendant's Exhibit 2, R__, Tr 72,73). She drove the 2006 Mitsubishi to her residence located 8 to 10 miles from Buddy's Garage. Turner's mother who had accompanied her to Buddy's Garage drove another automobile driven by Turner over to Buddy's Garage.

Turner testified that her car made a strange noise coming from underneath her car as she drove home, a distance of 6 to 8 miles. On July 16, 2013 the day after she obtained her car from Buddy's Garage, she drove the 2006 Mitsubishi to Mike's Body Shop and Towing, in Greenville

which gave an estimate for repair covering the installation of a front bumper and a rear bumper. After several more days Turner drove the 2006 Mitsubishi to Poinsett Tire in Greenville. Roy Stanstell, a former manager at Poinsett Tire, looked at the underside and concluded that the car had its original transmission. The transmission has not been replaced. (R____, Tr p 79-96)

Turner arranged for the father of a friend of her daughter to install the front bumper. He made no charge.

Subsequently, Turner and her children drove the 2006 Mitsubishi frequently. They treated it like a family car. On one occasion while driving the 2006 Mitsubishi in Spartanburg County, Turner received a traffic ticket for speeding from Greer Police Officer Randall Ballenger. Defendant's Exhibit 3(R____ Tr p 97-99) Then either she or her daughter wrecked the 2006 Mitsubishi. She says Title Max refused to accept return of the car because it was damaged. The manager of the Title Max, a Robert Anguilm, testified that the 2006 Mitsubishi was never delivered to the premises. (R____, Tr p110-116)

Until Roy Stanstell, formerly a manager with Poinsett Tire, testified during the trial that the original transmission was not replaced, the Kellett's did not know that while Finchem charged for the replacement of the transmission that the transmission was not in fact replaced.

Knowing that Turner or her family drove the car for months after the car left Buddy's Garage, and while the Magistrate Court case was pending, the Kellett's refused to settle the lawsuit.

After acquiring information that made them suspicious of Mike Finchem, the Kellett's fired Mike Finchem several days before Turner picked up her 2006 Mitsubishi. Upon the termination of Mike Finchem the

possibility ended for cars to be accepted for repair and the owners charged for repairs that were not made. No cars were accepted for repair after Finchem was fired. Upon release of the Turner automobile, Buddy's Garage closed.

ARGUMENT I

The evidence establishes that the Defendant violated the contract between the parties which entitles the Plaintiff to damages for breach of contract

Respondent/Appellant Natasha Turner owned a 2006 Mitsubishi Lancer automobile which was involved in a wreck in Spartanburg County. She arranged for her car to be towed from Spartanburg County to Buddy's Garage for repairs on May 7, 2013.

Buddy's Garage had one employee, a Mike Finchem. He made an estimate or proposal showing that the cost of repair for the Plaintiff's automobile would be \$3867.89. (R_Tr p 20), introduced as Plaintiff's Exhibit 1. The proposal shows that a used transmission and a front bumper would be installed. The front bumper was not installed when the Plaintiff's automobile was turned over to her on July 15, 2013. At this point Finchem no longer was employed by Buddy's Garage which now had no employees. Carmen Kellett understood that Turner had made arrangements with Mike Finchem, the former employee of Buddy's Garage to install the front bumper. Carmen gave Turner a check for \$130 to cover the labor for installation of the front bumper by someone other than Buddy's Garage.

Subsequently, a Roy Stansell who had been a Manager with a business known as Poinsett Tire, inspected the 2006 Mitsubishi Lancer. He found that the original transmission remained in the car and that a used transmission had not been installed. (R__Tr 79,80,88) This meant that when Turner accepted her automobile from Buddy's Garage, the original transmission remained in Turner's automobile and had not been replaced.

With respect to the front bumper, it was not installed.

These circumstances establish that a breach of contract occurred when the old transmission was not replaced with a used transmission as described in the proposal.

The Court finds that these circumstances prove a fraud was committed by Buddy's Garage. Appellants will agree that for Buddy's Garage to charge Turner for the replacement of her transmission when the transmission was not replaced would be unfair and deceptive.

The Court finds that the fraud of the Defendants caused the Plaintiff to sustain damages in the amount of \$3,522.62. However, whether the Defendants committed fraud or a breach of contract the damages remain the same.

Argument II

A violation of the South Carolina Unfair Trade Practice Act can occur only if the wrongful acts can be repetitious and affect the public interest

"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 Practice Act, resulting in damages of \$10,567.86."

While the Kelletts agree that viewing the evidence in a light most favorable to Turner that unfair and deceptive acts were committed, they assert that the acts were not capable of being repeated after their dishonest employee was fired on July 13, 2013. Not only could this dishonest employee no longer cheat people, the Kellett's closed Buddy's Garage. (R__Tr p 142,) Therefore, the SCUTPA was not violated.

These unfair or deceptive acts of Mike Finch could not be repeated either by Finchem nor could any deceptive acts be repeated by Buddy's Garage under any circumstances. The Kettetts closed Buddy's Garage immediately upon Turner removing her automobile.

It is well-established that the deceptive conduct must affect the public interest. *Daisy Outdoor Advertising Company, Inc. v Abbott*, 322 S.C. 489, 493, 473 S.E.2d 47, 49 (S.C. 1996) The Court found that the Defendant's actions did adversely affect the public interest. Upholding *Daisy Outdoor Advertising is Schellmann v Roettger*, 368 S.C. 17, 627 S.E. 2d 742 (S.C. App. 2006)

The Court of Appeals in *Wright v Craft*, 372 S.C. 1, 640 S.E. 2d 486 (S.C.App.2006) holds: "Since 1986, South Carolina courts have required that a plaintiff bringing a private cause of action under UPTA allege and prove the defendant's actions adversely the public interest."

The opinion then quotes from *Daisy Outdoor Advertising, supra*.

Not only must the wrongful act be capable of being repetitious the wrongful act must affect the public interest. The failure of Buddy's Garage to replace a transmission and not install a front bumper involves only Natasha Turner and Buddy's Garage, a small automobile repair shop. No other members of the public are affected.

In the fairly recent case of *Hennes v Shaw*, 397 S.C. 391, 725 S.E. 2d 501(S.C. App. 2012) which involved a dispute between two realtors over the sale and commission on a parcel of real estate, the Court of Appeals dismissed a claim under the SCUTPA on the ground that the realtor's actions did not adversely affect the public interest.

The potential for repetition is a requirement rather than merely a factor that may be considered as evidence of public impact. *Young v Century Lincoln-Mercury, Inc.*, 302 S.C. 320 at 327, 396 S.E. 2d 105, 109 (Ct. App. 1989)

The Court of Appeals stated in *Barnes v Jones Chevrolet, Inc.*, 292 S.C. 607, 612, 358 S.E. 2d 156, 159 (S.C. App. 1987) “ a material issue to be proved is that the unfair practice or act affects persons other than the parties to the transaction.” When the employee committing the dishonest act is fired and when the employer of such employee no longer exists there is no way that another unfair act can be committed. Buddy’s Garage was a husband and wife business with one employee, not a big automobile repair facility with many employees and dealing with many automobile owners.

Argument III

If a party is awarded damages under the South Carolina Unfair Trade Practice Act, can attorney fees be awarded when such party neither sought attorney fees in its complaint nor at the trial, but requested that attorney fees be awarded in a Rule 52, SCRPC motion.

The 1976 South Carolina Code of Laws provides in Section 39-5-140 that ***** “Upon the finding by the court of a violation of this article, the court shall award to the person bringing such action under this section reasonable attorney’s fees and costs.”

If the Court of Appeals agrees with the Kellett that no evidence exists that the unfair and deceptive acts were repetitive or involved the public interest, then the question of awarding attorney fees to Turner does not exist.

The Trial Judge found that under the circumstances of this case no attorney fees should be awarded under the SCUTPA.

When a party entitled to an award of attorney fees makes no request during the trial and then asks for attorney fees pursuant to a Rule 52 Motion to Amend Order after the trial is over, neither the opposing counsel nor the court have an adequate opportunity to address documentation in support of the request. Is the attorney's fee request reasonable under the circumstances is a matter that must be addressed by the Trial Judge. A request for attorney fees as an after thought is unfair to the opposing party and to the court.

Attorney fees can only be awarded for services concerning a violation of the SCUTPA, not for services related to misrepresentation or fraud or other issues. While the same facts may support these various legal theories, the Kelletts do have the right to analyze documentation submitted to support the request. To make this analysis during a hearing for a Rule 52 motion would be impossible.


C O N C L U S I O N

A violation of the South Carolina Unfair Trade Practice Act requires that the unfair or deceptive act be capable of being repetitious and to affect the public interest. No evidence exists that the unfair and deceptive acts will be repetitious nor will they affect the public interest. Therefore, the judgement against the Kelletts should be set aside.

The evidence does support the findings of the Court that the Plaintiff sustained damages in the amount of \$3,522.62. Therefore,

judgement against the Kelletts should be entered in the amount of \$3,522.62 or in the alternative, a new trial should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Clifford F. Gaddy, Jr., do hereby certify that on November 22, 2016
I served a copy of the

DESIGNATION OF MATTER

and a copy of the

INITIAL BRIEF OF THE APPELLANTS

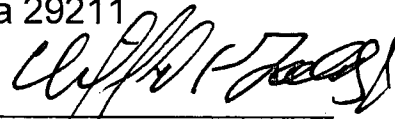
upon the Respondent Natasha Turner by placing a copy in envelopes with
proper postage and depositing each envelope with the United States
Postal Service addressed to

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I do further certify that on November 22, 2016 I placed a copy of the Designation of Matter and a copy of the Initial Brief of the Appellants/Respondent in an envelope which was deposited with the United States Postal Service with proper postage addressed to

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