

**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

v.

Michael T. Kellett and Carmen Kellett

Appellants

INITIAL REPLY BRIEF OF THE RESPONDENT

Joseph M. Plaxco (SC Bar No. 100975)
Joseph M. Plaxco, LLC
707 East North Street
Greenville, South Carolina 29601
(864) 240-9112
(864) 232-7707 (facsimile)
Attorney for Respondent

R. Frank Plaxco (SC Bar No. 4476)
925 Cleveland Street; Unit 59
Greenville, South Carolina 29601
(864) 232-9828
Attorney for Respondent

RECEIVED

JAN 17 2017

SC Court of Appeals

TABLE OF CONTENTS AND CASES

Table of Contents

Contents	Page
Statement of Issues on Cross Appeal	1
Argument	2
Question I	2
Question II	3
Question III	4
Conclusion	4

Table of Cases and Laws

Case

<i>State v. Ballenger</i> , 202 S.C. 155, 24 S.E.2d 175 (S.C. 1943)	2
--	---

Statutes and Other Authority

S.C. Code Ann. § 39-5-140, (1976)	3
Rule 56 (d), SCRCP	3

STATEMENT OF ISSUES ON CROSS APPEAL

- I. Is a business committing an unfair trade practice liable for reasonable attorney fees under the Act, S.C. Code Ann. § 39-5-140 when such fees were sought in the complaint?
- II. Is the Respondent entitled to punitive damages for willful conversion or for willful fraud and deceit?
- III. Is the Respondent entitled to costs?

ARGUMENT

I. Is a business committing an unfair trade practice liable for reasonable attorney fees under the Act, S.C. Code Ann. § 39-5-140 when such fees were sought in the complaint?

The Appellants ("the Kelleetts") now acknowledge that the complaint sought attorney fees, but argue the trial judge properly denied them because Ms. Turner did not request them during the trial. The Kelleetts' argument is unsound for two reasons.

First, at the close of the testimony, the trial judge (and the lawyers) were tired after a long day; and the judge was not interested in closing argument or further proceedings. In fact, when Ms. Turner's lawyer rose to present a last argument, Judge Verdin advised she would be issuing an order shortly. (Tr. 203-204; R. ____.) We say this not in criticism of the judge, but simply to point out that she did not choose to consider closing argument or further proceedings; and in fact they probably were not necessary. *State v. Ballenger*, 202 S.C. 155, 159, 24 S.E.2d 175, 177 (1943) is relevant. In that case, our Supreme Court held that the defendant did not waive error in limiting the time for closing argument by not protesting, saying,

[T]here was no protest from the appellant's attorneys. However, this was a positive ruling and, we mean *positive*, coming from [the trial judge]. Apropos to the rulings of this outstanding jurist, the writer is reminded of the age old story of the old gentleman who had several cat holes cut in the door to his home; and upon inquiry as to why he had so many holes, replied that when he said "scat," he meant "scat."

Ballenger, 202 S.C. 159, 24 S.E.2d at 177.

Second, the time is not ripe for consideration of an award and amount of attorney fees immediately on the conclusion of testimony. At that point the testimony is closed, but the case is not over. More time and work will most likely be required, which cannot be known and quanti-

fied at that time. To require evidence supporting the amount of attorney fees at conclusion of the testimony would be to require evidence of the present existence of future events – an impossible task. In every case involving the issue in which we have participated, the issue and amount of attorney fees has been addressed after completion of the trial and disposition of any post-trial matters.

While the Rules of Civil Procedure do not specifically prescribe the procedure for attorney fee awards, it is relevant that the prevailing party has ten days after the entry of judgment to move for costs. Rule 56(d), SCRCP.

Ms. Turner's lawyers have not done anything to waive her right to attorney fees mandated by the Unfair Trade Practices Act, S.C. Code Ann. § 39-5-140 (1976). This issue should be remanded for the lower court to determine reasonable fees after receiving information of the total time and effort expended by her lawyers and other relevant factors.

II. Is the Respondent entitled to punitive damages for willful conversion or for willful fraud and deceit?

The lower court's order makes it clear that punitive damages were not awarded because of the treble damage for violation of the Unfair Trade Practices Act. The Appellants acknowledge the lower court's finding that Ms. Turner "was entitled to recover based upon conversion, fraud and misrepresentation." (App. Reply Brief, p. 6; R. ____), and that punitive damages were not addressed only because, "the Court declines to make a cumulative award." (Am. Order, ¶ 14, p. 6; R. ____.) It is plain that the court would have awarded punitive damages but for the Unfair Trade Practices Act treble damage award. Our point is simply that if, for whatever reason, the

treble damage award should be reversed, then punitive damages should be awarded, either by this Court or on remand by the lower court.

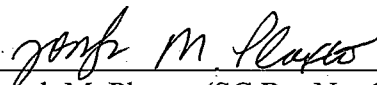
III. Is the Respondent entitled to costs?

The Appellants have not addressed this question in their Reply Brief, and we take it they agree that the Respondent is entitled to costs.

CONCLUSION

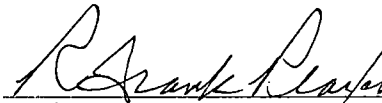
We respectfully submit the lower court's order should be modified (1) to allow attorney fees in an amount to be determined; (2) to allow costs provided by law; and (3) to award punitive damages in an appropriate amount alternative to the award of treble damages.

Respectfully submitted:



Joseph M. Plaxco (SC Bar No. 100975)
Joseph M. Plaxco, LLC
707 East North Street
Greenville, South Carolina 29601
(864) 240-9112

- and -



R. Frank Plaxco (SC Bar No. 4476)
925 Cleveland Street; Unit 59
Greenville, South Carolina 29601
(864) 232-9828

January 14, 2017

**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

v.

Michael T. Kellett and Carmen Kellett

Appellants

PROOF OF SERVICE BY MAIL

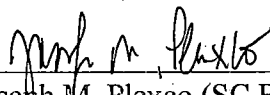
I hereby certify that on the 14th day of January, 2017, I served a copy of the Respondent's Initial Reply Brief on the Appellants, Michael T. Kellett and Carmen Kellett, by mailing it to their attorney of record, Clifford F. Gaddy, Jr., by depositing it in the U.S. mail, in an envelope with sufficient postage affixed, addressed as follows:

Clifford F. Gaddy, Jr.
408 N. Church St., Suite B
Greenville, SC 29601

RECEIVED
JAN 17 2017
SC Court of Appeals

I do further certify that on December 14th, 2017, I placed a copy of the Respondent's
Initial Reply Brief in the U.S. mail, with sufficient postage addressed to:

Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211



Joseph M. Plaxco (SC Bar No. 100975)
707 East North Street
Greenville, South Carolina 29601
(864) 240-9112 (telephone)

JOSEPH M. PLAXCO, LLC
ATTORNEY AT LAW

707 EAST NORTH STREET
GREENVILLE, SOUTH CAROLINA 29601

TELEPHONE: (864) 240-9112
TELEFAX: (864) 232-7707
JOSEPH.PLAXCO@PLAXCOLAW.COM

January 14, 2017

Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

**Re: Michael T. Kellett and Carmen Kellett, Appellants, v. Natasha Turner,
Respondent
Appellate Case No. 2016-001425**

Dear Ms. Kitchings,

In connection with the above referenced appeal, please find enclosed Ms. Turner's Initial Reply Brief and a Proof of Delivery for the same.

By copy of this letter, I am hereby serving Mr. Clifford Gaddy, attorney for Mr. and Mrs. Kellett, with the same.

Should you have any questions, please let me know.

Sincerely,

JOSEPH M. PLAXCO, LLC



Joseph M. Plaxco

RECEIVED

JAN 17 2017

SC Court of Appeals

JMP

Enclosures

cc: Mr. Clifford F. Gaddy, Jr. (via mail)

JOSEPH M. PLAXCO, LLC
ATTORNEY AT LAW
707 East North Street
Greenville, South Carolina 29601



Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED

JAN 17 2017

SC Court of Appeals

