THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Appellate Case No.: 2016-002063

South Carolina Department of Consumer Affairs..... Appellant,

v.

A Bargain Center, LLC ..... Respondent.

INITIAL BRIEF OF RESPONDENT

S. Jahue Moore
MOORE, TAYLOR & THOMAS, P.A.
Post Office Box 5709
West Columbia, SC 29171
(803) 796-9160
ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF THE ISSUES ON APPEAL

I. DID THE ADMINISTRATIVE LAW COURT ERR IN FAILING TO ORDER RESTITUTION WHEN LOOKING TO SOUTH CAROLINA CASE LAW REGARDING THE CONTRACTS OF AN UNLICENSED ENTITY AND THE FEDERAL TRUTH IN LENDING ACT?

II. DID THE ADMINISTRATIVE LAW COURT ERR IN FAILING ISSUE A FINE RECOMMENDED BY THE SC DEPARTMENT OF CONSUMER AFFAIRS?

STATEMENT OF THE CASE

The South Carolina Department of Consumer Affairs ("Appellant") issued a letter to A Bargain Center, LLC ("Respondent") on October 7, 2015 alleging violations of the South Carolina Pawnbrokers Act, S.C. Code Ann. §§ 40-39-10 to -160 (2011), requesting Respondent cease and desist pawnbroker activity and pay a fine of $10,500.00. (Letter dated 10/7/15). On October 21, 2015, Respondent's attorney sent a letter to Appellant indicating Respondent would cease and desist any pawnbroker activity and stating any violation of the Pawnbrokers Act was unintentional and there was no attempt to hide any transactions or conduct any illegal activity. (Letter dated 10/21/15). Appellant responded, stating Respondent would be required to pay a fine. (Letter dated 11/30/15). Respondent's attorney sent another letter stating the matter was a result of a misunderstanding and Respondent was willing to comply with the law, but did not want to pay the requested fine. (Letter dated 12/22/15).

On February 5, 2015, Appellant filed a request for contested case hearing at the Administrative Law Court, which was assigned to the Honorable Shirley Robinson. (Appellant's Request for Contested Case). Appellant requested that the court order a fine of $75,750, restitution to each customer, and a cease and desist from engaging in any and all pawn brokering activity immediately. (Appellant's Request for Contested Case). Respondent's attorney filed a response requesting a dismissal. (Respondent's Response to Contested Case). The Administrative Law Court ("ALC") held a hearing on May 17, 2016, and issued a Final Decision and Order on July 21, 2016. The court found Respondent had operated as a pawnbroker and ordered a cease and desist from doing so, and further ordered Respondent pay an administrative fine of $2,500. (Order dated 7/21/16).

Appellant filed a motion for reconsideration on August 1, 2016, requesting the court reconsider its ruling and assess a fine of at least $10,500.00. (Appellant's Motion for Reconsideration). Because Respondent's attorney was not asked to formally respond to the motion, he sent a letter to the court expressing that the decision of the court was well reasoned and an appropriate statement of the law. (Letter dated 8/8/16). The court issued an order on the motion amending only a statement regarding how Respondent charged its customers a set fee of $15 each time a customer requested that the repurchase deadline be extended. (Order dated 9/1/16). All other arguments by the Appellant were denied because the Appellant brought nothing to light that caused the court to, in any other way, change its final decision in this matter. (Order dated 9/1/16). The Appellant then filed a Notice of Appeal to this Court on October 3, 2016.

STATEMENT OF THE FACTS

Respondent, A Bargain Center, LLC, is located on Monmouth Avenue in Swansea, South Carolina and has been in operation for around three years. (Transcript p. 43, lines 2-19). The primary business of Respondent is buying and selling merchandise. (Transcript p. 46, lines 11-15).

On August 6, 2015 Detective Kevin Blake of the Lexington County Sheriff's Department responded to Respondent's location after receiving a complaint that a stolen microwave was located there. (Transcript p. 110, line 1 – p. 112, line 9). Detective Blake asked for any documents related to the sale of the microwave, which were promptly provided by Walter Cassidy, owner of Respondent, as there was a known relationship of cooperation between the store and other detectives. (Transcript p. 117, line 21 – p. 118, line 13). Detective Blake believed the record of the sale was similar to a pawn slip and later reached out to the Department of Consumer Affairs. (Transcript p. 118, line 15 – p. 119, line 6). Chief Kenneth Middlebrooks and Chief Joanie Green

are investigators for the Department of Consumer Affairs responsible for investigating the call from Detective Blake about Respondent's record of sale. (Transcript p. 211, line 16 – p. 212, line 14). They visited the store on September 10, 2015 and Mr. Cassidy was cooperative in handing over documents related to the investigation. (Transcript p. 212, lines 2-14).

Respondent was not aware of any wrongdoings before the investigation and upon notification by the department of his violation, he immediately ceased any pawnbroker activities. (Transcript p. 53, line 22 – p. 55, line 5). He further explains he was told by an investigator there would be small fine he would be able to pay over time. (Transcript p. 52, lines 14-22). Brandi Burdo, the manager of A Bargain Center, explained, in the "buy-back" transactions a customer would come in and want to sell an item, the store would, for example, buy it for $10, which is usually half of what the store would sell it for, and for a 15 day period the customer would have the opportunity to buy the item back for $15. (Transcript, p. 61, lines 6-24, p. 71, lines 15-22). Following the notification by the department, Ms. Burdo testified they ceased any unlawful transactions and allowed any customers who currently had their items at the store to repurchase them for the same amount of money they were given, making the customer whole. (Transcript p. 73, line 21 – p. 74, line 21).

Michael Korzen was a frequent customer of Respondent and sold some items in the "buy-back" system. (Transcript p. 83, lines 3-9). Mr. Korzen describes that Respondent was honest with how the transaction would go, he knew what was going on, and was satisfied with the result. (Transcript p. 98, line 10 – p. 99, line 25).

STANDARD OF REVIEW

The Court's review of the Administrative Law Court is limited to whether the finding was supported by substantial evidence or controlled by error of law. Eagle v. S.C. Dep't of Health &

Envtl. Control, 407 S.C. 334, 341, 755 S.E.2d 444, 448 (2014) (citing Hill v. S.C. Dep't of Health & Envtl. Control, 389 S.C. 1, 9, 698 S.E.2d 612, 616 (2010)). In determining whether the ALC's decision was supported by substantial evidence, the Court need only find there is evidence in the record which reasonable minds could reach the same conclusion the ALC reached. *Id* at 342, 755 S.E.2d at 448.

The Court may not substitute its judgment for the judgment of the ALC as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-610(B). The Court may reverse or modify the decision if the substantive rights of the Appellant have been prejudiced because the finding, conclusion, or decision is: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. *Id.*

ARGUMENTS

I. THE ADMINISTRATIVE LAW COURT DID NOT ERR IN FAILING TO ORDER RESTITUTION.

The ALC has judicial discretion and a decision should be upheld if it is supported by substantial evidence in the record. Risher v. South Carolina Department of Health and Environmental Control, 393 S.C. 198, 203, 712 S.E.2d 428, 431 (2011). The Court of Appeals may reverse or modify the decision if the substantive rights of the Appellant have been prejudiced and the finding is clearly erroneous in view of the reliable, probative, and substantial evidence on the record. *Id.* That is not the case here. Respondent concedes to the decision that Respondent was in violation of the Pawnbrokers Act. It was a technical and unintentional violation of the

statute. Appellant's argument is de minimis because the ALC acted within judicial discretion in its correct order.

A. THE ADMINISTRATIVE LAW COURT DID NOT ERR IN FAILING TO ORDER RESTITUTION WHEN LOOKING TO SOUTH CAROLINA CASE LAW REGARDING THE CONTRACTS OF AN UNLICENSED ENTITY.

The ALC acknowledged Respondent was in violation of the Pawnbrokers Act by operating as a pawnbroker without first obtaining a Certificate of Authority from the Department of Consumer Affairs. (Order dated 7/21/16, p. 5). The Appellant fails to cite case law requiring the ALC to order restitution as a result of void and unenforceable contracts. The Appellant acknowledges that the ALC correctly found the Respondent operated as a pawnbroker without a Certificate of Authority. Respondent recognizes a technical infraction of the Pawnbrokers Act was committed, and has complied with the order by the ALC to cease and desist operating as a pawnbroker. Failing to deem the contracts unenforceable was not an error by the ALC, whose issue at the contested hearing was the violation of the Pawnbrokers Act. The issue was ruled on and found in favor of the Appellant.

Whether restitution should be required is a question to be decided on the facts of each case. Niggel Associates, Inc. v. Polo's of North Myrtle Beach, Inc., 296 S.C. 530, 531, 374 S.E.2d 507, 509 (S.C.App. 1988). In order to recover restitution in a contract, a plaintiff must show: (1) he conferred a non-gratuitous benefit of the defendant; (2) the defendant realized some value from the benefit; and (3) it would be inequitable for the defendant to retain the benefit without paying the plaintiff its value. *Id.* (citing Ellis v. Smith Grading and Paving, Inc., 294 S.C. 470, 366 S.E.2d 12 (Ct.App. 1988). The ALC properly looked to the facts of the case in determining that restitution was not appropriate. The Respondent owns a thrift store, where the value of the goods it sells do not add up to the fines requested by the Appellant. Furthermore, the Appellant does not present

any evidence of Respondent's customers who are unhappy with their experience at the store. Appellant requests restitution for 21 transactions presented at trial as well as 50-150 transactions that are not supported by any evidence. This request is not to benefit those who were in contract with the Respondent, but proof of Appellant's goal to harm the Respondent with excess fines. To require restitution for some transactions that are not even in evidence is unduly burdensome, if not impossible.

Appellant puts great weight to the testimony of Michael Korzen to say Respondent was unjustly enriched by transactions that violated the Pawnbrokers Act. Mr. Korzen acknowledged he understood the transaction occurring the Respondent's stores, he was satisfied with his transaction and did not feel he was cheated. (Transcript p. 99, line 17-25). There needs to be some proof that he was unjustly enriched; proof beyond the testimony of one satisfied customer whose transactions might have been slightly different had he gone to a licensed pawn shop. Had Mr. Korzen been unsatisfied he may have been more willing to testify at the contested hearing, instead he was nervous and testified that from his conversations with representatives of the Appellant he was concerned he may go to jail. (Transcript p. 93 line 25 – p. 95 line 3). Mr. Korzen did not act as a customer who was looking for restitution since it appears he was unwilling to testify from the beginning. Any restitution is not for the benefit of customers like Mr. Korzen, but for Appellant's goal of punishing Respondent. The ALC correctly denied Appellant's request for restitution in light of relevant case law and the evidence presented at trial.

B. THE ADMINISTRATIVE LAW COURT DID NOT ERR IN FAILING TO ORDER RESTITUTION WHEN LOOKING TO THE FEDERAL TRUTH IN LENDING ACT.

Appellant further argues restitution is necessary based on the Federal Truth in Lending Act ("TILA"). TILA has the purpose of promoting informed use of credit to result in justice and fairness to both the lender and the borrower. General Motors Acceptance Corp. v. McMinn, 285

S.C. 67, 68, 328 S.E.2d 472, 477 (1985). Because the Pawnbrokers Act should be in compliance with TILA it is redundant and unnecessary for the court to echo this violation, and does not affect the ALC's discretion in ordering against restitution. Respondent's records of his transactions were not compliant with the TILA because he was not aware of its existence, nor of the existence of the Pawnbrokers Act. It was not persuasive to the ALC during trial, nor is it persuasive in Appellant's brief, that the violation of an act included in the Pawnbrokers Act should change the outcome of the case.

The argument that Respondent was grossly negligent having a willing intent to mislead is customers is an offensive allegation that questions the ALC's ability to judge the character of witnesses. As the ALC correctly explained, the weight and credibility assigned to evidence presented at the hearing of a matter is within the province of the trier of fact. (Order dated 7/21/16 p. 4, citing S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co., 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992)). Furthermore, a trial judge who observes a witness is in the best position to judge the witness' demeanor and veracity and to evaluate the credibility of his testimony. (Order dates 7/21/16 p. 4, citing Woodall v. Woodall, 322 S.C. 7, 10, 471 S.E.2d 154, 157 (1996); Wallace v. Milliken & Co., 300 S.C. 553, 556, 389 S.E.2d 448, 450 (Ct. App. 1990)). The ALC found Mr. Cassidy and Ms. Burdo testified they were not aware their actions violated the Act, and stopped accepting property in the improper manner immediately after being contacted by the Appellant. (Order dated 7/21/16 p. 6). The ALC judge, who was in the best position to give credibility to witness testimony, did not find the Respondent to be grossly negligent or find he intended to mislead his customers, as the Appellant suggests. Respondent's violation was unintentional and he did what he described as a "buy back" or "layaway" transaction to help those in his community who needed money. Mr. Korzen's testimony proved that the customers were satisfied and did not

feel they were being taken advantage of. (Transcript p. 99, line 17-25). If that was not the case, the Appellant, who had the burden of proof at trial, should have been able to find a disgruntled customer. They did not do so. Furthermore, if Mr. Cassidy was intentionally running an illegal pawnshop he would not have given Detective Kevin Blake paperwork reflecting his act during the course of investigating a burglary. (Transcript p. 117, line 12 – p. 119, line 6). He was not attempting to hide his actions, because he did not know he was doing anything wrong. Mr. Cassidy truthfully testified he did not know his transactions would be considered loans or pawn activity, and ceased all such activity immediately upon notification by the Appellant. (Transcript p. 54, line 4 – p. 55, line 5).

Appellant cites 15 U.S.C § 1607(e)(2), the Consumer Credit Protection Act, as requiring, as a matter of state and federal law, Respondent must be ordered to pay restitution to all affected customers. This statute mandates each agency shall require, in cases where an annual percentage rate or finance charge was inaccurately disclosed, an adjustment when it determines that such disclosure resulted from: (a) a clear and consistent pattern or practice of violations; (b) gross negligence; or (c) a willful violation which was intended to mislead the person to whom the credit was extended. The statue further explains that an agency need not require such an adjustment if it determines such disclosure error resulted from any other unique circumstance involving clearly technical or non-substantive disclosure violations that do not adversely affect information provided to the customer and have not mislead or otherwise deceived the customer. Furthermore, the statute does not define adjustment as a complete restitution for all transactions.

There is not a clear and consistent pattern or practice of violations of the Act. The Appellant's investigators were only able to confirm nineteen instances where Respondent either loaned money secured by pledged goods or purchased tangible personal property from customers

on the condition that the property could be redeemed for a fixed price within a specific timeframe. (Order dated 7/21/16 p. 5). When the investigators were only able to prove these few transactions, Appellant goes further to request restitution for 50 – 150 transactions with no evidence to support the number or no evidence to support the existence of records that would show who the customers are, what they sold to Respondent, and the price.

The ALC judge's decision to not order restitution does not support Appellant's argument that the judge ignored legislative intent, ignored statutory language, and disregarded the case law. The ALC properly found that Respondent unintentionally violated the Pawnbrokers Act and found Appellant's arguments regarding restitution to be unfounded in both the Final Decision and Order and the Order on Appellant's Motion for Reconsideration. (Order dated 7/21/16 p. 6 and Order dated 9/1/16 p. 2). ALC had the judicial discretion to order a fine and not restitution, and this Court should not overturn the decision of a lower court that was in the best position to judge the credibility of the witnesses and analyze the evidence.

II. THE ADMINISTRATIVE LAW COURT DID NOT ERR IN FAILING TO ISSUE A FINE RECOMMENDED BY THE SC DEPARTMENT OF CONSUMER AFFAIRS.

The SC Department of Consumer Affairs requested the Administrative Law Court order a fine that would bankrupt a thrift store selling used goods where the inventory is worth no more than $8,000 - $12,000. The ALC found Mr. Cassidy's testimony to be unrefuted and noted how the Department's Investigators found him to be cooperative, immediately ending any unlawful activity. While the Department asserts the Respondent continued unlawful activity after notice, there is no evidence to support this, which the ALC acknowledged in the Order on Petition's Motion for Reconsideration. The ALC found Mr. Cassidy to be truthful and recognized he did not intentionally violate the Pawnbrokers Act.

The Appellant requested a contested hearing and tried a case with no legitimate attempt to compromise. Their ultimate goal to stop the Respondent from acting as an unlicensed pawnbroker was successful as it ended immediately following notification by the Department. The Respondent unintentionally violated the Pawnbrokers Act and has not violated the act since notified of its existence. Instead of being satisfied with a cease and desist by the Court and a fine that does enough to promote deterrence to a small thrift store, the Appellant hopes a fine will be levied against the Respondent that will bankrupt his store and directly impact his livelihood.

The Appellant initially requested a fine of $75,750 at the contested hearing and now requests a fine of $10,500, along with a refund of all interest collected from customers and a return or refund in a monetary value of all property within the pawn transactions. One of these requests would bankrupt the Respondent, while both are sure to have a drastic effect on his livelihood. The Appellant further requests records where most do not exist and while they had the burden of proof at trial, they did not put forth the evidence necessary for their desired result.

A fine of the magnitude requested at the contested hearing, and the fine requested in the Appellant's brief, would be a violation of Respondent's due process rights. The fine is viewed as punitive damages. Any penalty imposed should take into account the reprehensibility of the conduct, the harm caused, the awareness of the conduct's wrongfulness, the duration of the conduct, and any concealment. Welch v. Epstein, 342 S.C. 279, 308, 536 S.E.2d 408, 423 (2000). Essentially, the punishment should fit the offense. Here, the Respondent conducted a technical infraction of the Pawnbrokers Act, the harm was minimal as Mr. Cassidy believed he was helping people in his town, he was not aware he was violating the law, he stopped immediately upon notification, and he did not conceal any of his actions.

Furthermore, economic bankruptcy, while not an absolute bar, is a fact in considering punitive damages. *Id.* The fine requested at trial and in appeal would cause Respondent's small thrift store to file bankruptcy and close. This would have a direct impact on Respondent's livelihood and those in the Swansea area who depend on the store to purchase used goods at a reasonable price. It is difficult to understand why the Appellant would want to harm the Respondent when he was fined by the Court and has stopped any actions in violation of the Pawnbrokers Act.

The ALC did understand the goal of deterrence in issuing a fine and acknowledged the number of Pawnbrokers Act violations. When the fine was issued the Court took into account Mr. Cassidy's unrefuted testimony that the entire store's inventory was worth no more than $8,000 - $12,000, so the $75,500 in fines plus restitution requested at trial and the $10,500 in fines plus restitution requested on appeal would do more than deter; it would bankrupt Respondent's business. (Order dated 9/1/16 p. 3). The Court considered the quantity and severity of the violations alleged by the department, and found Appellant's argument to be unpersuasive. *Id.* In recognizing that the Appellant, through a motion for reconsideration, requested a monetary penalty that would admonish Respondent for its actions and deter others from behaving similarly, it is clear the ALC believed the ordered fine produced the desired effect, even though it was not to the severe level the Appellant desired. (Order dated 9/1/16 p. 2).

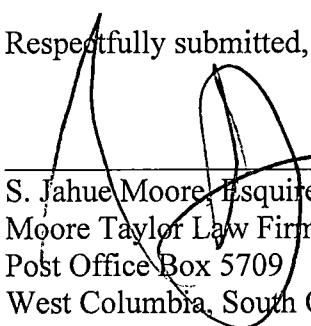
The Administrative Law Court is not bound by any of the Department's findings because as the fact-finder it hears a contested case *de novo*. The ALC recognized the Department's authority in regulating pawnbroker activity in the order, but noted the determination of an appropriate fine for Respondent's violations is within the province of the ALC. (Order dated 7/21/16, p.5 (citing S.C. Code Ann. § 40-39-150(b) (2011) ("[t]he administrative law judge...may

impose administrative fines...upon persons violating any of the provisions of this chapter...")))). The ALC ordered a fine that was appropriate for an unintentional technical violation of the Pawnbrokers Act by a small thrift store in Swansea, South Carolina.

CONCLUSION

The Administrative Law Court did not err in ordering the Respondent cease and desist operating as a pawnbroker and pay an administrative fee to the South Carolina Department of Commerce Affairs of $2,500. The ALC acted within judicial discretion in not ordering restitution as requested by the Appellant. Appellant failed to provide proof at trial of the alleged 150 transactions by the Respondent. The Appellant further requests a fine of at least $10,500, which would bankrupt the Respondent and be in violation of his due process rights. The ALC issued an appropriate sanction for an unintentional violation. For the reasons set forth herein, this Court should affirm the Orders of the Administrative Law Court.

Respectfully submitted,



S. Jahue Moore, Esquire
Moore Taylor Law Firm, P.A.
Post Office Box 5709
West Columbia, South Carolina 29171
(803) 796-9160

ATTORNEYS FOR RESPONDENT

West Columbia, South Carolina
January 11, 2017