

**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

v.

Michael T. Kellett and Carmen Kellett

Appellants-Respondents

APPELLANT'S INITIAL BRIEF OF THE RESPONDENT-APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUES ON CROSS APPEAL

I. Is a business committing an unfair trade practice liable for reasonable attorney fees under the South Carolina Unfair Trade Practices Act, S.C. Code Ann. §§ 39-50-10 *et seq.*, when such fees were sought in the complaint?

A. Were attorney fees sought in the complaint?

B. Are attorney fees limited to willful unfair trade practices; or do they apply to all violations, whether willful or not?

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

III. Is the Respondent-Appellant entitled to costs?

STATEMENT OF THE CASE

This case was commenced on June 10, 2014, in the Court of Common Pleas for Greenville County, SC. The Respondent-Appellant, Natasha Turner ("Turner"), sought damages for breach of contract, conversion, fraud and deceit, and violations of the Unfair Trade Practices Act ("UTPA"), all arising from the Appellants-Respondents' ("Kelletts") breach of an agreement to repair an automobile. There were three answers, the last of which pled a general denial.

The case was tried nonjury before Honorable Letitia H. Verdin on November 19, 2015. On December 11, 2015, Judge Verdin issued an order awarding Turner treble damages of \$10,567.86 for willful violation of the Unfair Trade Practices Act ("UTPA"). The order did not address the causes of action for willful conversion and fraud and deceit; nor did it address Turner's claim for attorney fees under the UTPA.

On January 7, 2016, Turner moved under Rule 52, SCRPC for an amendment of the order to separately state findings of fact and conclusions of law, to award attorney fees under UTPA, and to award punitive damages under the common law causes of action.

On June 7, 2016, Judge Verdin issued an amended order, separately stating findings of fact and conclusions of law. The order denied attorney fees and costs on the ground that Turner had not sought them in the complaint. Although the amended order found willful conversion and fraud and deceit to have been committed by the Kelletts, punitive damages were denied on the ground that the court declined to make a cumulative award. (Am. Order ¶ 14, p. 6, R. p. 31)

On July 1, 2016 the Kelletts served their Notice of Appeal; and on July 6, 2016, Turner served her Notice of Appeal.

STATEMENT OF FACTS

With few exceptions, the trial court's Findings of Fact are unchallenged; and therefore set out the facts of the case, binding on all parties. "In an action at law, on appeal of a case tried without a jury ... factual findings of the trial judge will not be disturbed on appeal unless a review of the record discloses that there is no evidence which reasonably supports the judge's findings." *Crory v. Djebelli*, 329 S.C. 385, 387; 496 S.E.2d 21, 23 (1997) (citing *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773, 775 (1976)).

Buddy's Garage was an unincorporated automobile repair business owned by the Kelletts as equal partners. (Tr. 129:17 – 129:23; R. p 166) Neither was active in the daily operation of the business, and their only employee, Mr. Finchem, was the manager, estimator, mechanic, body repairer and representative for the business. (Tr. 130:7 – 130:20; R. p. 167) In the ordinary course of business, customers dealt solely with Finchem; and this was true in all respects in Ms. Turner's dealing with the business up to the time Mrs. Kellett contacted Ms. Turner and advised that repairs had been completed and her car was ready to be picked up. (Tr. 19:7 – 17, R. p. 56; Tr. 163: 11 – 11, R. p. 200; Tr. 172: 5 – 173:1, R. p. 209 - 210; Tr. 19:7 – 16; R. p 56)

On May 7, 2013, Ms. Turner took her car to Buddy's Garage for repairs resulting from an accident (Tr. 22:15 – 23:7; R. p. 59 - 60) A few days later, Finchem told Ms. Turner that both bumpers and the transmission needed replacement. (Tr. 21:13 – 22:5; R. p 58 - 59) He showed her a work order (Pl.'s Ex. 1; R.243), indicating that the cost would be \$3,867.69, and he advised that payment must be received before repairs were made. (Tr. 20:14 – 23:14; R. p. 57 - 60) Ms. Turner accepted the work order, and signed a statement on it that she did not know of any other repairs that were needed at that time. (Tr. 46:1 – 46:20; R. p. 83) She borrowed the amount of

her collision insurance deductible, \$2,500 (Tr. 23:3 – 23:11; R. p. 60); and Finchem requested from the insurer and received \$1,815.26, \$447.57 more than the amount of the work order. (Tr. 24:11 – 25:17; R. p. 61 - 62) Ms. Turner's payment was delivered seven days after receiving the work order. (Pl.'s Exhibit 2; R. p. 244) Both payments were deposited in Buddy's checking account, which was under the sole control of the Kelleths. (Tr. 174:6 – 175:9; R. p. 211 - 212; Kellett Dep. 18:23 – 20:23; R. p. 259 - 261)

There is no satisfactory explanation for the additional \$447.57 charge. Mrs. Kellett claimed it was for storage because the car had been stored at Buddy's for such a long time pending payment and parts. (Tr. 181:14 – 181:23; R. p. 218) But, Ms. Turner was never told by the work order or otherwise that there would be a charge for storage and the time between the estimate and Ms. Turner's payments was only seven days. This would result in a *per diem* charge of \$63.94, a strange amount indeed.¹

The work order provided for replacement of the transmission with a used one having 22,000 miles. (Pl.'s Ex. 1; R. p. 243) On direct examination, Mrs. Kellett stated that these were the number of miles on a transmission Buddy's had or had located (Tr. 131:23 – 132:4; R. p. 168 - 169) Necessarily this would mean that the transmission was at least located by the time of the work order, May 7, 2013. But on cross examination she said the transmission had been hard to locate, and that Finchem had finally found one in North Carolina after Ms. Turner's car was delivered to Buddy's Garage. (Tr. 180:1 – 12; R. p. 217) Mrs. Kellett testified that she gave cash to Finchem from Turner's payments to buy the transmission. (Tr. 178:12 – 24; R. p. 215) But if

¹ The notation of a storage charge was not on the work order when Ms. Turner agreed to it before payment. This is necessarily true because the notation is in Mrs. Kellett's handwriting and refers to fourteen days (Tr. 183:13 – 15; R. p. 220) No such time had passed when Ms. Turner reviewed and approved the estimate.

this was true, the transmission was necessarily located *after* Turner's payments. There is no record of any payment by the Kelletts for a transmission. (Tr. 179:19 – 21; R. p. 216)

After making payment, Ms. Turner inquired several times about the progress of repairs, and was told Buddy's was waiting for parts. (Tr. 25:21 -26:5; R. p. 62 - 63) Finally, on July 15, 2013, Mrs. Kellett contacted Ms. Turner and advised the car was ready to be picked up. (Tr. 28:12 – 16; R. p. 65) She went to Buddy's, met Mrs. Kellett and looked at the car. (Tr. 28:22 – 29:7; R. p. 65 - 66) She saw that neither bumper had been replaced. (Id.) As to the front bumper, Ms. Turner was told that Fincham had taken the parts, and that she would have to pick them up from him. (Tr. 28:17-21; R. p. 65) Mrs. Kellett tendered a check for \$130.00 for an apparent refund for labor, \$32.50 less than Ms. Turner had paid for that labor. (Pl.'s Ex. 5; Pl.'s Ex. 1; R. p. 246 and 243) As to the back bumper, Mrs. Kellett told her she was being too picky, and that it did not need to be replaced, though it had been included in the work order and had been paid for. (Trans. 35:11 – 23; R. p. 72; Pl.'s Ex. 1; R. p. 246) In claiming Ms. Turner was entitled only to a refund for installation of the front bumper, Mrs. Kellett represented that all other work had been properly performed. (Trans. 28:13 – 16; R. p. 65; Tr. 76:14 – 22; R. p. 113)

The discussion became heated, and Mrs. Kellett's language became abusive, to the point that Ms. Turner became apprehensive for her safety. (Tr. 37:25 – 38:9; R. p. 74 – 75; Tr. 73:19 – 75:3; R. p. 110 - 112) Ms. Turner took the \$130.00 check to end the discussion, but never cashed it. (Tr. 37:12 – 14; R. p. 74; Pl.'s Ex. 5; R. p. 246)

After leaving Buddy's, Ms. Turner noticed that the transmission was not functioning normally. (Tr. 39:9 – 19; R. p. 76) She had the car inspected by an expert, the witness Stanstell, and learned the car still had its original transmission, unrepaired. (Tr. 40:1 – 7; R. p. 77; Tr. 87:10)

– 88:21; R. p. 124 – 125; Tr. 91:18 – 25; R. p. 128) The lower pan had been wiped clean, perhaps to make it appear it had been replaced. (Tr. 89:5 – 15; R. p. 126)

When Ms. Turner brought suit in magistrate’s court, the Kelleets answered, alleging that their employee, Finchem, and not they, had committed the wrongful acts. (Tr. 42:3 – 42:17; R. p. 79; Pl.’s Ex. 6.; R. p. 247) The magistrate’s court case was dismissed without prejudice before trial, and suit was brought in common pleas court, alleging conversion, fraud and violation of the Unfair Trade Practices Act. (Compl. filed June 10, 2014; R. p. 1) Punitive damages were sought on the conversion and fraud counts; treble damages and attorney fees were sought on the unfair trade practices count. (Id.) Costs provided by law were sought on all counts. (Id.)

ARGUMENT

I. Is a business committing an unfair trade practice liable for reasonable attorney fees under the South Carolina Unfair Trade Practices Act, S.C. Code Ann. §§ 39-50-10 *et seq.* when such fees were sought in the complaint?

Note: The matter of attorney fees was also addressed in the Kelleets’ Initial Brief; and accordingly we dealt with the issue in our response brief. However, since the issue is one on which we seek reversal, we present our argument again here.

There are two facets to this specific question. First, was the lower court correct in denying attorney fees based on a finding that they had not be sought in the complaint? Second, are attorney fees awarded only for willful violations of the Unfair Trade Practices Act?

First, the lower court was plainly mistaken in finding the complaint did not seek attorney fees. The complaint, in paragraph 40, alleges that Ms. Turner is entitled to attorney fees, and

section D of the prayer seeks “treble damages, *attorney fees* and costs” for violation of the South Carolina Unfair Trade Practices Act. (Compl.; R. p. 7)

Aside from the sufficiency of the complaint, S.C. Code Ann. § 39-5-140 (1976) provides, “Upon the finding by the court of a violation [of the Unfair Trade Practices Act] the court *shall* award...reasonable attorney fees and costs.” (emphasis added.) The point is that the mandate for attorney fees in an unfair trade practices case does not require any allegation of entitlement in the complaint.

Without question, the court’s recital was simply an oversight. But it must be corrected.

Second, attorney fees are not limited to willful violations of the Act, but must be awarded for all violations, whether willful or not.

Though not separately designated, paragraph (a) of S.C. Code Ann. § 39-5-140 actually has three distinct parts. First, an injured party is entitled to actual damages for a violation of the Act. “Any person...who suffers...loss...as a result of [an unfair trade practice] may bring an action ...to recover actual damages.” Second, treble damages apply if the violation was intentional: “If the...[act] was a willful or knowing violation of [the Act] the court shall award three times the actual damages....” Third, attorney fees and costs must be awarded in all cases for violation of the Act, not just those involving willful or knowing conduct: “Upon...a violation of...the Act... the court shall award...reasonable attorney’s fees and costs.”

The lower court has found that the Kelletts knowingly committed unfair trade practices, and we believe that finding will be sustained. But their intention is not relevant to the issue of attorney fees. Whether they intended to or not, Ms. Turner was the victim of an unfair trade practice and is entitled to reasonable fees.

II. Is the Respondent entitled to punitive damages?

In addition to the unfair trade practice count the Respondent also sought punitive damages for the Appellants' willful conversion of the money she paid (Compl. First cause of action, R. p. 4), and also for the fraud and deceit practiced by the Appellants (Compl. Second Cause of Action, R. p. 4)

The facts plainly support punitive damages. The lower court found that the Kelleths intentionally and willfully converted Ms. Turner's money. (Am. Order ¶ 6, p. 4 ; R. p. 29) The evidence supporting the finding is clear and convincing and the Kelleths do not challenge it. Indeed, they admit conversion and fraud, claiming it was by their employee and not them.²

But it was they, not their employee, who "willfully and intentionally retained" Ms. Turner's funds. They have persisted in the conversion for more than three years.

The lower court also found that the Kelleths were guilty of all the elements of common law fraud and deceit. (Am. Order ¶¶ 9 & 10; R. p. 30) Again, the evidence fully supporting the finding is clear and convincing; and the Kelleths have not excepted.

It follows that the standards for a punitive damage award have been met.

Punitive damages have long been accepted in this state. In fact, South Carolina was the first of the American states to authorize them. In *Genay v. Norris*, 1 SC 3, 1 Bay 8 (1784), the Court awarded "vindictive" damages for an intentional attempt to injure.

Punitive damages are allowed in both conversion and fraud and deceit cases. In *Mackela v. Bentley*, 365 S.C. 44, 614 S.E.2d 648, 651 (2005), the Court said, "Punitive damages are

² In ¶ 26 of their second answer in common pleas court, they say Finchem "willfully and intentionally retained" Ms. Turner's funds, "knowing they rightfully belonged to the plaintiff until the agreed work was done" and that "Finchem did not perform the work as agreed and yet maintained said funds for himself." (R. p.18)

recoverable in conversion cases if the defendant's acts have been willful, reckless, and/or committed with conscious indifference to the rights of others." The Court enumerated several factors to be considered in determining the propriety of punitive damages. These include the defendant's degree of culpability, the duration of the conduct, the defendant's awareness or concealment, the likelihood the award will deter others, and whether the award is reasonably related to the harm likely to result from the conduct. *Id.* Substantially the same standards are contained in S.C. Code Ann. § 15-32-520(e) (1976).

More recently, a punitive damage award of 26 times the actual damages was affirmed by this Court. In *Lister v. NationsBank of Delaware N.A.*, 329 S.C. 133, 494 S.E.2d 449 (S.C. App., 1997), a car rental company made an unauthorized charge against the plaintiff's credit card for damage to a car. The Court affirmed a punitive award of \$200,000 in addition to actual damages of \$7,700, saying,

Although there is no evidence in the record of similar past conduct, the punitive damages award should strongly deter future conduct by [the defendant] *and others*. The award is reasonably related to the harm likely to result from this conduct.... The need for protection and deterrence is heightened by the enormous difficulties the Listers experienced in dealing with [the defendant's agent].

(*Id.* at 150-151, 458-459) (emphasis added).

In this case, like the Listers, Turner too experienced enormous difficulties dealing with Buddy's Garage and its agent and owner.

An award under the Unfair Trade Practices Act does not preclude punitive damages. S.C. Code Ann. § 39-5-160 (1976) provides, "The powers and remedies provided by this article shall be cumulative and supplementary to all powers and remedies otherwise provided by law."

In our case, the lower court recognized that relief under the UTPA is supplemental and cumulative to other rights of recovery. (Am. Order ¶ 8, p. 7; S.C. Code Ann. § 39-5-140 (1976) and S.C. Code Ann. § 39-5-160 (1976). But, the lower court declined to make a cumulative award, apparently considering that the treble damages award was sufficient punishment. Perhaps so, subject to the qualification that, if the treble damage award is not sustained, then we are surely entitled to punitive damages. For that reason, in our Rule 52, SCRPC motion, we sought an amendment to provide punitive damages as an alternative to treble damages under UTPA. (Pl.'s Notice and Motion for Amended of Order filed Jan. 7, 2016 ; R. p. 24)

In short, we are not asking for two bites of the apple; but we are asking for one full bite.

III. As the prevailing party, was Ms. Turner was entitled to costs?

The lower court's order denies costs. "Plaintiff is not entitled to costs otherwise allowed by law." (Am. Order, ¶ 13, p. 5; R. p. 30)

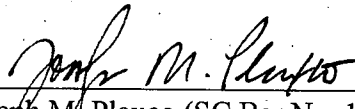
But S.C. Code Ann. § 15-37-10 (1976) provides, "In every civil action...except cases in chancery...such costs [shall] be allowed *as of course*...against the losing party. In cases in chancery the same rule as to costs shall prevail unless otherwise ordered by the court." (emphasis added.) This is a case at law, and the lower court did not have reason or discretion to deny costs in contravention of the law.

The denial of costs was probably inadvertent. But whether deliberate or inadvertent, the lower court should be reversed on this issue.

CONCLUSION

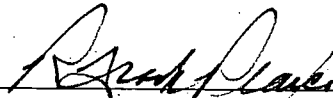
We respectfully submit the lower court's order should be modified (1) to allow attorney fees in an amount to be determined; (2) to allow costs provided by law; and (3) to award punitive damages in an appropriate amount alternative to the award of treble damages.

Respectfully submitted:



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February 1, 2017

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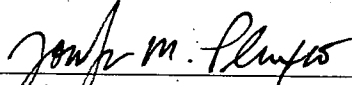
I hereby certify that on the 1st day of February, 2017, I served a copy of the Appellant's Initial Brief of the Respondent-Appellant and the Respondent's Initial Brief of the Respondent-Appellant, to the Appellants-Respondents, Michael T. Kellett and Carmen Kellett, by mailing it to their attorney of record, Clifford F. Gaddy, Jr., by depositing it in the U.S. mail, in an envelope with sufficient postage affixed, addressed as follows:

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I do further certify that on February 1, 2017, I placed a two copies (one to be returned) of Appellant's Initial Brief of the Respondent-Appellant and the Respondent's Initial Brief of the Respondent-Appellant in the U.S. mail, with sufficient postage addressed to:

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