

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

RESPONDENT'S INITIAL BRIEF OF THE RESPONDENT-APPELLANT

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SC Court of Appeals

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STATEMENT OF ISSUES

- I. Did the Appellants-Respondents breach their contract with the Respondent-Appellant by failing to repair Respondent-Appellant's car?
- II. Did the Appellants/Respondents' acts constitute an unfair trade practice under the South Carolina Unfair Trade Practices Act, S.C. Code § 39-5-10 *et seq* (1976)?
- III. Is a business committing an unfair trade practice liable for reasonable attorney fees under the South Carolina Unfair Trade Practices Act 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?

STATEMENT OF THE CASE

Turner has set forth her Statement of the Case in her Appellant's Initial Brief of the Respondent-Appellant. However, she wishes to clarify some factual allegations the Kelletts assert in their Initial Brief that are in need of correction.

First, three answers were filed by the Kelletts, one in magistrate's court and two in the common pleas court.

Second, while Mrs. Kellett testified that Finchem was involved in an insurance fraud, there is no evidence that Ms. Turner was involved. (Tr. 45:4 – 25; R. p. 82; Tr. 105:16 - 20; R. p. 142)

Third, the Kelletts are mistaken in saying Ms. Turner sued without first complaining that the car had not been repaired. (Tr. 73:19 – 74:3; 74:13 – 75:3; R. p. 110 - 112) Also Ms. Turner testified that her calls to Buddy's Garage were not fruitful, as the telephone line had been disconnected. (Tr. 41:14 - 41:21; R. p. 78)

Fourth, Ms. Turner signed no memorandum that all repairs were satisfactory when she picked up her car from Buddy's Garage. (Tr. 46:1 - 46:20; R. p. 83)

Fifth, Ms. Turner's Motion For Amendment of Order sought an award of punitive damages alternative to the award of treble damages under the Unfair Trade Practices Act, in addition to separately stated findings of facts and conclusions of law, and an award of attorneys fees and costs (Pl.'s Notice and Motion for Amended of Order filed Jan. 7, 2016; R. p. 24)

Finally, the Kelletts are mistaken in saying Ms. Turner's complaint did not seek attorney fees. In Paragraph 40 of her Complaint, Ms. Turner alleged she was entitled to attorney fees; and in Paragraph D of the relief prayer, she sought them. (Compl.; R. p. 6 - 7)

ARGUMENT¹

I. Did the Appellants-Respondents breach their contract with the Respondent Appellant by failing to repair Respondent-Appellant's car?

In their second common pleas answer, the Kellekts admitted Buddy's Garage had committed conversion and fraud. In Paragraph 26 of their answer, they alleged:

Defendant Finchem, acting as agent of the defense as part of his ongoing scheme of fraud, theft and deception perpetrated on the defendants, as well as a number of customers of Buddy's Garage, willfully and intentionally retained the funds deposited by the plaintiff knowing they rightfully belonged to the Plaintiff until the agreed work was done. Acting outside the scope of his employment, without the knowledge or consent of the defendants, Finchem did not perform the work as agreed and yet maintained said funds for himself.

(Answer, Counterclaim and Crossclaim, R. p. 18) Shortly following, the Kellekts employed another lawyer, and a general denial was alleged by Amended Answer.

Through all pre-trial proceedings and sworn testimony in the trial itself, the Kellekts have persisted in their claim that all repairs other than installation of the front bumper had been made; that they had done nothing wrong and owed Ms. Turner nothing. Now, more than three years after the event and through the intervention of an honorable attorney they admit in their Brief that the work was not done and that they kept the money belonging to Ms. Turner. (They overlook that the work order also provided for replacement of the rear bumper. We assume this to be an oversight.)

The Kellekts apparently argue the Court should excuse intentional and willful conversion, fraud and deceit, and unfair trade practices because they now acknowledge that their representations to Ms. Turner were untrue.

¹ For purposes of factual references, see Turner's "Statement of Facts" contained in Appellant's Initial Brief of the Respondent-Appellant.

They are too late. Three years have passed, during which they have continued to keep Ms. Turner's money; and during which she lost her car because she could not afford to pay a second time to have it fixed. She has had to employ attorneys and an expert, and incur the costs of litigation.

The Kelletts make a novel argument, but we submit they have earned no right to such charity.

The facts establish beyond any doubt that the Kelletts took Ms. Turner's money and failed to deliver, falsely claiming that they had, even to the extent of sworn testimony in deposition and trial. They falsely alleged that it was their employee, Finchem, who converted Ms. Turner's money, when they knew the conversion was by them alone. By their conduct, they knowingly committed unfair trade practices, which were of a character capable of repetition.

II. Did the Appellants-Respondents' acts constitute an unfair trade practice under the South Carolina Unfair Trade Practices Act, § 39-5-10 *et seq* (1976)?

In the initial Order, the lower court found in favor of the Plaintiff "as to her claims of conversion of funds, fraud, misrepresentation and violation of the Unfair Trade Practices Act against all Defendants" and awarded treble damages. (Order of Dec. 11, 2015, R. p. 22) In the Amended Order, the court held, "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." (Am. Order, Conclusion 4; R. p. 31)

But the Kelleths argue that the acts committed were not capable of being repeated because Finchem was fired on July 13, 2013, and also because the Kelleths ended up closing Buddy's Garage after Ms. Turner retrieved her unfixed automobile there. (App.'s Brief) The Kelleths also assert that the acts committed were not capable of affecting the public interest since "[t]he 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" and "no other members of the public [were] affected" (Argument II, App.'s Brief)

The Kelleths construe the language of the Unfair Trade Practices Act (hereafter, "UTPA") far too narrowly. S.C. Code Ann. § 39-5-20(a) (1976) provides, "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful. ... Unfair or deceptive acts or practices have an impact upon the public interest if the acts or practices have the potential for repetition." *Crary v. Djebelli*, 329 S.C. 385, 387, 496 S.E.2d 21, 23 (1998). Generally, a plaintiff may prove potential repetition in two ways: (a) "by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence" and (b) "by showing the company's procedures create a potential for repetition of the unfair and deceptive acts." *Daisy Outdoor Advertising Co., Inc. v. Abbott*, 322 S.C. 489, 495; 473 S.E.2d 47, 5 (1996). However, these are not the only two means for showing potential for repetition. *Daisy*, 322 S.C. at 496-497, 473 S.E.2d at 51-53. The Supreme Court "expressly reject[s] any rigid, bright line test that delineates in minute detail expressly what a plaintiff must show to satisfy the potential for repetition/public impact prong of the UTPA test...Rather, each case must be evaluated on its own merits." *Id.*

The Kelletts apparently argue that the Act only applies to large businesses. But there is no basis for their argument. Despite the size of Buddy's Garage and the number of its employees and customers, it is clear from the record that the conduct complained of affected the public interest, and was thus capable of potential repetition. The test is not whether the plaintiff can prove repetitive acts of bad conduct; it is whether the conduct is of a type that there is a potential for repetition. *Id.* It is hard to imagine a clearer example of an unfair trade practice than taking money to make repairs, and then not only failing to make them, but claiming, even through the trial of the case three years later, that they had been made.

In fact, the Kellett's culpability for unfair trade practices does not depend only on the *potential* for repetition. Ironically, the Kelletts themselves establish *actual* repetition. In their brief in this Court, the Kelletts say their employee, Finchem, was involved in a fraudulent scam, one that they were aware of. (App.'s Brief) In the magistrate's court, the Kelletts admitted liability in their answer, but not to the full amount, because "they were taking action against [Finchem] for fraud." (Tr. 42:3 - 42:17; Pl.'s Ex. 6; R. p. 247)

After the case was removed to common pleas and the Kelletts filed their second answer there, they alleged Finchem was their agent and dealt exclusively with Turner in the transactions alleged in the Complaint; (Second Answer, ¶ 23, R. p. 18) and that, acting as "agent of the Defendants, and as part of his ongoing scheme of fraud, theft, and deception perpetrated ... on a number of customers of Buddy's Garage, willfully and intentionally retained the funds deposited by the plaintiff knowing that they rightfully belonged to the Plaintiff until the work was done." (Second Answer; R. p. 18)

Ms. Kellett also testified as to her knowledge of Finchem's scheme; that Finchem was engaged in a scam in which he claimed to have reported to the authorities two cars left for repairs at Buddy's Garage were stolen, when in fact they were not. (Tr. 138:4 - 139:15; R. p. 175, 176) She also testified that she fired Finchem upon learning that he was involved in a scheme ordering parts that were paid for by Buddy's Garage, but not provided to customers. (Tr. 161:3 - 161:7; R. p. 198)

She testified, "[i]n other cases, [she had] become aware that Mike Finchem was getting parts and not putting them in cars," the exact same scheme concerning the repairs for Ms. Turner. (Tr. 195:7 - 195:13; R. p. 232)

The evidence here meets the standard set for proving potential repetition in *Daisy*, supra. There is ample evidence supporting the lower court's finding and conclusion that the Defendants' conduct had the potential for repetition, and that in fact it had been repeated, such that it affected the public and was thus in violation of the UTPA.

The lower trial court's of an award under UTPA should be affirmed.

III. Is a business committing an unfair trade practice liable for reasonable attorney fees under the South Carolina Unfair Trade Practices Act when such fees were sought in the complaint?

Note: The matter of attorney fees is an issue we are seeking on reversal, and it is addressed in the Appellant's Initial Brief of the Respondent-Appellant. However, since the issue is addressed in the Kellett's Initial Brief, we present our response 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 them. (Compl.; R. p. 40, 41)

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.

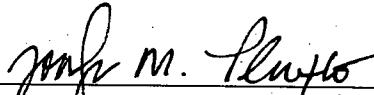
Though not separately designated, paragraph (a) of S.C. Code Ann. § 39-5-140 actually has three distinct parts. First, an injured party is entitled to actual damages for a violation of the Act. “Any person...who suffers...loss...as a result of [an unfair trade practice] may bring an action ...to recover 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 Kelleys 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 attorney fees.

CONCLUSION

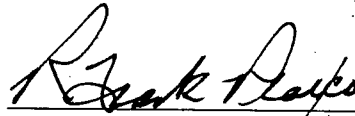
In conclusion, Turner requests that this Court affirm the lower court's finding that (a) the Kelleys violated their contract with Turner, (b) that the Kelleys' acts constituted an unfair trade practice, and (c) that Turner is entitled to reasonable attorney fees.

Respectfully submitted:



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February 1, 2017

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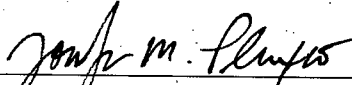
I hereby certify that on the 1st day of February, 2017, I served a copy of the Appellant's Initial Brief of the Respondent-Appellant and the Respondent's Initial Brief of the Respondent-Appellant, to the Appellants-Respondents, Michael T. Kellett and Carmen Kellett, by mailing it to their attorney of 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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