

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

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SC Court of Appeals

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Appellate Case No: 2016-001425

Natasha Turner.....Respondent/Appellant

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

REPLY BRIEF OF THE APPELLANTS

Clifford F. Gaddy, Jr., Esquire
S. C. Bar License # 2275
408 N. Church St., Ste. B
Greenville, South Carolina 29601
(864) 250-5155
Attorney for Appellants/Respondent

Other Counsel of Record:

Joseph M. Plaxco, Esquire
S. C. Bar License # 100975
707 E. North Street
Greenville, South Carolina 29601
(864) 240-9119
Attorney for Respondent/Appellants

R. Frank Plaxco, Esquire
S. C. Bar License # 4476
925 Cleveland Street, # 59
Greenville, South Carolina 29605
864-232-9828
Attorney for Respondent/Appellants

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925 Cleveland Street, # 59
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864-232-9828
Attorney for Respondent/Appellants

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Argument I

1. Did the evidence establish that the Appellants("Kelleths") violated the contract between the parties which entitled Respondent Natusha Turner to damages for breach of contract?

The primary witness for the Appellants was Carmen Kellett. Ms. Kellett's relevant testimony was that she knew that a used transmission was purchased for the Turner automobile because she paid for the transmission and saw the transmission at Buddy's Garage. Her testimony was contradicted by the testimony of Rick Santell who testified that the transmission in the Turner automobile had not been replaced. The Turner automobile had the same transmission that was factory installed.

Yes, the Trial Judge found that a breach of contract occurred. The evidence will support this finding of fact.

Specifically, the transmission was not replaced and the rear bumper was not replaced. Both items were included on the proposal or estimate of repairs made by Mike Finchem, the employee of the Kelleths. (Rp 57,58 and Rp 60). Natasha Turner paid for repairs which were not made.

The Trial Judge found that the damages sustained by Respondent Turner were \$3,522.62 (See Rp 30 Paragraph 11.)

The Trial Judge also found that the nine elements of fraud were proved (Rp 30). Natasha Turner paid for repairs which were not made. The evidence supports this finding of fact.

The evidence will support these findings of fact in that Mike Finchem prepared a Proposal for the repair of Turner's automobile which included the replacement of the transmission, collected the cost of the repairs plus an additional sum. Carmen Kellett was adamant that the replacement transmission was present at Buddy's Garage; however, the replacement transmission was not installed in the Turner automobile. Since Finchem was an employee of the Kelleths, his actions as an employee are attributed to the Kelleths as Finchem's

employee and therefore, when the Kelletts received payment for repairs that were never made.

Argument II

2. Does the South Carolina Unfair Trade Practice Act (SCUTPA) apply when the unfair and deceptive acts could neither be repeated nor could they affect the public interest?

The landmark case of Ardis v Cox, 314 S.C.512, 431 S. E. 2d 267 (S.C. App. 1993) holds that the SCUTPA is unavailable to redress private wrongs if the public interest is unaffected. LaMotte v The Punch Line of Columbia, Inc., 296 S. C. 66, 370 S. E. 2d 711 (1988); Noack Enterprises, Inc. v Country Corner Interiors, 290 S. C. 475, 351 S. E. 2d 347 (Ct. App. 1986) An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the Act's embrace. See Noack. Unfair or deceptive acts or practices [must] have the potential for repetition. A deliberate or intentional breach of a valid contract, without more, does not constitute a violation of the SCUTPA. The Key Co., Inc. v Fameco Distributers, Inc., 292 S.C. 524, 357 S.E. 2d 476 (Ct. App.1987). Otherwise, every intentional breach of a contract would constitute an unfair trade practice and thereby subject the breaching party to treble damages.

As pointed out by the Court in Wright v Craft, 372 S.C. 1, 23, 640 S. E. 486, 498 (Ct.App 2006) "To recover in an action under the UTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected the public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair and deceptive act(s)."

Daisy Outdoor Advertising Co. v Abbott, 322 S.C. 489 , 473 S. E. 2d 47 (SC SupCt 1996) holds that for the SCUTPA to apply the wrongful act must have the potential for repetition.

Circuit Judge Letitia H. Verdin's Amended Order dated July 7, 2016 found 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." (Rp 30) The order makes no findings explaining how the unfair and deceptive acts could be repeated.

The evidence contains only one occasion of an unfair and deceptive act, namely, the Natasha Turner situation where she paid for repairs that she did not receive. There could be no repetition for two reasons:

Upon Natasha Turner receiving her automobile that the Kellett's closed Buddy's Garage. (Rp 180) Therefore, it would be impossible for these unfair and deceptive acts to occur again because the Kelletts' auto repair business no longer existed.

Furthermore, undisputed evidence shows that it was Mike Finchem, employed by the Kelletts as an automobile mechanic, and it was not the Kelletts who cheated Natasha Turner. The Kelletts, by terminating Mike Finchem prior to Natasha Turner driving her car away from Buddy's Garage, show their good faith.. (Rp 179) By requiring Mike Finchem to leave when he was the sole employee of Buddy's Garage, the ability of Buddy's Garage to act deceitfully to a customer, as well as cheat the Kellett's, eliminated any further unfair and deceptive acts.

Respondent Turner in her Brief attempts to prove that Carmen Kellett participated in the deceit by retaining the funds paid by Natasha Turner. This point misleads in that it remains unknown to the Court what negotiations occurred to restore the funds paid by Turner. No where does it appear and there are no facts presented to the Kelletts, until Rick Stanstell testified, that the Kelletts were aware that the transmission had not been replaced in the Turner automobile.

Of overwhelming significance is that if the employee performing the unfair and deceptive acts was fired and the business using this crooked employee closed, then it would be impossible for these unfair and deceptive acts to be repeated. Therefore, a requirement for a violation of the SCUTPA was not met.

Was the public interest affected by any unfair and deceptive acts? There must be a finding that the public interest must be affected before a violation of

SCTRA is found. There is no definition of "public interest" in the SCUTPA, but the opinions of South Carolina cases dealing with the "public interest" show that our South Carolina courts consider the "public interest" to be matters involving trade and commerce significant to the community. When unfair and deceptive acts occur between a customer and mom and pop garage, the legal system affords redress to the victim based upon breach of contract and fraud.

Since the Amended Order, dated July 6, 2016 issued by Circuit Judge Letitia H. Verdin makes a finding of fact that Respondent sustained damages of \$3,522.62, if the appellate court finds that the Trial Court erred in its holding that SCUTPA applies, then Respondent is entitled to a judgment for her damages.

Argument III

3. Should Respondent Natusha Turner be awarded attorney fees?

Appellants have stated in their Statement of the Case and in their Brief that the Respondent did not request that attorney fees be awarded in her Complaint nor at the end of the trial. Appellants are mistaken saying that the Complaint did not request attorney fees. The Complaint requested attorney fees. Neither during the trial nor after the trial did Respondent request an award of attorney fees, but Respondent did request attorney fees in a Rule 52, SCRPC motion.

The Trial Judge specifically addressed the issue of attorney fees in her order which reads: (Rp 30,312)

Plaintiff also seeks reasonable attorney fees and costs under Section 39-5-140 of the Unfair Trade Practices Act; and in support of the motion Plaintiff's attorneys represented in their Brief that this case has required more time of the Plaintiff's attorneys than one would ordinarily expect. However, Plaintiff did not request an award for attorney fees in the complaint or at the conclusion of trial. Plaintiff only made such a request in its brief, therefore failing to allow time for the Court or the opposing party to evaluate the validity of the request. The court denies request for \$8,000 in attorney fees and costs.

Appellants would agree that the intent of Rule 52, SCRPC is to allow the Court to address or correct any aspect of the case which was not considered during or after the trial. Therefore, Appellants agree that the Trial Judge could award attorney fees in a Rule 52 motion. The SCUTPA provides that if damages

are awarded that attorney fees be awarded. But the SCUTPA does not give any criteria for the court to consider in awarding attorney fees.

Respondent's request for an award of \$8,000 in attorney fees was denied. What amount of attorney fees, if any, should be awarded? Usually, the party seeking attorney fees will furnish affidavits and documents describing the services rendered. The way that Respondent has requested an award doesn't give the court or opposing party an opportunity to analyze the request.

The Respondent sought relief alleging causes of action for breach of contract, fraud and conversion. Respondent is not entitled to attorney fees relating to services of her attorney for matters outside of the SCUTPA. Appellants should be entitled to review the basis upon which the request is made.

Another obstacle presents itself with respect to an award of attorney fees. A finding of fact made by the court in an action at law cannot be disturbed on appeal if there is evidence to support the finding or that an error of law occurred.

What would be reasonable attorney fees? Respondent has not given an adequate justification for a fee that would be reasonable. The Trial Judge awarded Respondent treble damages--three times the actual damages sustained by Respondent. The Trial Judge felt that a treble damage award was a sufficient sum to award Respondent. The Trial Judge also directed that Respondent could not collect costs incurred which substantiates the view of the Appellants that the treble damage award was enough.

The Trial Judge has in substance made a finding of fact that the Respondent has not shown that the facts justify an award of attorney fees. For the appellate court to now find an amount of attorney fees that should be awarded means that the appellate court is engaging in findings of fact.

If the appellate court finds that the SCUTPA does not apply, then, the Respondent is not entitled to an award of attorney fees. If the appellate court determines that the South Carolina Unfair Trade Practice Act does apply, then the case must be remanded back to the Trial Court for a determination of attorney fees.

Argument IV

4. Is the Respondent Natasha Turner entitled to punitive damages?

Appellants construe Respondent to be maintaining that the Trial Judge should award punitive damages if the Trial Judge found that Natasha Turner was

entitled to recover based upon conversion, fraud and misrepresentation. The Trial Judge specifically held "the Court declines to award punitive damages."

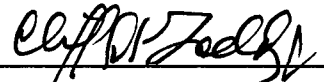
In Paragraph 14. of the Order, after pointing out that punitive damages were allowable, the Trial Judge repeated, "the Court declines to make a cumulative award." (Rp 31) It is well-established that when an action at law is tried without a jury the standard of review is whether there is any evidence to support the trial judge's find of fact. See Townes Associates v City of Greenville, 266 S. C. 81, 221 S. E. 2d 773 (1976). It was the decision of the Trial Judge based upon her view of the evidence that awarding punitive damages were not warranted. The evidence supports this finding of fact by the Trial Judge.

CONCLUSION

For the reasons expressed above the Amended Order of the Trial Judge should be reversed and judgment granted to the Respondent for actual damages in the amount of \$3,522.62. If the Amended Order is affirmed in substance, the case must be remanded to the Trial Court to determine an award of attorney fees to the Respondent.

February 27, 2017

Respectfully submitted



Clifford F. Gaddy, Jr.

Attorney for the Appellants

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Natasha Turner,

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v.

Michael T. Kellett and
Carmen Kellett,

Appellants/Respondents.

PROOF OF SERVICE

I certify that a bound copy of the Brief of Appellants and the Reply Brief of Appellants was served by HAND DELIVERY to each of the following on February 28, 2017.

Hand delivered by Legal Eagle courier to:

Clifford F. Gaddy, Jr., Esq.
408 N. Church Street, Ste. B
Greenville, South Carolina 29601

Joseph M. Plaxco, Esq.
707 E. North Street
Greenville, South Carolina 29601

R. Frank Plaxco, Esq.
925 Cleveland Street - Unit 59
Greenville, South Carolina 29601

I certify that 14 bound copies and 1 unbound original of the Brief of Appellants and the Reply Brief of Appellants 1 was served by US Mail, postage pre-paid to the Clerk of the South Carolina Court of Appeals on January 19, 2017.

Mailed to the following physical address:

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Clerk of Court
1220 Senate Street
Columbia, SC 29201

Hand delivered and mailed by:



James Pfeiffer, Courier
Legal Eagle
PO Box 5682
Greenville, Sc 29606

2/28/17
Date