

APPELLATE CASE NO. 2016-001159

**IN THE
FIRST DISTRICT COURT OF APPEALS
FOR THE CIRCUIT**

WENDELL COOPER

Appellant

v.

TOM BERRY AND KWIK KERB, DEFENDANTS

Of whom Tom Berry is the Respondent

**ON APPEAL FROM THE GREENVILLE COUNTY
COURT OF COMMON PLEAS**

BRIEF OF RESPONDENT

January 11, 2018

Brandon Bell
SC Bar #101115
710 Hunts Bridge Rd, #8
Greenville, SC 29617

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ATTACHMENTS:

Respondent’s Proposed Record of Appeal

Affidavit of Attorney’s Fees

Certificate of Service

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN ALLOWING AN UNLICENSED ATTORNEY TO REPRESENT KWIK KERB IN THE PROCEEDINGS?
2. DID THE TRIAL COURT ERR BY NOT DISMISSING TOM BERRY'S TESTIMONY FROM THE RECORD?
3. DID THE TRIAL COURT ERR IN ENTERING A JUDGMENT AGAINST THE PLAINTIFF WHEN DEFENDANT FAILED TO APPEAR IN COURT?
4. IS RESPONDENT ENTITLED TO AN ORDER GRANTING REIMBURSEMENT OF HIS ATTORNEY'S FEES AND COSTS?

STATEMENT OF THE CASE

Parties entered into a contract for services on May 16, 2013. The work was performed on June 25, 2013. An extended 15-year warranty was offered when the work was performed, which Plaintiff declined. Plaintiff later complained of some discoloration of the curb, which was addressed when Defendant returned in compliance with the 90-day warranty included in the purchase price.

Approximately ten (10) months after the execution of the contract. Plaintiff attempted to submit to Defendant a check for One Hundred and Eighty Five Dollars and Zero Cents (\$185) to acquire the 15-year limited warranty that was previously offered. Defendant did not accept the check. However, Plaintiff alleges that Defendant was legally obligated to perform more work in compliance with this warranty despite the fact that he failed to avail himself of it.

Plaintiff filed a lawsuit against Defendant in the Magistrates Court for Greenville County on June 22, 2015. The Plaintiff alleged that Defendant had breached an express or implied warranty by failing to repair discoloration on the curb installed. In support of his contention, Plaintiff submitted to the Court an original copy of the offer for this warranty that appeared to have been altered and retroactively dated to the time of the original contract. The magistrate came to this conclusion because Defendant proffered the yellow carbonless copy of the same warranty offer, which demonstrated that Plaintiff's signature was not present.

The Magistrates Court dismissed Plaintiff's Complaint on January 25, 2016. Plaintiff appealed that decision and proceeded to the Court of Common Pleas for Greenville County. The Court of Common Pleas dismissed Plaintiff's appeal on April 27, 2016. Plaintiff now appeals that decision.

SUMMARY OF ARGUMENT

Respondent alleges that Appellant declined the warranty offered and attempted to accept the offer approximately ten (10) months later by proffering a check (which was declined by Respondent) and even going so far as to alter the warranty offer by applying his signature and retroactively dating the same. Respondent alleges that neither the trial court nor the Court of Common Pleas committed an error in dismissing the Plaintiff's Complaint.

Respondent also alleges that Appellant attempted to fraudulently obtain damages from him through abuse of the legal system. This allegation stems from the fact that Appellant submitted evidence that appeared to have been altered in an attempt to acquire a judgment. When that failed, Appellant proceeded to launch a campaign of harassment through the filing of these frivolous appeals.

RESPONSES TO ARGUMENTS SUBMITTED BY APPELLANT

1. **"KWIK KERB BREACHED THEIR WARRANTY WHEN IT FAILED TO CURE THE PROBLEM" – APPELLANT, PAGE 3 OF BRIEF**

Respondent stands by its original argument that it was under no obligation to repair any perceived deficiencies because Appellant had declined to accept the extended 15-year warranty at the time of contracting. Respondent alleges that he performed additional work on the job in compliance with the 90-day warranty that accompanies the contract and that is all he is required to do without further compensation.

2. **"KWIK KERB GAVE FALSE TESTIMONY TO THE COURT AND TESTIMONY SHOULD BE STRICKEN FROM THE RECORD" – APPELLANT, PAGE 4 OF BRIEF**

Respondent alleges that he did not give false testimony and that Appellant attempted to commit fraud against him by retroactively adding his signature to the original offer for the extended warranty.

The magistrate simply determined that Appellant's testimony concerning the warranty was not credible and that it appeared that Appellant had added his signature to the warranty offer at a later date (Paragraph 5, Lines 9 and 10; Order of Judgment, Judge Simms). Appellant contends that he had the "authentic" copy in his possession and he did indeed have the original copy on which the carbonless copies were based. However, the Magistrate believed that the yellow carbonless copy was the more reliable evidence.

It is also worth noting that if Appellant had accepted the warranty offer at the time it was offered (June 25, 2013), then there was no reason for him to send an

additional check for One Hundred and Eighty-Five Dollars and Zero Cents (\$185, the cost of acquiring the extended warranty) approximately ten (10) months later. No doubt this played a role in the trial court's evaluation of his credibility.

3. "KIM BERRY LISTED BY THE COURT AS PRO SE DEFENDANT WAS NOT THE ATTORNEY OF RECORD AND WAS PRACTICING LAW WITHOUT A LICENSE BECAUSE HER NAME WAS NOT IN THE COMPLAINT AND A PRO SE ATTORNEY CANNOT REPRESENT A CORPORATION IN A COURT OF RECORD" – APPELLANT, PAGE 4 OF BRIEF

Respondent alleges that Kim Berry had his full authority to represent Kwik Kerb at the hearing and was not committing unauthorized practice of law because Kwik Kerb is not a corporation. To clarify, Appellant is referring to the immediately preceding appearance in the Court of Common Pleas. Mr. and Mrs. Berry both were present at the trial court appearance.

Kwik Kerb is not registered with the SC Secretary of State in any particular specified business structure and is operated more akin to a partnership than anything else. The business proceeds are disclosed to the IRS in the Berrys' joint tax return and Kim Berry has always taken part in business affairs and decision-making. Therefore, Kim Berry had the authority to appear on Tom's behalf and was not committing unauthorized practice of law to do so.

In addition, it should be known that Mrs. Berry's appearance did not involve any kind of legal expertise that would place the Appellant at a disadvantage...the hearing Judge simply asked a series of questions regarding the facts of the case and made a decision. Kim Berry spoke only on two (2) occasions and only a couple of sentences each time. The vast majority of the proceeding was devoted to Appellant's arguments. This can be verified through the attached Transcript.

Respondent also alleges that if the Court erred in allowing Kim Berry to appear on Tom Berry's behalf (at the Court of Common Pleas), it constituted a harmless error that did not affect the outcome of the proceedings and the disposition should be upheld.

ARGUMENTS SUBMITTED BY RESPONDENT

1. RESPONDENT HAS BEEN THE VICTIM OF ATTEMPTED FRAUD AND A SERIES OF FRIVOLOUS LEGAL PROCEEDINGS AND, THEREFORE, IS ENTITLED TO AN ORDER GRANTING ATTORNEY'S FEES AND COSTS ASSOCIATED WITH THESE PROCEEDINGS

Appellant attempted to fraudulently acquire damages from him by submitting spoliated evidence to acquire a favorable judgment. Although Respondent found

this conduct reprehensible and was offended by it, he decided to leave the matter be as opposed to seek legal action against Appellant. Appellant has since proceeded to drag Respondent through the Appeals process for approximately two (2) years. This has caused Respondent a great deal of undue stress and expense. Respondent alleges that he is entitled to an Order granting him reimbursement for his actual costs.

CONCLUSION / RELIEF REQUESTED

Respondent maintains that he did not violate any law or breach any contract in connection with this case. He asks that this Court dismiss the Appellant's appeal with costs awarded to Respondent. An affidavit of attorney's fees is attached to confirm these expenses.

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Leitita H. Verdin, Circuit Court Judge

Case # 2016-001159

Wendell Cooper, Appellant

v.

Tom Berry and Kwik Kerb, Defendants
Of whom Tom Berry is Respondent

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CERTIFICATE OF SERVICE

I certify that I have served Respondent's Appeal (pgs. 1-7) and attachments (Respondent's proposed record on Appeal, affidavit of attorney's fees, and certification of service) in the above-styled case by depositing of copy in the United States Mail, postage paid on January 12, 2018 addressed to the Appellant at 117 Palm Springs Way, Simpsonville, SC 29681.

January 12, 2018


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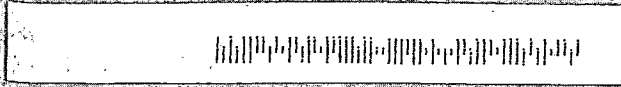


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