

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

SC Court of Appeals

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 FINAL REPLY BRIEF OF THE RESPONDENT-APPELLANT

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STATEMENT OF ISSUES

- I. Is a business committing an unfair trade practice liable for reasonable attorney fees under the Unfair Trade Practices Act, S.C. Code Ann. § 39-5-140 (1962) 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?

ARGUMENT

I. **Is a business committing an unfair trade practice liable for reasonable attorney fees under the Unfair Trade Practices Act, S.C. Code Ann. § 39-5-140 (1962) when such fees were sought in the complaint?**

The Appellants-Respondents (“the Kelleys”) now acknowledge that the complaint sought attorney fees, but argue the trial judge properly denied them because Ms. Turner did not request them during the trial. The Kelleys’ argument is unsound for two reasons.

First, at the close of the testimony, the trial judge (and the lawyers) were tired after a long day; and the judge was not interested in closing argument or further proceedings. In fact, when Ms. Turner’s lawyer rose to present argument, Judge Verdin stopped him and advised she would issue an order shortly. (R. p. 239.) We say this not in criticism of the judge, but simply to point out that she did not choose to consider closing argument or further proceedings; and in fact they probably were not necessary. *State v. Ballenger*, 202 S.C. 155, 24 S.E.2d 175, 177 (S.C. 1943) is relevant. Our Supreme Court held that the defendant did not waive error in limiting the time for closing argument by not protesting, saying,

[T]here was no protest from the appellant’s attorneys. However, this was a positive ruling and, we mean *positive*, coming from [the trial judge]. Apropos to the rulings of this outstanding jurist, the writer is reminded of the age old story of the old gentleman who had several cat holes cut in the door to his home, and upon inquiry as to why he had so many holes, replied that when he said “scat,” he meant “scat.”

Second, the time is not ripe for consideration of an award and amount of attorney fees immediately on the conclusion of testimony. At that point the testimony is closed, but the case is not over. More time and work will most likely be required, which cannot be known and

quantified at that time. To require evidence supporting the amount of attorney fees at conclusion of the testimony would be to require evidence of the present existence of future events – an impossible task. In every case involving the issue in which we have participated, the issue and amount of attorney fees has been addressed after completion of the trial and disposition of any post-trial matters.

While the Rules of Civil Procedure do not specifically prescribe the procedure for attorney fee awards, it is relevant that the prevailing party has ten days after the entry of judgment to move for costs. Rule 56(d), SCRCP.

Ms. Turner’s lawyers have not done anything to waive her right to attorney fees mandated by the Unfair Trade Practices Act, S.C. Code Ann. § 39-5-140 (1962). This issue should be remanded for the lower court to determine reasonable fees after receiving information of the total time and effort expended by her lawyers and other relevant factors.

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

The lower court’s order makes it clear that punitive damages were not awarded because of the treble damage for violation of the Unfair Trade Practices Act. The Kelletts acknowledge the lower court’s finding that Ms. Turner “was entitled to recover based upon conversion, fraud and misrepresentation” (Appellants-Respondents’ Reply Brief, p. 6), and that punitive damages were not addressed only because, “the Court decline[d] to make a cumulative award.” (R. p. 31.) It is plain that the court would have awarded punitive damages but for the Unfair Trade Practices Act treble damage award. Our point is simply that if, for whatever reason, the treble damage

award should be reversed, then punitive damages should be awarded, either by this Court or on remand by the lower court.

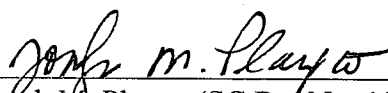
III. Is the Respondent-Appellant entitled to costs?

The Kelletts have not addressed this question, and we take it they agree that the Respondent-Appellant is entitled to costs.

CONCLUSION

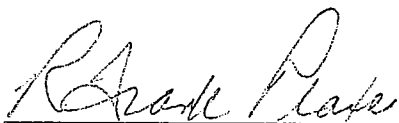
We respectfully submit the lower court's order should be modified (1) to allow attorney fees in an amount to be determined; (2) to allow costs provided by law; and (3) to award punitive damages in an appropriate amount alternative to the award of treble damages.

Respectfully submitted:



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February 15, 2017

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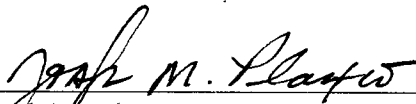
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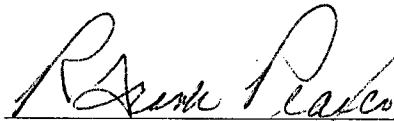
SC Court of Appeals

CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

We hereby certify that the Final Reply Brief of the Respondent-Appellant is in compliance with Rule 211(b), SCACR.



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