THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas
Thomas A. Russo, Circuit Court Judge

RECEIVED
MAY 07 2018
SC Court of Appeals

Case No. 2014-CP-21-00916

Beneficial Financial I Inc., successor by merger to Beneficial Mortgage Co. of South Carolina, Appellant,

v.

Jon Windham, a/k/a Jon D. Windham; Frances Windham, a/k/a Frances C. Windham; and Jerry Coker, a/k/a Jerry L. Coker; Carolina Bank a/k/a Carolina Bank & Trust Co., The United States of America, by and through its agency, the Internal Revenue Service; and The Citizens Bank, Defendants,

Of Whom Jon Windham is the ..... Respondent

Appellate Case No. 2017-001954

RESPONDENT'S FINAL BRIEF

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STATEMENT OF THE CASE

On April 11, 2014, Beneficial Financial I, Inc. (hereinafter referred to as "BFI") filed an action seeking to foreclose on Jon Windham's (hereinafter referred to as "Windham") property. (R. pp. 6-21). In response to the Complaint, Windham filed an Answer and Counterclaims against BFI on May 12, 2014. (R. pp. 22-39). Specifically, Windham denied that BFI was entitled to any recovery and asserted counterclaims against BFI for (1) violations of South Carolina's Unfair Trade Practices Act ("SCUTPA"), (2) Intentional Infliction of Emotional Distress, (3) Negligent Training and Supervision, (4) Reckless and Wanton Training and Supervision, (5) Breach of the Implied Covenant of Good Faith and Fair Dealing, (6) Fraud, and (7) Negligent Misrepresentation. (R. pp. 22-39). On July 18, 2014, BFI filed a reply to same wherein BFI admitted that it force-placed insurance on Windham's home and admitted that it was aware of some of the facts set forth in Windham's counterclaims. (R. p. 43, lines 12-14 (¶40), p. 45, lines 13-15 (¶ 63), and lines 21-23 (¶69)). Contrary to BFI's representation in its Statement of the Case that Windham failed to make any payments since June 29, 2012, BFI admitted in its Reply that Windham made payments in October, 2012, November, 2012, December, 2012, and between January and July, 2013. (R. p. 43, line 20 - p. 44, line 11 (¶¶ 42-45)).

On October 13, 2014, Windham filed a Motion to Compel against BFI asking the Court to Order BFI to respond to Windham's Interrogatories and Requests for Production requests that were three months past due. (R. p. 65, lines 29-32 (¶2) (MTC filed May 10, 2017)). On February 5, 2015, the day before the hearing on Windham's Motion to Compel, BFI responded to Windham's discovery requests and provided Answers to Interrogatories

and documents. (R. p. 65, line 33 - p. 66, line 8 (¶3). Unfortunately, the Interrogatories were not verified and the documents were redacted. (R. p. 66, lines 1-3). Thereafter, BFI agreed to provide unredacted documents and amended answers to Interrogatories 1 and 2 on or before July 6, 2015. (R. p. 66, lines 6-8). On April 13, 2016, at the hearing on Co-Defendant Coker's Motion for Summary Judgment, Windham specifically began requesting deposition dates for BFI's Rule 30(b)(6) witness. (R. p. 62, lines 32-33 (¶1) (MTContinue); p. 66, lines 15-18 (¶5)). When BFI failed to provide any such dates, Windham sent an email to BFI's counsel on June 17, 2016, again requesting dates for BFI's deposition. (R. p. 62, lines 33-34 (¶1)). On September 20, 2016, Coker's counsel sent an email offering 15 different dates in October and November from which BFI could choose for its deposition. (R. 62, lines 38-40 (¶2)). In response, BFI's counsel stated that she was not available anytime before October 17, and that she was also not available on October 27 or November 7. (R. p. 62, line 40 - p. 63, line 1 (¶2)). Thereafter, Windham noticed BFI's deposition for November 15, 2016. (R. p. 63, lines 3-5 (¶3)). On November 13, 2016, two days before the noticed deposition, BFI's counsel stated she was ill and needed to continue the deposition. (R. p. 67, lines 1-2 (¶6)). As a condition for continuing the properly noticed deposition, BFI agreed to provide a new date for deposition prior to December 16, 2016. (R. p. 67, lines 2-4 (¶6)). From November, 2016, until February 22, 2017, Windham made multiple attempts to get new dates for BFI's deposition and to set mediation. (R. p. 67, lines 15-17 (¶9)). BFI never responded. (R. p. 67, line 18 (¶9)). On February 22, 2017, Windham re-noticed the deposition of BFI for April 20, 2017, and emailed same to BFI's counsel. (R. p. 67, lines 19-20 (¶10)). On April 10, 2017, Windham emailed BFI's counsel to confirm BFI was going

to appear at the deposition. (R. p. 67, lines 21-22 (¶11)). One week before the scheduled deposition, BFI indicated that April 20th would not work for its deposition and BFI did not appear for the deposition. (R. p. 67, line 22 - p. 68, line 2 (¶11)). On May 10, 2017, Windham filed a Second Motion to Compel requesting the Court to order BFI to provide dates on which Windham could conduct BFI's deposition within 45 days and also to provide dates on which BFI was available to mediate within 90 days. (R. pp. 65-69). This motion was set for hearing on June 9, 2017. (R. pp. 70-71 (Consent Order)).

On June 9, 2017, the Court signed and entered the parties' executed Consent Order on Windham's Motion to Compel. (R. pp. 70-71). Pursuant to the Consent Order, which was specifically agreed to and signed by BFI's counsel, BFI was ordered to produce its Rule 30(b)(6) witness for deposition on July 10, 2017, at the office of Windham's counsel. (R. p. 70, lines 29-30 (¶1)). The Consent Order specifically stated "[f]ailure to appear at this deposition will result in [BFI] being prohibited from offering any testimony in support of [BFI]'s foreclosure action and also prohibit [BFI] from offering any testimony in defense of Windham's counterclaims." (R. p. 70, lines 30-33 (¶1)). In contravention of the Court's Order, BFI did not appear at the deposition on July 10, 2017. (R. p. 53, line 25 - p. 54, line 1). Thereafter, on July 26, 2017, Windham filed a Motion for Summary Judgment. (R. pp. 72-73). On August 18, 2017, Windham filed a Memorandum in Support of his Motion for Summary Judgment, and an Affidavit of Windham, specifically seeking summary judgment on his claims that BFI violated the SCUTPA, committed fraud, made negligent misrepresentations, intentionally inflicted emotional distress upon Windham, and negligently, recklessly and wantonly failed to train and supervise its employees in order to

prevent said conduct. (R. pp. 74-94). BFI filed nothing in opposition to Windham's Memorandum in Support of Motion for Summary Judgment. On August 31, 2017, the Court conducted a hearing on Windham's Motion. (R. pp. 51-60). Following the hearing, the Court granted Windham's motion and entered summary judgment against BFI. (R. pp. 4-5).

ARGUMENT

Windham respectfully requests this Court to affirm the summary judgment entered in his favor by the trial court on the grounds that BFI failed to properly preserve any issues for appeal, Windham properly established that there was no genuine issue of material fact to be determined by the jury, and Windham was entitled to judgment as a matter of law.

1. Statement of Facts

Throughout the entire course of this action, BFI has failed to comply with the South Carolina Rules of Civil Procedure ("SCRCP") and with Orders entered by the trial court. Now, BFI seeks mercy from the Court of Appeals and a reversal of the summary judgment properly entered against BFI. For over one and one-half years, Windham sought to depose BFI's Rule 30(b)(6) witness. The deposition was noticed multiple times, and each time, BFI failed to appear. Not once did BFI file a Motion for Protective Order seeking protection from appearing. Rather, BFI simply notified Windham's counsel right before the noticed deposition that it would not be appearing. When Windham filed his Motion to Compel BFI to attend a deposition and provide dates for mediation, BFI did not file a response with the trial court. Instead, BFI's counsel agreed to the entry of a Consent Order wherein BFI was required to produce a witness on July 10, 2017, for deposition. (R. pp. 70-71). While BFI has represented in its Statement of the Case that "due to decreased staffing due to a wind down of its business, the Lender experienced difficulty scheduling a corporate representative to travel to South Carolina for a Rule 30(b)(6) deposition," there was no exception or excuse for BFI's failure to attend the properly noticed deposition. (Appellant's Brief, p. 3). Additionally, BFI did not even raise this allegation to the trial court. (R. pp. 54, 58).

Windham has repeatedly been denied his right to depose BFI's Rule 30(b)(6) witness. By denying Windham's right to depose their witness, BFI deprived Windham the right to question the witness regarding BFI's documents, policies and procedures, and the ability to discover other evidence for use at trial. In recogition of the seriousness of BFI's refusal to produce a corporate witness for deposition, the trial court entered the Consent Order signed by counsel specifically providing for sanctions against BFI should they fail to attend the deposition on July 10, 2017. (R. pp. 70-71).

At the hearing on Windham's motion for summary judgment and in its Statement of the Case, BFI alleged that the parties had "agreed to take the deposition off because the settlement was so imminent." (R. pp. 54, 58; Appellant's Brief, p. 3). There was no such agreement. (R. p. 58). Rather, BFI did what it had done prior to every other noticed deposition - it elected not to come. Not one time, even in the face of the Consent Order requiring its attendance, did BFI file a Motion for Protective Order seeking the Court's permission to not appear at the deposition. At the summary judgment hearing, the trial court was not fooled by BFI's claims that settlement was imminent as their counsel went on to admit that seven weeks went by without any communication after BFI failed to appear at the noticed deposition, that settlement was not consummated, and that, in fact, she still didn't even have authority to settle the claim as she had a "final call to get authority to get settlement terms" scheduled for the Wednesday following the hearing on Windham's motion for summary judgment. (R. p. 54, lines 9-25).

In response to Windham's motion for summary judgment, BFI filed nothing. BFI did not object to Windham's affidavit and failed to file any memorandum of law in opposition

to the law submitted by Windham in support of his motion. Even at the hearing, the only claim BFI addressed was the Unfair Trade Practices Act (UTPA) claim, such argument not even addressing Windham's specific claim that BFI's wrongful force-placement of insurance on his home constituted the UTPA. (R. p. 55, lines 3-25). Based on the affidavit of Windham, the memorandum filed by Windham in support of his motion for summary judgment, and the arguments of counsel at the hearing, the trial court properly entered Judgment in favor of Windham. (R. pp. 4-5 (Order granting Summary Judgment)).

II. Standard of Review

"'In reviewing an order for summary judgment, the appellate court applies the same standard which governs the trial court under Rule 56 of the South Carolina Rules of Civil Procedure.' *M & M Grp., Inc., v. holmes,* 379 S.C. 468, 473, 666 S.E.2d 262, 264 (Ct. App. 2008). 'Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' *Id.* (quoting Rule 56(c), SCRCP). 'On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the appellant, the non-moving party below.' *Id.* (quoting *Willis v. Wu*, 362 S.C. 146, 151, 607 S.E.2d 63, 65(2004)). *Gecy v. S.C. Bank & Trust, et al.*, No. 2014-002712 (Ct. App. Feb. 21, 2018).

III. BFI failed to properly preserve any issue for review on appeal and thus the trial court's entry of summary judgment is due to be affirmed

It is well settled law in South Carolina that an issue cannot be raised for the first time on appeal. *Pye v. Estate of Fox*, 369 S.C. 555, 566, 633 S.E.2d 505, 510 (2006). Rather, the specific issue being appealed must have been raised to and ruled upon by the trial court in order to be preserved. *Id. See also Llapp v. S.C. Dep't of Motor Vehicles*, 387 S.C. 500, 507, 692 S.E.2d 565, 569 (Ct. App. 2010) ("To be preserved for appellate review, an issue must have been: (1) raised to and ruled upon by the [circuit] court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the [circuit] court with sufficient specificity."). In *Foster v. Foster*, the Court of Appeals specifically ruled that where the appellants only argued one issue at the summary judgment hearing and then sought to raise an additional argument on appeal, that the appellant had failed to preserve the issue for review. 384 S.C. 380, 385, 682 S.E.2d 312, 315 (Ct. App. 2009). Because the appellants failed to raise their argument to the trial court, the issue was not preserved for review. *Foster*, 384 S.C. at 386, 682 S.E.2d at 315. *S.C. Dept. of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (holding that in order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge).

In this matter, the one and only argument raised by BFI at the hearing on Windham's summary judgment motion dealt with Windham's UTPA claim. (R. pp. 55-56). Specifically, BFI alleged that "the loan payments were applied per the loan contract" and that "there was a promise to modify the loan that was not kept." (R. p. 55, lines 4-8). BFI

referred the trial court to a bankruptcy case regarding the misapplication of loan payments and to an unpublished case for the premise that failure to modify a loan is not an unfair trade practice. Thereafter, the trial court specifically stated to BFI, "I think you kind of completely ignored their argument just now, did you not?" (R. p. 56, lines 8-9). Even with that prompting by the trial court, BFI never responded to Windham's argument to the trial court that BFI's repeated force-placement of insurance, when BFI knew Windham had insurance, was in fact an unfair trade practice. BFI did not submit any memorandum in opposition to the memorandum filed by Windham addressing each of the six claims submitted for summary judgment. The only argument made by BFI at the summary judgment hearing failed to even address Windham's argument that BFI's force-placement of insurance on Windham's home, when BFI had knowledge that his home was insured, constituted an unfair trade practice. Therefore, pursuant to the law set forth above, it is clear that BFI failed to preserve any of the arguments raised by their appellate brief. Accordingly, the trial court's entry of summary judgment is due to be affirmed.

IV. The trial court properly entered summary judgment in favor of Windham as there were no genuine issues of material fact

"A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *Gecy v. S.C. Bank & Trust, et al.*, No. 2014-002712, p.4 (Ct. App. Feb. 21, 2018) (internal citations omitted). Once the moving party has carried its initial burden in demonstrating the absence of a genuine issue of material fact, the

opposing party may not rest on the denials of their pleading, but rather, must set forth specific facts showing that there is a genuine issue for trial. *Midland Mut. Life Ins. Co. v. Harrell*, 331 S.C. 394, 397, 503 S.E.2d 189, 190 (Ct. App. 1998). "The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (citations omitted).

BFI argues that Windham was granted summary judgment by default. That is clearly not accurate. As set forth above, a trial court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. Here, the record is clear that Windham's motion was in fact and law properly supported. BFI chose not to file any opposition to the law submitted by Windham. BFI's failure to comply with the rules of civil procedure and produce a witness for deposition, its consent to the order providing sanctions should BFI fail to produce a witness for the final noticed deposition, and BFI's intentional disregard of that consent order makes clear there was no issue of material fact before the trial court. Therefore, the only remaining question is whether Windham was entitled to judgment as a matter of law. As set forth herein, Windham was entitled to judgment as a matter of law and the trial court's order granting summary judgment is due to be affirmed.

V. The trial court properly entered summary judgment in favor of Windham as Windham was entitled to judgment as a matter of law

1. BFI's placement of force-placed insurance on Windham's property, when BFI knew the property was insured, and BFI's failure to modify Windham's mortgage were unfair trade practices in violation of UPTA

"To recover in an action under the UTPA, [Windham] must show: (1) [BFI] engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) [Windham] suffered monetary or property loss as a result of the [BFI]'s unfair or deceptive acts(s)." *Soberanis v. City Title Loan, LLC*, 2:16-4034-RMG, 2017 U.S. Dist. LEXIS 50114, *20 (D.S.C. April 3, 2017) (quoting *Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486, 498 (S.C. Ct. App. 2006)). An impact on the public interest may be shown if the acts or practices have the potential for repetition. *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 595 S.E.2d 461, 466 (S.C. 2004) (citing *Crary v. Djebelli*, 329 S.C. 385, 496 S.E.2d 21, 23 (S.C. 1998)). The potential for repetition may be shown by (1) showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) showing the company's procedures created a potential for repetition of the unfair and deceptive acts." *Soberanis*, 2017 U.S. Dist. LEXIS 50114 at *21, (quoting *Wright*, 640 S.E.2d at 501-02). "These two ways are not the only means for showing the potential for repetition or public impact, and each case must be evaluated on its own merits to determine what a plaintiff must show to satisfy the potential for repetition/public impact prong of the UTPA." *Wright v. Craft*, 372 S.C. 1,31; 460 S.E.2d 486, 501 (Ct. App. 2006) (*citing Daisy Outdoor Adver. Co. v. Abbott*, 322 S.C. 489, 497; 473 S.E.2d 47, 51 (1996)). Ultimately, the public impact/public interest prong of the UTPA

must be determined on a case by case basis. *Sinclair & Assoc. of Greenville, LLC v. CresCom Bank*, 2:16-cv-00465-DCN, 2016 U.S. Dist. LEXIS 159340, *6 (D.S.C. November 17, 2016).

a. BFI Engaged in Unfair or Deceptive Practices

On appeal, BFI argues that "to the extent Borrower's UTPA claim is based upon the Lender's alleged failure to modify the Borrower's claim, it fails." (Appellant's Brief, p. 8). However, Windham's UTPA claim is not based upon BFI's generic failure to modify a loan, but rather, on BFI's wrongful force-placement of insurance on Windham's property when BFI had knowledge that the property was already properly insured by Windham, by taking Windham's monthly payments and wrongfully applying the payments to interest and fees, by unilaterally refusing to accept any further payments from Windham, and by refusing to offer a loan modification after telling Windham to pay $12,000 in trial plan payments for a loan modification. (R. p. 31, lines 7-14). The actions of BFI were unequivocally unfair and deceptive. BFI fraudulently and intentionally told Windham to make bi-monthly payments of $1,000.00 and that, after so doing, Windham would receive a loan modification. BFI received each payment automatically and without issue. After the final payment was made, Windham did not receive the promised loan modification nor did BFI ever offer to modify the loan. Instead, BFI pocketed Windham's money, never told Windham that it had stopped accepting his payments, and ultimately instituted the foreclosure action instead of providing Windham the promised loan modification.

Additionally, BFI unfairly and wrongfully force-placed insurance on Windham's property. Windham had homeowner's insurance on his property, and that insurance had

never lapsed. BFI's forced placement of homeowner's insurance caused Windham's payments to rise to an unsustainably high level and BFI's failure to reimburse Windham and re-establish Windham's payments at the pre-error level were actions solely designed to maximize profits for BFI at the expense of Windham, a South Carolina resident. Importantly, in BFI's reply to Windham's counterclaims, BFI admitted that it force-placed insurance on Windham's property. In his affidavit, Windham stated that his homeowner's insurance was current and had never lapsed. (R. p. 91, lines 27-28 (¶1)). Windham also stated that he had repeatedly provided proof of his homeowner's insurance to BFI but BFI continued to force-place insurance. (R. p. 91, lines 28-30 (¶1)).

On appeal, BFI argues for the first time that its ability to force-place insurance on a home is governed by the mortgage and therefore, Windham's claim is simply a breach of contract claim rather than an unfair trade practice. (Appellant's Brief, p.8). That is simply incorrect. If Windham did not have insurance on his home, then BFI's right to force-place insurance on the property would be governed by the mortgage. However, in this case, Windham continually had insurance on his property, and BFI's force-placement of insurance, especially in light of BFI's knowledge that the property was properly insured, was an unfair trade practice. Additionally, Windham, both in his counterclaims and in his motion for summary judgment, specifically alleged that BFI's unfair trade practices affect the public interest and have the potential for repetition. (R. p. 31, lines 19-20; p. 80, lines 1-8).

b. The Actions of BFI affect the Public Interest and have the potential for repetition

The actions of BFI were in line with its policies and procedures and there is a clear

potential for repetition, particularly in light of BFI's actions of repeatedly force-placing insurance on Windham's home. BFI serviced numerous loans in South Carolina, as well as across the country. BFI has not asserted that its actions in this matter were, in any way, contrary to its policies and procedures. The actions of BFI as related to Windham were done under the authority of the same policies, procedures, and leadership that are in effect relating to every other loan managed, serviced, and/or written by BFI. While BFI's intentional refusal to appear for the deposition precluded Windham from taking testimony from BFI on it's conduct, policies and procedures, Windham did offer evidence with his motion for summary judgment showing that other BFI consumers were suffering the same issues as Windham. (R. p. 80, lines 3-8). Again, it is important that BFI did not object to that evidence or file anything in opposition to that evidence. Therefore, there was undisputed evidence before the Court that BFI's actions affect the public interest and have the potential for repetition. Accordingly, the trial court's entry of summary judgment on Windham's UTPA claim is due to be affirmed.

BFI did not raise the remaining elements of a claim under the UTPA to this Court and therefore, those issues are waived.

2. Windham properly established he suffered physical and emotional distress damages as a result of BFI's intentional infliction of emotional distress.

BFI did not make any argument via brief or at the summary judgment hearing in opposition to Windham's claim that BFI intentionally inflicted emotional distress on him, and now raises this issue for the first time on appeal. While Windham asserts this issue was not properly preserved for appeal, Windham provides this response.

In response to the trial court's entry of summary judgment on Windham's Intentional Infliction of Emotional Distress (IIED) claim, BFI's only allegation on appeal is that Windham's physical and emotional distress damages are insufficient as a matter of law. (Appellant's Brief, p.9). Therefore, BFI has admitted by its omission that the trial court properly found that (1) BFI intentionally or recklessly inflicted severe emotional distress on Windham; (2) BFI's conduct was so extreme and outrageous as to exceed all possible bounds of decency and be regarded as atrocious, and utterly intolerable in a civilized community, and (3) BFI's actions caused Windham's emotional distress. *Holtzscheiter v. Thomson Newspapers*, 306 S.C. 297, 302, 411 S.E.2d 664, 666 (1991) (internal quotations omitted). In *Ford v. Hutson*, the supreme court held that objective symptomatology is not an absolute prerequisite for recovery of damages for intentional infliction of emotional distress. 276 S.C. 157, 162, 276 S.E.2d 776, 778 (1981). Rather, a party can recover damages for emotional distress in the absence of physical impact or physical injury. *Id.*

Here, Windham testified in his affidavit that he has spent that last three years suffering with constant fear that he was going to lose his home as a result of BFI's unilateral and wrongful actions. (R. p. 93, lines 6-17). Windham testified that he continued making his monthly payments, even after BFI wrongfully force-placed insurance on his home and increased the payment, and that he paid $12,000 in payments in response to BFI's promise that he would receive a loan modification. (R. p. 92). Windham has suffered great personal loss of time and money at the hands of BFI. (R. p. 93, lines 6-17). In addition, Windham testified that for the last several years he has been dealing with anxiety, embarrassment, humiliation, fear, loss of sleep, headaches and pain as a direct result of BFI's conduct. (R.

p. 93, lines 14-17). This testimony was uncontroverted by BFI and BFI offered no objection to said testimony. As Windham's testimony was specific and set out the severity of his emotional distress, his testimony was clearly not "a passing reference to fairly ordinary symptoms." *See Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 360, 650 S.E.2d 68, 72 (2007). Therefore, it is clear that Windham properly established the severe emotional distress necessary to sustain his claim. The trial court's entry of summary judgment on Windham's IIED claim is due to be affirmed.

3. Windham properly established his negligent and reckless training and supervision claims against BFI.

BFI did not make any argument via brief or at the summary judgment hearing in opposition to Windham's claim that BFI negligently and recklessly failed to train and supervise its employees, and now raises this issue for the first time on appeal. While Windham asserts this issue was not properly preserved for appeal, Windham provides this response.

An affirmative legal duty may arise from statute. *Rayfield v. S.C. Dep't of Corr.*, 297 S.C. 95, 100, 374 S.E.2d 910, 913 (Ct. App. 1988). To establish BFI owed Windham a duty of care arising from a statute, such as the UTPA, Windham must simply show (1) that the purpose of the statute is to protect him from the kind of harm he suffered; and (2) that he belongs to the class of people that the statute is intended to protect. *Whitlaw v. Kroger Co.*, 306 S.C. 51, 53, 410 S.E.2d 251, 252 (1991). The UTPA was clearly designed to protect South Carolina consumers from unfair and deceptive practices by companies doing business in South Carolina. Accordingly, BFI owed Windham a legal duty to protect him from its

unfair and deceptive practices. When "an employer knew or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself negligent in hiring, supervising, or training the employee, or that the employer acted negligently in entrusting its employee with a tool that created an unreasonable risk of harm to the public." *James v. Kelly Trucking Co.*, 377 S.C. 628, 631, 661 S.E.2d 329, 330 (2008).

Dating all the way back to BFI's reply to Windham's counterclaims wherein BFI admitted that it had force-placed insurance on Windham's property, BFI has had knowledge that its employees were acting in violation of South Carolina law. BFI specifically admitted in response to these very claims "that it was aware of some of the facts set forth in Windham's counterclaims." (R. p. 45, lines 13-14 and 21-22 (¶¶63, 69)). BFI certainly knew, or should have known, that its failure to properly train and supervise their employees assigned to handle Windham's loan could result in the conduct happened upon Windham, mainly the wrongful, repeated forced-placement of insurance on Windham's home. BFI's ambivalence towards training and supervising its own employees to prevent the actions happened upon Windham evidence not only BFI's negligence, but also its total recklessness in this matter. BFI is aware that the subject of this action is Windham's home. BFI is also aware that it is dealing with individuals throughout South Carolina and their homes. Yet, BFI continued to negligently and recklessly train and supervise its employees to prevent the wrongful force-placement of insurance on consumers' homes. Had BFI properly trained and supervised its employees, the conduct happened upon Windham would not have occurred. Therefore, the trial court's entry of summary judgment on these claims is due to be affirmed.

4. Windham specifically did not seek summary judgment on his claim for breach of the implied covenant of good faith and fair dealing, and summary judgment was not entered on this claim.

Windham did not seek and the trial court did not enter summary judgment on the breach of the implied covenant of good faith and fair dealing claim. Therefore, this issue is moot.

5. Windham properly established that BFI committed fraud.

BFI did not make any argument via brief or at the summary judgment hearing in opposition to Windham's claim that BFI committed fraud, and now raises this issue for the first time on appeal. While Windham asserts this issue was not properly preserved for appeal, Windham provides this response.

"To state a cause of action for fraud, Windham must simply allege (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that it should be acted upon by the person; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) and his consequent and proximate injury." *Chinners v. GE Capital Corp.*, No. 2:10-cv-0126-MBS, 2010 U.S. Dist. LEXIS 62272, at *4-5 (D.S.C. June 22, 2010)(internal quotations omitted).

In his affidavit submitted in support of summary judgment, Windham specifically testified that BFI represented to him that, upon completion of six bi-monthly payments of $1,000.00 each, for a total of $12,000.00, he would be offered a loan modification. (R. p. 92, lines 5-7). BFI's statement was clearly false as Windham completed said payments and was never offered a loan modification. (R. p. 92, lines 11- p. 93, line 5). BFI's representation was material in that Windham would not have provided BFI with $12,000.00

in payments after BFI's force-placement of insurance caused him to become behind if not for BFI's express representation that these bi-monthly payments would lead to a loan modification which would allow Windham to save his home. BFI had complete knowledge of the falsity of its statement and never had any intention of offering Windham a loan modification. It was BFI's intention that Windham rely upon its representation and make $12,000.00 in payments to BFI, which is exactly what happened. Windham was unaware as to the falsity of BFI's statement as is again evidenced by Windham making the requested payments. Windham relied upon the truth of BFI's statement and had a right to rely upon same. The actions of BFI not only caused Windham to lose $12,000.00, but also caused Windham to suffer severe mental and physical pain, suffering, emotional distress, sleeplessness, anxiety, humiliation, worry, and fear, all of which were related to BFI's fraudulent representation as well as the foreclosure action initiated by BFI after taking Windham's $12,000.00 and refusing to provide a loan modification. BFI did not object to Windham's affidavit or make any argument in response. Therefore, the trial court's order granting summary judgment on Windham's fraud claim is due to be affirmed.

6. Windham properly established his negligent misrepresentation claim against BFI.

BFI did not make any argument via brief or at the summary judgment hearing in opposition to Windham's negligent misrepresentation claim, and now raises this issue for the first time on appeal. While Windham asserts this issue was not properly preserved for appeal, Windham provides this response.

"To state a claim for negligent misrepresentation, Windham must show that (1) BFI made a false representation to Windham; (2) BFI had a pecuniary interest in making the statement; (3) BFI owed a duty of care to see that it communicated truthful information to Windham; (4) BFI breached that duty by failing to exercise due care; (5) Windham justifiably relied on the representation; and (6) Windham suffered a pecuniary loss as the proximate result of his reliance on the representation." *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 320 S.C. 143, 154, 463 S.E.2d 618, 624 (Ct. App. 1995). When making determinations as to the presence of a duty, South Carolina courts have relied upon the Restatement (Second) of Torts, which sets forth that one "who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." Restat 2d of Torts, § 552 (2nd 1979); *see ML-Lee Acquisition Fund, L.P.*, 320 S.C. at 158.

In the instant matter, it is clear from Windham's affidavit that BFI made a false representation to Windham when BFI represented to Windham that, if he made six bi-monthly payments totaling $12,000.00, BFI would provide him a loan modification. BFI had a pecuniary interest in making such a statement: the sum total of all payments made by Windham in response to BFI's representation. BFI owed a duty of care to Windham as BFI's false statements were made in the course of its business and made for the guidance of Windham. BFI breached its duty by making the false statement that Windham would receive

a loan modification after making $12,000.00 in payments and then refusing to provide same after Windham faithfully made said payments. Windham's reliance upon BFI's representation was justified as BFI was the holder and/or servicer of his mortgage. Finally, Windham suffered pecuniary loss due to the representation of BFI as set forth herein. Accordingly, as set forth herein, the trial court's entry of summary judgment on Windham's negligent misrepresentation claim is due to be affirmed.

CONCLUSION

In response to Windham's motion for summary judgment, BFI chose not to file any memorandum in opposition to the claims raised by Windham. At the hearing on the motion for summary judgment, BFI only addressed one element of Windham's UTPA claim and failed to make any other arguments to the trial court. Even after the trial court informed BFI that it was ignoring Windham's argument, BFI did not address any of the issues raised by Windham. Accordingly, BFI did not properly preserve any issues for appeal and the trial court's order granting summary judgment is due to be affirmed. Even if this court determines that BFI did properly preserve an issue to be reviewed on appeal, the record clearly evidences that there are no genuine issues of material fact to be determined by the jury and Windham presented uncontroverted evidence that he was entitled to judgment as a matter of law on each of his claims presented for summary judgment. Accordingly, Windham respectfully requests this honorable court to affirm the trial court's order granting summary judgment.

This the 4th day of May, 2018.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas
Thomas A. Russo, Circuit Court Judge

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MAY 07 2018
SC Court of Appeals

Case No. 2014-CP-21-00916

Beneficial Financial I, Inc., successor by merger to
Beneficial Mortgage Co. of South Carolina, ... Appellant

v.

Jon Windham, a/k/a Jon D. Windham; Frances Windham, a/k/a
Frances C. Windham; and Jerry Coker, a/k/a Jerry L. Coker;
Carolina Bank & Trust Co.; The United States of America, by
and through its agency, the Internal Revenue Service; and
The Citizens Bank, ... Defendants

Of Whom Jon Windham is the . . . . . Respondent

Appellate Case No. 2017-001954

CERTIFICATION OF COMPLIANCE WITH RULE 211(b)

I hereby certify that Respondent's Final Brief complies with Rule 211(b), SCACR.

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