STATE OF SOUTH CAROLINA
In The Court Of Appeals

Appeal from Berkeley County
Court of Common Pleas

Hon. Dale E. Van Slambrook., Master In Equity

Case No. 2012-CP-08-2981

Rita Brooks , Respondent,

v.

Velocity Powersports, LLC, American Honda Finance Corporation and American Honda Motor Co. Inc.,

of which Velocity Powersports LLC is the Appellant.

APPELLANT'S FINAL BRIEF

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July 2, 2019

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III. Did the trial court err in determining a statutory defense was available when none was pled?

IV. Did the trial court err in determining that Plaintiff met her burden to establish the recovery of attorney's fees?

II. STATEMENT OF THE CASE

Plaintiff, Rita M. Brooks ("Brooks), took her 2007 Honda, Model ARX12T Jet Ski (hereinafter "Ski")(R. p. 253) to Velocity Powersports LLC (hereinafter "Velocity") for service on April 9, 2012. (R. p. 71, ln 10-12) She had used the Ski the day before and could not run it over 35 miles per hour. (R. p. 70, ln 13-15). She requested that the Ski be evaluated for the issue and told Velocity "to go ahead and do a tune-up as far as oil change, spark plug, whatever for the new season." (R. p. 72, ln. 13-14) She signed a Repair Order with the estimated sum of $200.19 for services to be performed. (R. p. 75, ln 8 -13; R. p. 121, ln10-17; R. p. 152, ln 12-25; R. p. 120, ln 10-23). On the lower part of the page where Brooks' signature appears is the following:

A FEE OF $ 25.00 PER DAY WILL BE CHARGED IF WATERCRAFT IS NOT PICKED UP WITHIN 5 DAYS OF COMPLETION

ANY VEHICLE DEEMED TO DIRTY WILL BE CHARGED A FEE OF $35

ALL S.B.T ENGINES HAVE WARRANTY FROM S.B.T ONLY NO WARRANTY FROM VELOCITY POWERSPORTS IS IMPLIED OR EXPRESSED. S.B.T ENGINE WARRANTY DOES NOT COVER LABOR TO INSTALL OR REMOVE ENGINE, PARTS OR FLUIDS . S.B.T WARRANTY COVERS THE ENGINE ONLY NOT LABOR.

ANY AFTERMARKET PERFORMANCE WORK PARTS AND ACCESSORIES CAN VOID THE ORIGNAL MANUFACTURE WARRANTY.

I UNDERSTAND THAT IF THE MANUFACTURE WARRANTY DOES NOT COVER MY REPAIR I AM RESPONSIBLE FOR THE FULL AMOUNT DUE AT THE RATE OF $94.00 PER HR.

X Rita Brooks SIGN HERE

(R. p. 265)

Velocity started the diagnostic process by performing the service such as changing the spark plugs. (R. p. 202, ln 3-9; R. p. 204, ln 10-13) Brooks called to check on the status of the Ski on April 26, 2012 and was told by Velocity it was troubleshooting to try and diagnose the issue. (R. p. 77, ln 5 -15) On May 7, 2012 Brooks accompanied by Jerry Call appeared at Velocity to check on the Ski. (R. p. 78, ln 15-20). She was told by the service manager (R. p. 81, ln 6-18) they were still attempting to "find out what was going on with it" (R. p. 82, ln 1-2) and that they had to look into the situation further. (R. p. 122, ln 17-22)

Velocity communicated to Brooks that a comprehensive teardown was required and that potentially the issue with the Ski may not be covered by the manufacturer's warranty, and if not, she would be responsible for all costs associate with any repair. (R. p. 178, ln 10 -25; R. p. 203, ln 17-25; R. p. 204, ln 16 - p. 204, ln 2). Brooks did not authorize the comprehensive teardown. (R. p. 182, ln 9-19; R. p. 199, ln 7-16; R. p. 205, ln 3-21; R. p. 217, ln 11-15; R. p. 218, ln 21 - p. 219, ln 6)

Brooks returned again on May 21, 2012 with Mr. Call (R. p. 83, ln 10 - 20) and was told the service manager would call her the next day. (R. p. 84, ln 1-2). On May 22, 2012, Mr. King, the service manager called Brooks and spoke with her. (R. p. 86, ln 6-13). He advised her she needed to pay for the work performed and pick-up the Ski. (R. p. 86, ln 14-25; R. p. 179, ln 3-11; R. p. 200, ln 14-20: R. p. 202, ln 18-25) Brooks at that time refused to pay the invoice for services rendered and refused to pick-up the Ski. (R. p. 125, ln 16-21; R. p. 179 ln1-6; R. p. 200, ln 21-22) She threatened to involve an attorney. (R. p.

86, ln 24-25; R. p. 178, ln 18-21) Velocity advised her it had made the business decision not to do any further work since she would not authorize the comprehensive teardown and agree to be responsible for the work if ultimately not covered by the warranty. (R. p. 86, ln 21-22; R. p. 178, ln 21- p. 179, ln 25).

Velocity "summarized" the Ski. (R. p. 197, ln 8 -24) Velocity performed the following work: cleared the fault codes, change the oil and filter, changed the spark plugs, tested compression, check fuel pressure, checked the turbo, and removed the intake boom. (R. p. 146, ln 6-13)

After speaking with Brooks, Mr. King sent to Brooks a letter via certified mail which she admitted receiving. (R. p. 87, ln 11-19) The letter was postmarked May 24, 2012. (R. p. 255) The letter states: As of the date of this letter you still have not picked up your 2007 Honda ARX 12R3. Enclosed is a copy of your repair order showing a balanced owed of $219.92. We will be charging a storage fee of $25 per day starting on May 28, 2012." (R. p. 257) Pages 3 and 4 of the repair order attached show:

Parts

Part Number	Quantity	Description	Each Price	Extension
2-IMR9D-9H	4	NGK SPARK PLUG #6544/04	$17.95	$71.80
BULK OIL	4	10W40 BULK OIL	$5.95	$23.80
MISC	4	OET	$0.02	$0.08
293600016	1	LUBE-BOMBAR	$10.95	$10.95
140303	1	HIFLO HF303 FILTER	$9.95	$9.95
			Parts Subtotal	**$116.58**

Labor

Description	Job Code	Technician	Quantity	Line Total
OIL CHANGE / SPARK PLUGS		P.J WILSON	1 Hours	$94.00
			Labor Subtotal	**$94.00**

Recommendations	Resolution
DIAGNOSE WATER INJESTION INTO THE ENGINE OIL.	CHANGED THE OIL AND FILTER / INSTALLED NEW SPARK PLUGS TEST RAN THE SKI = WATER HAS REENTEDED THE OIL

Job Subtotal	**$210.58**

Customer Job Totals	
Parts	$116.58
Labor	$94.00
Total of Customer Jobs	**$210.58**
Repair Order Subtotal	**$210.58**
Sales Tax	$9.34
Repair Order Total	**$219.92**
Total Amount Due	**$219.92**

(R. pp. 260-261) Again, after receiving the letter Brooks did not retrieve the Ski and she continued to refuse to pay the Invoice. (R. p. 125, ln 22 – p. 126, ln 16) She was aware that storage fees of $25 were imposed. (R. p. 127, ln 14-17) Brooks Storage fees as of January 12, 2015 are the total sum of $33,175.00.

III. PROCEDURAL HISTORY

Brooks brought this action against Velocity for breach of warranty, violation of Magnuson-Moss warranty act, negligence, unfair trade practices, constructive fraud, and fraud on October 15, 2012. (R. pp. 12-18) On November 26, 2012, Velocity filed and Answer and Counterclaim (R. pp. 23-30) asserting a number of affirmative defenses and counterclaims for breach of contract, unjust enrichment and storage costs. Three years later, on January 8, 2016 Brooks filed a Reply that generically denied the allegations of the counterclaims. (R. p. 31)

The matter was heard non-jury before the Master in Equity for Berkeley County on August 28, 2018. An Order was filed on October 8, 2018 awarding damages in favor of Plaintiff but preserving the issue of attorneys' fees for further hearing to be scheduled. (R. pp. 1-4) On October 17, 2018 Velocity filed a Motion for Reconsideration as to the

October 8, 2018 Order. (R. pp. 32-35) A hearing on the Motion for Reconsideration was heard on November 13, 2018, followed by an Order on December 5, 2018. (R. pp. 6-7)

On November 29, 2018 Brooks filed an Affidavit in support of her request for attorney fees. (R. pp. 38-49) On February 19, 2019 Velocity filed opposition to attorney's fees. (R. pp. 53-54) A hearing was held on February 20, 2019, followed by an Order on March 26, 2019. (R. pp. 9-10) An amended Notice of Appeal was filed on March 28, 2019, referencing all three (3) Orders.

IV. STANDARD OF REVIEW

The standard of review that governs the issues raised in is appeal is an error of law standard. On appeal of a case tried without a jury, the appellate court's jurisdiction is limited to correction of errors at law. *Epworth Children's Home v. Beasley,* 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005). The judge's findings are equivalent to a jury's findings in a law action. *King v. PYA/Monarch, Inc.,* 317 S.C. 385, 389, 453 S.E.2d 885, 888 (1995). Questions regarding credibility and weight of evidence are exclusively for the trial judge. *Sheek v. Crimestoppers Alarm Sys.,* 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct.App.1989). The appellate court will not disturb the trial court's findings of fact as long as they are reasonably supported by the evidence. *Epworth,* 365 S.C. at 164, 616 S.E. 2d at 714.

V. ARGUMENT

A. PLAINTIFF DID NOT ESTABLISH A CLAIM FOR UNFAIR TRADE PRACTICES.

A. 1 It is not unfair for a business to decide not to do further work after a customer refuses to pay for work performed.

The Court erred by affirmatively determining work was performed by a business at the request of a customer and the customer's refusal to pay for the work constitutes an

unfair trade practice on the part of the business. Such a conclusion is inapposite to the law.

A plaintiff must prove the following elements to recover on an unfair trade practices claim: "(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 or deceptive act(s)." *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 638, 743 S.E.2d 808, 816 (2013); *Wright v. Craft*, 372, S.C. 1, 640 S.E. 2d 486, 498 (Ct. App. 2006).

"An act is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive; a practice is 'deceptive' when it has a tendency to deceive." *Johnson v. Collins Entm't Co.*, 349 S. C. 613, 636, 564 S.E. 2d 653, 665 (2002); *see also deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 269, 536 S.E.2d 399, 407 (Ct.App.2000) (stating "[a]n unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive" and "[a] deceptive practice is one which has a tendency to deceive").

The Plaintiff did not meet her burden and the Court's findings do not support the conclusion an unfair trade practice occurred. The Court specifically found that Brooks, the customer, took her Ski to Velocity for the purposes of certain repairs and a "summerization" or "tune-up." (R. p. 2) The Court further found that Velocity did accomplish the "summarization" or "tune-up" and charged and billed Brooks for parts and labor attendant to the performance of such "summarization" or "tune-up." (R. p. 2) Brooks however declined to pay Velocity for the services billed or charged...(R. p. 2)

The Court then concluded Velocity's refusal to release the Ski to Brooks without first being paid was an unfair trade practice. (R. p. 2)

There is nothing unfair or deceptive and in fact it is counter intuitive to take the position it is unfair to require a customer to pay for services rendered. The public expects it will have to pay an establishment for services it requests be performed and are in fact performed. This is not a case where a consumer was billed for work not performed. The facts established here and found by the Court are antithetical to that concept.

It is not deceitful to require a customer to pay for work they do not dispute was performed. It is not deceitful when a Court specifically finds the work was performed and the only bill submitted was for work performed. It is inconsistent to find the admitted refusal to pay by one constitutes an unfair trade practice by another to request payment for services. There is no basis in law to determine it is unfair or deceptive under S.C. Code §39-5-20 to require a customer to pay for services and repairs it requested and agreed to pay for and were performed. The Court erred in its conclusion.

The Court's findings and conclusions are inconsistent. As noted, on one hand the Court found the work was performed. It also found Brooks refused to pay for the work. It recognized the letter of May 22, 2015 provided Brooks with notice of the intent to charge storage fees if Brooks did not retrieve the Ski and pay her outstanding bill. It then found Velocity committed an unfair act by refusing to release the vehicle without receiving payment. These findings are inconsistent. Moreover, the accrual of storage fees were a result of Brooks choice not to pick up the Ski and pay for services. Brooks should not be allowed to recover from her own actions and inactions.

A. 2 The Court erred by determining the alleged unfair trade practices had an impact upon the public interest.

"To be actionable under the [Act], an unfair or deceptive act or practice must have an impact upon the public interest." *Wright*, 372 S.C. at 29, 640 S.E.2d at 501. "An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the [A]ct's embrace . . . ." *Novack Enters., Inc. v. Cty. Corner Interiors, Inc.*, 290 S.C. 475, 479, 351 S.E.2d 347, 349–50 (Ct. App. 1986). "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, 379, 595 S.E.2d 461, 466 (2004).

> The potential for repetition may be demonstrated in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts.

Wright, 372 S.C. at 30, 640 S.E.2d at 502. "A plaintiff proves an adverse effect on public interests if he proves facts that demonstrate the potential for repetition." *Id.*

Brooks offered no evidence to support an impact on the public interest. Brooks offered no evidence showing similar conduct occurred in the past. Brooks showed nothing other than what transpired was a unique experience to her alone because she refused to pay for work she requested and was performed. An exclusive experience that related only to her because she would not authorize a more comprehensive tear down and provide assurance that she would pay for the tear down if the manufacturer's warranty did not cover the work. A unique experience related to Brooks alone since she refused to pick-up her Ski after receiving written notice if she did not, storage fees would be imposed. Brooks did not offer any evidence of public impact because none exists and

likely could never exist because of the deliberate actions of Brooks. Brooks should not be able to complain when she through her actions created the issue.

Likewise, the Court erred by determining an unfair practice had occurred because an alleged breach of contract does not constitute an unfair trade practice. *See Key Company, Inc. vs. Fameco Distributors, Inc.* 292 S.C. 524, 357 S.E.2d 476 (Ct. App. 1987). An unfair trade practice claim is not an alternative vehicle to pursue an alleged breach of contract. *Id.* Even an intentional breach of a contract does not rise to the level of a violation of UTPA. *Id.* Here at best, Brooks attempted to assert Velocity failed to fulfill its contractual obligation, although it did. Brooks' allegations are insufficient to constitute a violation of the UTPA.

A.3 Brooks suffered no damages caused by Velocity.

The Court erred by determining Plaintiff suffered actual damages. S.C. Code Ann §39-5-140 allows for the recovery of actual damages by one who suffers and ascertainable loss of money or property, real or personal, as a result of an unfair or deceptive method. Any loss of use was cause by Plaintiffs failure to pay for services and retrieve her vehicle. Plaintiff cannot be the cause of the loss by breaching the terms of service then seek to recover for the same.

"Actual damages under UTPA include special or consequential damages that are the natural and proximate result of the deceptive conduct." *See Global Prot. Corp. v. Halbersberg*, 332 SC. 149, 159, 503 S.E. 2d 483, 488 (Ct. App. 1998). Any loss of use occurred because Plaintiff's refused and failed to pay her outstanding bill for services rendered after demand for payment was made. Any loss of use of occurred after Plaintiff refused and fail to retrieve her vehicle before storage fees started to accrue after written

notice. No damages were suffered because of the natural or proximate result of conduct by Velocity.

The Court erred by determining Plaintiff's independent obligation to pay under her purchase finance agreement equated to the value of loss of use. Brooks had that obligation from the moment she committed to the payments to a third party lender and paid the amount owed in full. Nothing Velocity did or did not do changed that obligation. The Court erred by determining payments owed to a third party equated to actual damages in favor of Brooks.

A.4 Velocity did nothing that could be deemed willful.

The UTPA provides for treble damages upon a finding of a willful violation of the Act. *See* S.C. Code Ann. § 39–5–140(a) (Supp. 2014). A willful violation is defined by statute as occurring "when the party committing the violation knew or should have known that his conduct was a violation of [the UTPA]." S.C. Code Ann. § 39–5–140(d). Thus, if a person of ordinary prudence who was engaged in trade or commerce could have ascertained that his conduct violated the UTPA, such conduct is willful within the meaning of the statute. *Wright v. Craft* , 372 S.C. 1, 23–24, 640 S.E.2d 486, 498 (Ct. App. 2006).

The Court erred in determining a willful violation occurred. Brooks offered no support for the concept that Velocity should have known its conduct was a violation. To the contrary, certainly Velocity had a reasonable expectation that Brooks would pay for the services she requested. Indeed, Velocity had the reasonable expectation it would be paid for any work in performed which is why prior to undertaking further tear down Velocity sought Brooks' approval. Brooks refused authorization and Velocity did not

undertake to do the work nor did it charge Brooks for the work. An expectation that business does not have to provide free work to a customer is not a wilfull violation. The Court erred as a matter of law.

B. VELOCITY WAS ENTITLED TO CHARGE STORAGE FEES AND THE COURT ERRED BY REFUSING TO AWARD THEM.

B.1 No statutory defense was pled, therefore, none was available.

Rule 8(c), SCRCP provides that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively [his] defenses." *Madren v. Bradford*, 378 S.C. 187, 661 S.E. 2d 390 (Ct. App. 2008); *Wright v. Craft*, 372, S.C. 1, 20-21, 640 S.E. 2d 486(Ct. App. 2006); *D & D Leasing Co. of S.C. v. David Lipson, Ph.D., P.A.*, 305 S.C. 540, 542, 409 S.E.2d 794, 796 (Ct. App. 1991). Hence, the assertion that a claim is prohibited by a statute is in the nature of an affirmative defense precluding enforcement of a contract and should be pled. *Costa and Sons Const. Co. v. Long,* 306 S.C. 465, 469, 412 S.E.2d 450, 453 (Ct.App.1991)

Velocity asserted counterclaims for breach of contract and storage costs. Brooks asserted no defenses to those counterclaims. Brooks never sought to amend her Reply to include any affirmative defenses. Brooks was not entitled to argue for a potential benefit from an affirmative defense without having pled it. The trial court erred when it arbitrary determined that Defendant's claims for storage fees were precluded by S.C. Code Ann. §56-19-840 when the provision was never pled. *See Madren v. Bradford*, 378 S.C. 187, 661 S.E. 2d 390 (Ct. App. 2008) The statutory defense, whether applicable or not, was not pled and was not available. The Trial Court's determination should be reversed.

B. 2 S.C. Code Ann. §56-19-840 is not applicable.

Separately from committing error by considering an affirmative defense not pled, the Trial Court erred by randomly determining S.C. Code Ann. §56-19-840 applied.

The Trial Court made this determination without any support it is Order dated October 8, 2018. It followed the same course of action in its Order ruling on Velocity's motion for reconsideration by stating in part: "that while S.C. Code Ann. §56-19-840 appears to be applicable to the case at bar...." (R. p. 6) The Court gave no support for the concept it applies outside the confusing statement: "the applicability of the statute is not solely determinant of the Defendant's storage lien claim, but cumulative and in addition to the fact that the Defendant attempted to recover a charge for which the Defendant was not entitled." (R. p. 6)

It is undiscernible what the Court meant "not solely determinant...but cumulative." However, Velocity at no time was attempting to enforce a storage lien and sale the Ski at public auction. Thus, the Court erred when it determined S.C. Code Ann. §56-19-840 appears to be applicable."

B. 3 The Repair Order sign by Brooks entitled Velocity to recover for storage fees.

The Trial Court erred when it denied Velocity relief under its counterclaims. Velocity properly proved its claim for breach of contract.

In an action for breach of contract the non-breaching party must show the existence of a contract, the beach of said contract, and damages that result from said breach. *Fuller v. Eastern Fire & Cas. Ins. Co.,* 240 S.C. 75, 89, 124 S.E. 2d 602 (1962). In such a case the breaching party shall be liable "whatever damages follow as a natural consequence and a proximate result of such breach." *Id.*

Velocity's repair order signed by Brooks provides Brooks would be responsible for services render. The contract further provided if Brooks failed to retrieve her Ski in a timely manner Velocity would be entitled to storage fees. Brooks admitted that she signed the repair order. Brooks admitted she requested that Velocity perform work. The Court found that Velocity "did accomplish the 'summerization' or 'tune-up.'" Velocity decided not to engage further with Brooks and did not undertake to do a comprehensive teardown since Brooks did not authorize the work. Undisputed and as the Court found Brooks declined to pay Velocity for the services performed and billed. All the elements of a breach were established. The Court erred as a matter of law by concluding Velocity was not entitled to relief for breach of contract.

Not only did Velocity establish its right to payment for work performed but for storage fees as provided in the contract. The repair order was clear, storage fees would be charged at the rate of $25.00 a day if Brooks failed to retrieve the Ski.

The evidence was undisputed and the Court found Velocity notified Brooks of its intent to charge for storage fees by way of certified letter dated May 22, 2012. Brooks acknowledged receiving the letter. Velocity gave Brooks the opportunity to retrieve her Ski and before any storage fees were imposed. Brooks after notice failed to retrieve her Ski to preclude the imposition of storage fees. Instead, she continued her refusal to pay for services rendered. Velocity proved its right under contract to received storage fees. The Trial Court erred as a matter of law in failing to award Velocity damages against Brooks for breach of contract.

C. THE NECESSARY ELEMENTS FOR ATTORNEY'S FEES WERE NOT PRESENTED OR CONSIDERED.

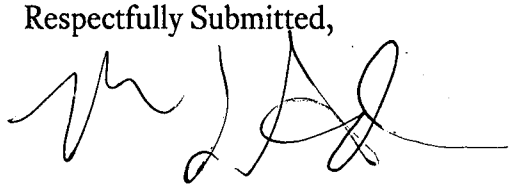
Under South Carolina law, six factors should be considered in determining the reasonableness of an attorneys fee, including: the nature, extent and difficulty of the legal services rendered; time and labor devoted to the case; the professional standing of counsel; contingency of compensation; the fee customarily charged in the location for similar services; and beneficial results obtained. *Baron Data Systems, Inc. v. Loter*, 297 S.C. 382, 377 S.E. 2d 296 (1989), and *Blumberg v. Nealco*, 310 S.C. 492, 494, 427 S.E.2d 659, 661 (1993). There must be sufficient evidence in the record to support each of the six factors analyzed for an award of attorney's fees. *See Taylor v. Medenica*, 331 S.C. 575, 580, 503 S.E.2d 458, 461 (1998).

The affidavit submitted does not contain sufficient evidence as to the six elements the Court is required to evaluate. There being insufficient evidence to analyze the six factors, the Court erred as a matter of law by any award of attorneys' fees.

CONCLUSION

Therefore, for the foregoing reasons, Velocity-Appellant respectfully asks this Court to reverse the lower court.

Respectfully Submitted,



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Velocity Powersports, LLC
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whom Velocity Powersports
LLC is Appellant,

Appellant.

CERTIFICATION OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

July 5, 2019

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