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

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SC Court of Appeals

Case No. 2012-CP-08-2981
Appellate Case No. 2019-00025

Rita Brooks, Respondent,

v.

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

of which Velocity Powersports. LLC, is the Appellant.

RESPONDENT'S BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. Did Judge Van Slambrook err in finding that Rita established a claim under her cause of action for unfair trade practices?

II. Did Judge Van Slambrook err in failing to award Velocity storage costs pursuant to the service agreement?

III. Did Judge Van Slambrook err in determining a statutory defense was available when none was pled?

IV. Did Judge Van Slambrook err in determining that Rita met her burden to establish the recovery of attorney's fees?

STATEMENT OF THE CASE

On October 15, 2012, the Respondent, Rita Brooks (Rita), brought this action against Velocity Powersports, LLC (Velocity), for violation of the Unfair Trade Practices Act and several other causes of action in connection with its wrongful retention of her jet ski. (R.12-19) Velocity filed an Answer and Counterclaim asserting a number of affirmative defenses and counterclaims for breach of contract, unjust enrichment and storage costs. (R. 23-30) Rita filed a Reply generally denying the allegations of the Counterclaim. (R. 31)

The case was heard by the Hon. Dale E. Van Slambrook, Master-in-Equity for Berkeley County, on August 28, 2018. He filed an Order of Final Judgment on October 8, 2018, granting Rita relief under her claim for unfair trade practices. The Court found Rita was entitled to an award of actual damages in the amount of $14,787.78, and to a trebling of her damages pursuant to the Unfair Trade Practices Act, resulting in a total damages award of $44,153.34, plus her reasonable attorney's fees and costs. The Court reserved the issue of the amount of the attorney's fees award for a later

hearing. (R. 1-4). On October 17, 2018, Velocity filed a Motion for Reconsideration. (R. 32-35) Rita filed a Return to the motion. (R. 36-37) A hearing on the motion was held on November 19, 2018, and an Order on Motion for Reconsideration and Supplemental Order of Final Judgment was entered on December 5, 2018. (R. 6-7)

On November 29, 2018, Rita filed an Affidavit in support of her request for attorney's fees showing that she had incurred $6,108.12 in fees. (R. 38-52) On February 19, 2019, Velocity filed a Memorandum In Opposition to Rita's attorney's fees request. (R. 53-54) A hearing was held on February 20, 2019, followed by an Order on March 26, 2019, awarding Rita $6,108.12 in fees. (R. 9-10) Velocity filed an amended Notice of Appeal of all three Orders on March 28, 2019.

STATEMENT OF THE FACTS

On April 24, 2010, Rita purchased a 2007 Honda AquaTrax F-12 jet ski from Velocity. (R. 62, ll. 2-21) The jet ski was represented to be new. (R. 64, ll. 4-11) The total purchase price, including principal and interest, was $12,820.01. (R. 66, ll. 9-12) Velocity also sold Rita a separate extended warranty at a cost of $825. (R. 66, ll. 15-20)[1] The jet ski came with a trailer, but Rita also purchased life vests, a cover for the jet ski, and a fire extinguisher. (R. 65, ll. 18-21) The salesperson told Rita that the 2007 jet ski was part of some leftover stock they had due to the bad economy. (R. 68, ll. 13-18) Rita was not informed that Honda no longer made watercraft. (R. 68, ll. 21-24) Had she known this she would not have made this purchase. (R. 68, l. 24 to R. 69, l. 1)

Rita used the jet ski in 2010 and 2011 and it performed satisfactorily. (R. 69, ll. 17-24; R. 70, ll. 6-8) However, the first time she took it out in 2012 she found that the jet ski would not go above

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[1]Velocity also received an undetermined portion of this $825 warranty sale as an agent of Honda. (R. 139, l.22 to R. 140, l. 11)

30 or 35 miles per hour, there was a problem with reverse shifting, and the engine would cut off. (R. 70, ll. 12-21) Rita took the jet ski back to Velocity the following day. (R. 70, l. 25 to R. 71, l. 2) *The date was April 9, 2012.* (R. 71, ll. 11-12) The following discussion then took place between Rita and Dave Carp, an agent for Velocity:

> Q All right. And what was the discussion between you and he? What did you say to him and what did he say to you?
>
> A. Basically the problems we were having with the ski and at that time they -- we told them to go ahead and do a tune-up as far as oil change, spark plugs, whatever for the new season. I gave him all the information on my warranty and extended warranty. He wrote all of that down and he told me everything would be covered under the warranty except for the tune-up.
>
> He also told me that -- this was on a Monday afternoon --that someone would contact me that Wednesday or Thursday and let me know what was going on with my jet ski.

(R. 72, ll. 8-22)[2]

Rita's next contact with Velocity occurred on April 24, 2012, when she called to check on the progress of the repairs. She again spoke with Mr. Carp, who informed her that "They hadn't had time to look at it." (R. 76, ll.3-19)

On May 2, 2012, Rita again called Velocity and again spoke with Mr. Carp. This time she was told "they were still trying to troubleshoot and diagnose it." (R. 77, l. 22 to R. 78, l. 8)

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[2]Velocity's claim for years of storage fees relies entirely on its claim that Rita signed a Repair Order on this initial visit which included this language: "A fee of $25.00 per day will be charged if watercraft is not picked up *within 5 days of completion.*" (R. 299, emphasis added.) As explained hereafter, there never was any completion of the work, rendering this language inapplicable.

On May 7,2012, Rita went to Velocity to check on the jet ski. (R. 78, ll. 15-17) She spoke with a technician named P.J. Wilson, again with Mr. Carp, as well as with Byron Hagar, the service manager:

> Q. Did you speak with Mr. Carp on that day?
>
> A. Yes, sir.
>
> Q. What did you say to him?
>
> A. We need to know the progress on the ski.
>
> Q. What did he say to you?
>
> A. I believe it was Mr. Wilson had told us that they had tried to get the codes to come up on the jet ski.
>
> Q. What is your understanding of codes?
>
> A. It has a computer in it like newer vehicles do and to diagnose if it has issues.
>
> Q. So Mr. Carp, you don't recall anything Mr. Carp said to you?
>
> A. No, sir.
>
> Q. Do you recall anything else of your conversation Mr. Wilson?
>
> A. I believe he said they had called Honda to try to diagnose the problem and they didn't have any luck with what they told them.

(R. 79, l. 25 to R. 80, l. 20)

In Rita's conversation with Mr. Hagar, he revealed that Velocity had previously had very bad experiences with the same model of jet ski they had sold her:

> Q. What, if anything, did he say to you?
>
> A. We had asked him about the progress of the ski and who else we could talk to, and he told us, well, we found out that we're not having a problem with the waste gate. We've had problems with earlier units as far as the water flowing out the

back or something. He said, your unit does not have that problem. And we said, well, we need to find out what is going on with it and what is wrong with the turbo or the brain of the unit.

* * *

He told me that they had taken in two jet skis like mine on trade, and they didn't know that they had issues because they would crank and run, and that they tried to -- they had sold them apparently new units. They had taken these units in on trade and they tried to fix them after they found out they had problems. One of them they spent about $3,000 on, the other one about $5,000 on in parts. And they could not get them to run and that they didn't even have money to pay their technicians to work on these units, and that they had ended up in the salvage yard in Atlanta.

(R. 81, l. 19 to R. 82, l. 25)

On May 21, 2012, Rita again returned to Velocity.

Q. What happened on that day? What was the nature of your contact?

A. We returned to Velocity and we talked to Dave Carp, the service writer, and he said they still hadn't diagnosed what was wrong with the ski, but their -- the -- let me back up. Their service manager would be returning to work because he had been on sick leave because he had hurt his back in motor cross, and that if anyone could fix my ski, he could, and he would be returning to work the next day. And he would he would call and let me know about my jet ski.

(R. 83, l. 16 to R. 84, l. 2)

The next day Rita received a phone call from Mr. King:

Q. You testified that you were told that Mr. King would return the following day, correct?

A. I'm sorry, yes, yes.

Q. All right. And that Mr. King would contact you. And did Mr. King contact you?

A. Yes, he did.

Q. By telephone?

A. Yes, sir.

Q. What did he say to you?

A. He told me that I owed them money and I need to come and pick up the jet ski.

Q. What did you say to him?

A. I said I thought you were going to fix the jet ski.

Q. And he said what?

A. He said, no, we're not going to work on it any longer.

Q. Did he say why?

A. He said because I had contacted an attorney.

Q. Okay. Did he tell you how he knew that you had contacted an attorney?

A. He didn't say.

Q. Did you get a letter from Mr. King?

A. Yes, sir. The next day.

* * *

Q. Have you seen that before? Exhibit 3?

A. Yes, sir.

Q. You received that by certified mail?

A. Yes, sir.

Q. When did you receive it? Let me rephrase. Had you received this certified letter from Mr. King when he called you on the 22nd, the day after your visit --

A. No, sir.

Q. -- on the 21st?

A. No, sir.

Q. What does Mr. King tell you in that letter? Read it if you will, publish it.

A. "Dear Ms. Brooks, As of the date of this letter, you still have not picked up your 2007 Honda ARX12T3. Enclosed is a copy of your repair order showing a balance owed of $219.92. We will be charging you a storage fee of $25 per day starting May 28, 2012.

"Also, if we do not receive payment within the next 30 days, we will initiate proceedings with the magistrate's office to take possession of that unit. If you have any questions please contact me. 843-841-5371. Sincerely, Billy King, Service Manager."

Q. What is that date of that letter?

A. May 22nd.

Q. That is the day after you visited Velocity?

A. Yes, sir The day he was to return to work.

Q. Does he say when the servicing was done on the unit?

A. Not in the letter.

Q. On the 21st when you were there, did they tell you that you owed any money?

A. No, sir.

Q. All right. Let's look at the repair order. How many pages is the repair order?

A. This version?

Q. Yes, ma'am. The exhibit you're looking at.

A. Five pages.

Q. All right. Do you see any page that looks like the page that you previously looked at and identified in Plaintiff's Exhibit No. 4, that was Page No. 2 in Plaintiff's No. 4. Is there a page like that in this five-page repair order?

A. No, sir.

Q. And direct your attention to Page 4. Does that page have numbers typed in for certain work allegedly performed?

A. Yes, sir. Parts and labor.

Q. What is the amount?

A. Total amount 219.92

Q. Okay. I'm going to re-direct your attention to Page 2 of the repair order that you previously looked at which is Plaintiff's Exhibit No. 4. Are the numbers the same?

A. No, sir.

Q. On that Page No. 4, that you're looking at there, it has a line for your signature. Is your signature on that repair order?

A. No, sir.

Q. Is your signature on any of those five pages of that repair order?

A. No, sir.

Q. Did you ever agree to pay Velocity for storage?

A. No, sir.

Q. I'll direct your attention to Page 1 of this repair order, and specifically parts and a price. What is your understanding of that Page 1?

A. Okay. They have a part description "PGM/F1 unit, $779.75." Extension carried over shows a zero.

Q. Do you know what that part is?

A. I believe that is the brain or whatever for the unit to control the operation. I'm not a technician. I'm not exactly sure.

Q. Is there a provision for labor cost related to that part number?

A. No, sir.

Q. Whether there is an amount there, do you see a line item for labor?

A. It says, "Diagnose ski codes zero hours."

Q. Okay. So there is no charge to you on that page, correct?

A. Correct.

Q. Okay. On Page 2, is there any indication of a charge to you?

A. No, sir.

Q. On Page No. 3 you have previously discussed, correct?

A. Yes, sir.

Q. Page No. 4 is the page where it provides for your signature you discussed, correct?

A. Yes, sir.

Q. Okay. Page 5, any numbers or any billing on that?

A. No.

Q. Any indication anything was repaired?

A. No.

* * *

Q. What part of tune-up or summerization is a repair in your view?

A. None. It would be just a service.

Q. All right. Have you ever seen any bill or has anybody from Velocity told you they repaired anything?

A. No, sir.

* * *

Q. When did you next have contact with or from Velocity after you got this certified letter from Mr. King?

A. Someone called me back within about a couple of days and wanted to know if I was going to pick up the jet ski.

Q. Was that after you had spoken with Mr. King?

A. Yes, sir.

Q. Do you know who called you?

A. I'm not positive.

Q. What was your position on paying this bill?

A. I didn't understand why I owed anything if it wasn't repaired.

Q. What value is a tune-up or summerization on a vehicle that doesn't work?

A. None whatsoever.

Q. Was that your primary purpose in going to Velocity for a tune-up or summerization?

A. No, sir.

Q. Was it for repair?

A. For repair.

Q. You don't know when they supposedly did this tune-up or summerization, correct?

A. No, sir.

Q. They didn't mention it to you on the 21st of May when you were there, correct?

A. Correct.

Q. And when did you first hear about any bill or anything being owed?

A. When Billy King called me.

Q. On what day?

A. That Tuesday. That would have been --

Q. The day after you were there?

A. Yes, sir. May 22, 2012.

(R. 83, l. 16 to R. 93, l. 20)

Gerald Cristo, one of the three owners of Velocity and its managing member (R. 137, l. 4 to R. 138, l. 6), testified that he offered to put the parts of the disassembled jet ski back together and waive the fees, "Provided they gave a release, obviously." (R. 164, l. 21)[3] Rita declined to accept the return of the non-working jet ski and sign a release (R. 131, ll. 4-18), and Mr. Cristo thereupon directed his employees to clean up the jet ski, which had been stored outside without a cover and in a disassembled state, and store it inside his warehouse, where it still remains:

> Q. What explanation did you offer to her for having left the unit outside and exposed to the elements for months on end?
>
> A. All of our skis are kept outside. Every single one of them. We have -- at any given point we could have 30 to 70 skis on our premises. There is no way we can store them inside. Now, what customers do do is those that have covers, and I believe Ms. Brooks said she had a cover. She could have brought her cover in there and we could have used that. But there is no way I can store a ski up in my warehouse with all my customers.
>
> Now, I did do this. After our face-to-face meeting, the next day, I had my lot guys totally detail the unit and put it up in my warehouse because I realized things were not going to get better and I put it in the warehouse and it's been in the warehouse ever since.

(R. 111, ll. 2 -19)

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[3]Mr. Cristo made it clear to Rita that "you have to sign a release." (R. 182, l. 1)

The record shows that although Dave Carp assured Rita on April 9, 2012 that the repairs would be covered by her warranties, at trial Mr. Cristo attempted to blame Rita for Velocity's abandonment of the repair work, while admitting that Velocity never actually performed any warranty work on the jet ski or even submitted any warranty claims to Honda because he was concerned Honda might decline the warranty:

> Q. What warranty work, if any, was conducted by Velocity on this particular ski?
>
> A. No warranty work was done or submitted to Honda.
>
> Q. Why is that?
>
> A. Because we never got deep enough into it because Ms. Brooks did not authorize us to go any further. When we knew the ski was more comprehensive, the signals that we were getting which is water was still in the oil, we knew that it was going to be a much more comprehensive teardown. We also knew that there was a probability that the manufacturer would decline that warranty because of the red flags that I discussed earlier. So we stopped and communicated to her that that wouldn't be the case.
>
> Q. How long has this ski -- how long has Ms. Brooks left the ski in your location?
>
> A. Since she first brought it in in April of 2012.
>
> Q. And through today's date; is that correct?
>
> A. Correct.

(R. 182, l. 4 to R. 183, l. 1)[4]

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[4]Billy King, the former Service Manager of Velocity, testified that after Honda became aware of the jet ski claim, it "called and wanted us to continue trying to figure out what was wrong with it. So we pulled it back in and started to look at it again. But shortly after that, we basically stopped with that." (R. 201, ll. 4-8)

STANDARD OF REVIEW

A claim under the Unfair Trade Practices Act is an action at law. *Jefferies v. Phillips*, 316 S.C. 523, 451 S.E.2d 21 (Ct. App. 1994). The standard of review for action at law tried without a jury is whether there is any evidence reasonably supporting the trial judge's findings of fact. *Townes Assoc. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). The appellate court will correct any error of law, but it must affirm the trial court's factual findings unless there is no evidence that reasonably supports those findings." *Jefferies v. Phillips*, 316 S.C. 523, 451 S.E.2d 21 (Ct. App. 1994).

ARGUMENTS

I. JUDGE VAN SLAMBROOK DID NOT ERR IN FINDING THAT RITA ESTABLISHED A CLAIM UNDER HER CAUSE OF ACTION FOR UNFAIR TRADE PRACTICES.

Judge Van Slambrook, in his Order of Final Judgment dated October 8, 2018, made the following findings of fact and conclusions of law, all of which are amply supported by the record:

> 2. I FIND AND CONCLUDE that that on April 24, 2010, the Plaintiff purchased a Honda Aqua Jet Ski, hereinafter "watercraft", from the Defendant at its business located at 151 Gateway Drive, Ladson, in Berkeley County, South Carolina; and,
>
> 3. I FIND AND CONCLUDE that the Plaintiff returned to the Defendant's place of business on April 9, 2012, and delivered the watercraft into the care, custody and control of the Defendant for purposes of certain repairs, and a "summerization" or "tune up"; and,
>
> 4. I FIND AND CONCLUDE that the Defendant was unable or unwilling to perform the repairs to the watercraft and after determination of such did accomplish the "summerization" or "tune-up" and charged or billed the Plaintiff for parts and labor attendant to the performance of such "summerization" or "tune-up"; and,
>
> 5. I FIND AND CONCLUDE that Plaintiff declined to pay the Defendant for the services billed or charged without the performance of certain necessary repairs by the Defendant as originally requested by the Plaintiff; and,

6. I FIND AND CONCLUDE that the Defendant refused to permit the Plaintiff to pick up the watercraft without payment for the services performed; and,

7. I FIND AND CONCLUDE that the Defendant notified the Plaintiff of its intention to charge for storage fees by letter dated May 22, 2012; however, the Defendant failed to report the watercraft as unclaimed to the Department of Motor Vehicles; and,

8. I FIND AND CONCLUDE that all claims, liens or costs for storage by the Defendant are forfeit as in such cases made and provided by S.C. Code of Law, Section 56-19-840; and,

9. I FIND AND CONCLUDE that the Defendant wrongfully charged the Plaintiff for storage fees and its refusal to release the watercraft without payment of the storage fees constitutes an unfair trade practice, capable of repetition which affects the public interest and that the Defendant's actions were wilful and wanton in that the Defendant knew or should have known that its conduct was unfair and deceptive and therefore a violation of this States' statutes concerning unfair and deceptive acts and practices; and,

10. I FIND AND CONCLUDE that as a result of the Defendant's conduct in violation of the Unfair Trade Practices Act, the Plaintiff has lost the use of the watercraft since April, 2012 and until the present or a period seventy-seven (77) months; and,

11. I FIND AND CONCLUDE that that the Plaintiff's monthly payment under the Retail Instalment Contract and Security Agreement between the Plaintiff and the Defendant was $191.14; and,

12. I FIND AND CONCLUDE that the uncontroverted testimony as to the reasonable value of loss of use of the watercraft to the Plaintiff was equal to her monthly payment in the amount of $191.14; and,

13. I FIND AND CONCLUDE that the sum of $191.14 multiplied by seventy-seven (77) months or a total of $14,717.78 to be the actual damages suffered by the Plaintiff; and,

14. I FIND AND CONCLUDE that the amount of actual damages should/must be trebled pursuant to the Unfair Trade Practices Act and that the total amount of damages then equals $44,153.34 plus reasonable attorney fees and costs; . . .

(R. 2-3)

S.C. Code Ann. § 39-5-20(a) of the Unfair Trade Practices Act provides that "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." To recover in an action under the Act, a 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 public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act. *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006).

The present case is closely analogous to several bill padding decisions issued by this Court and our Supreme Court. In *Barnes v. Jones Chevrolet Co.*, 292 S.C. 607, 358 S.E.2d 156 (Ct. App. 1987), the plaintiff was charged by a car dealership for parts and labor that were not actually provided. This Court held:

> Padding bills for auto repair is an unfair trade practice and act, and we so hold. *Noack* holds that it was the legislature's intent to limit the application of the U.T.P.A. to only those unfair or deceptive acts or practices in the conduct of trade or commerce which affect the public interest. *Noack* also stated, however, that unfair or deceptive acts with the potential for repetition have an impact on the public interest. We also hold that padding auto repair bills affects the public interest because of its potential for repetition. Barnes should have been allowed to present evidence of similar acts since this evidence also suggests the potential for repetition of the act for which he sought relief.

Id. at 613, 358 S.E.2d at 160-61.

Thereafter, in *Jefferies v. Phillips*, 316 S.C. 523, 451 S.E.2d 21 (Ct. App. 1994), this Court appeared to limit this broad statement regarding bill padding as an unfair trade practice, indicating that bill padding alone, without additional proof that the defendant had also engaged in other similar transactions, fell short of establishing an unfair trade practice:

> We find the reliance on *Barnes* is misplaced for two reasons. First, in *Barnes*, the plaintiff had paid an itemized bill for the repair of his automobile by an

automobile dealer. The plaintiff later learned the bill charged him for parts not used and labor not performed. *Id.* at 609, 358 S.E.2d at 158. The trial court did not allow the plaintiff to proffer evidence of two prior occurrences of padding by this same defendant. *Id.* at 612, 358 S.E.2d at 159. This court held that evidence of similar transactions was relevant on the issue of potential for repetition, and exclusion of that evidence was reversible error. *Id.* at 613, 358 S.E.2d at 160. This court then stated that "padding auto repair bills affects the public interest because of its potential for repetition." *Id.* Relying upon this statement, the master concluded that the action of "padding" a bill would, in any setting, violate the UTPA. Finding that Phillips padded the estimate, the master concluded that Phillips violated the Act.

> The master read *Barnes* too broadly. *Barnes* cannot be extended to reach every padding case absent proof of public impact. To do so would render evidence of similar transactions unnecessary, which would then render a trial court's error in refusing that evidence harmless. *Barnes* clearly held that such error was not harmless. Therefore, the ruling in *Barnes* must be read in light of the circumstances of that case. Each case must still be analyzed to determine whether the wrongful conduct impacts upon the public, whether through the circumstances of the transaction or through evidence of other similar acts.
>
> There is no evidence in this case of other similar acts. Nor are there any facts to establish or infer that Phillips' conduct has a potential for repetition, such that it affects the public. In the course of human endeavor, every action has some potential for repetition. The mere proof that the actor is still alive and engaged in the same business is not sufficient to establish this element. Since Jefferies presented no evidence that Phillips' conduct affected the public interest, he failed to prove a violation of the UTPA. *See also Columbia East Assocs. v. Bi-Lo, Inc.*, 299 S.C. 515, 386 S.E.2d 259 (Ct.App.1989) (affirming a directed verdict for the defendant because the plaintiff failed to prove the defendant's conduct affected the public).

Id. at 528-29, 451 S.E.2d 23-24.

This reasoning, however, was subsequently rejected by our Supreme Court in *Daisy Outdoor Advertising Co. v. Abbott*, 322 S.C. 489, 473 S.E.2d 47 (1996):

> The Court of Appeals' opinion also appears to hold that a UTPA plaintiff must allege and prove at least two separate torts--one against the plaintiff and one against a third party--in order to show an adverse impact on the public interest.
>
> This analysis misconstrues South Carolina law in two respects. Prior case law makes very clear that evidence of a potential for repetition, generally speaking, in and of itself establishes the required public impact. The Court of Appeals erred in requiring more. In fact, if evidence of adverse public impact beyond evidence of

> potential for repetition were required, then *Haley Nursery*, *Dowd*, and *Jones Chevrolet* would have been decided differently. In each of those cases, the only evidence of public impact was the evidence of the potential for repetition. Moreover, we have never required proof of torts against third parties (in addition to proof of a tort against the plaintiff) as an element of a cause of action under UTPA, and we decline to do so now.
>
> Because the trial judge found a potential for repetition of Daisy's actions, the Court of Appeals' only task on appellate review was to determine whether the Record contained any evidence to support the trial judge's finding. *See Townes Assoc. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976) (standard of review for action at law tried without a jury is whether there is any evidence reasonably supporting trial judge's findings of fact). If the Record contained such evidence, UTPA's public interest requirement was met.

Id. at 495-96. 473 S.E.2d at 50-51.

This Court's most recent bill padding decision is *Turner v. Kellett*, Op. No. 5623 (S.C.Ct.App. filed Feb. 6, 2019). In that case the plaintiff was charged for car repairs that were not provided. Although the defendant conceded that padding is an unfair or deceptive trade practice, it was able to prevail because the owner of the repair shop immediately fired the mechanic who had padded the bill without the owner's knowledge and permanently closed the shop, thereby eliminating the potential for repetition:

> Moreover, Carmen fired Finchem in July 2013 based on her belief he was defrauding Buddy's Garage. Immediately thereafter, Carmen permanently closed Buddy's Garage and told Turner to pick up her vehicle; Turner was Buddy's Garage's final customer. As a result of these actions, there was no potential for either Finchem or the Kelletts to further engage in unfair business practices through Buddy's Garage. *Id.* (providing the potential for repetition may be demonstrated by showing the company's procedures create a potential for repetition of the unfair and deceptive acts).
>
> Based on the foregoing, we find Turner failed to meet the public interest prong of the Act. *Novack Enters.*, 290 S.C. at 479, 351 S.E.2d at 349-50 ("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 . . . ."). Accordingly, we reverse the trial court's findings under the Act.

Id. at ___, ___S.E.2d at___ (Ct. App. 2019)

In this case Velocity was clearly guilty of bill padding. Even assuming the truth of Velocity's dubious claim that it actually went forward with performing a tuneup on a jet ski it already knew was inoperable, charging for such an obviously useless and gratuitous service amounts to the same thing as charging for a service that was never performed at all.

And Velocity engaged in even more egregious bill padding when it demanded storage fees of $25 per day and refused to release the inoperable jet ski back to Rita unless she executed a full release releasing Velocity from all claims. Velocity has continued to pursue these storage charges in its Counterclaim and even in this appeal. To this day Velocity has never tendered the release of the jet ski to Rita without the execution by her of a full release and still retains possession of the jet ski.

Moreover, the evidence clearly supports Judge Van Slambrook's finding that Velocity's actions are capable of repetition. Unlike the situation in *Turner v. Kellett*, here Velocity is still in operation. And while the defendant in *Turner v. Kellett* at least acknowledged that its padding was an unfair trade practice, in the present action Velocity insists it did nothing wrong, continuing to claim that it is entitled to be paid for a worthless tuneup and improperly assessed storage charges. Thus, there is every indication that Velocity would do the same thing again if the opportunity arises.

II. JUDGE VAN SLAMBROOK DID NOT ERR IN FAILING TO AWARD VELOCITY STORAGE COSTS PURSUANT TO THE SERVICE AGREEMENT.

As previously noted, Velocity's steadfast pursuit of storage fees in this case, even to the extent of claiming such bogus fees in this appeal, actually constitutes a further indication that its actions in

this case have the potential for repetition. Velocity is proclaiming, in effect, that it would do the same things it did in this case all over again.

Judge Van Slambrook determined that S.C. Code Ann. § 56-19-840 barred Velocity from charging storage fees but determined in his Reconsideration Order that, regardless of whether or not this statute applied, it was an unfair trade practice for Velocity to charge such fees. (R. 6). This ruling was correct. Whether or not the statute applies, it is undisputed that the Repair Order included this language: "A fee of $25.00 per day will be charged if watercraft is not picked up within 5 days of completion." As has been explained, there was never any completion of the work, rendering this language inapplicable. (R. 187, ll. 6-18) Velocity's threat of assessing storage fees was simply a strong-arm tactic aimed at frightening Rita into signing a release.

III. JUDGE VAN SLAMBROOK DID NOT ERR IN DETERMINING A STATUTORY DEFENSE WAS AVAILABLE WHEN NONE WAS PLED.

S.C. Code Ann. § 56-19-840 provides:

> A proprietor, an owner, or an operator of any towing company, storage facility, garage, or repair shop or any person who repairs or furnishes any material for the repair of a vehicle, where a vehicle remains unclaimed for a period of thirty days, must report the vehicle as unclaimed to the Department of Motor Vehicles within five days after the expiration of the thirty-day period. The report must be on a form prescribed by the department. The form may be submitted before the thirty-day period expires.
>
> A vehicle is considered "unclaimed" when the owner of the vehicle has not reclaimed it within thirty days after notification pursuant to Sections 29-15-10 and 56-5-5630. A person who fails to report a vehicle as unclaimed in accordance with this section forfeits all claims, liens, or costs associated with the towing and storage.

In his Order of Final Judgment dated October 8, 2018, Judge Van Slambrook found and concluded that Velocity failed to comply with this statutory requirement in its quest to charge Rita with years of storage fees:

> 7. I FIND AND CONCLUDE that the Defendant notified the Plaintiff of its intention to charge for storage fees by letter dated May 22, 2012; however, the Defendant failed to report the watercraft as unclaimed to the Department of Motor Vehicles; and,
>
> 8. I FIND AND CONCLUDE that all claims, liens or costs for storage by the Defendant are forfeit as in such cases made and provided by S.C. Code of Law, Section 56-19-840; and,
>
> 9. I FIND AND CONCLUDE that the Defendant wrongfully charged the Plaintiff for storage fees and its refusal to release the watercraft without payment of the storage fees constitutes an unfair trade practice, capable of repetition which affects the public interest and that the Defendant's actions were wilful and wanton in that the Defendant knew or should have known that its conduct was unfair and deceptive and therefore a violation of this States' statutes concerning unfair and deceptive acts and practices;
>
> . . .

(R. 2-3)

While this statute was not specifically mentioned in Rita's complaint, her claim that Velocity's action in charging storage fees in this case was unauthorized and constituted an unfair trade practice certainly was, and was in fact a central claim in the case. The Rules of Civil Procedure give trial courts flexibility to grant relief not specifically pled. *See, e.g.*, Rule 15(b), SCRCP ("When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."); Rule 54(c), SCRCP ("[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."). Rita's claim that it had no right to pursue storage fees in this case could hardly have come as a surprise to Velocity.

Moreover, as noted above, Judge Van Slambrook did not rely solely on S.C. Code Ann. § 56-19-840 in any event, but explained that it was an additional cumulative ground for determining that the charging of storage fees by Velocity in this case constituted an unfair trade practice. (R. 6) This

ruling was also correct. Padding its bill with improper storage charges in this case would have been an unfair trade practice by Velocity even if it had not been specifically prohibited by statute.

IV. JUDGE VAN SLAMBROOK DID NOT ERR IN DETERMINING THAT RITA MET HER BURDEN TO ESTABLISH THE RECOVERY OF ATTORNEY'S FEES.

The Unfair Trade Practices Act provides in S.C. Code Ann. § 39-5-140(a), "Upon the finding by the court of a violation of [the Act], the court shall award to the person bringing such action under this section reasonable attorney's fees and costs." As will be seen from the Record, this case involved a full blown trial and two separate hearings on post trial motions. Rita's trial counsel presented a detailed affidavit concerning the $6,108.12 in attorney's fees she incurred in this matter. (R. 38-52) It is obvious that Judge Van Slambrook acted within his discretion in awarding Rita fees in this reasonable amount for these beneficial services.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the orders of Judge Van Slambrook be affirmed.

Respectfully submitted,

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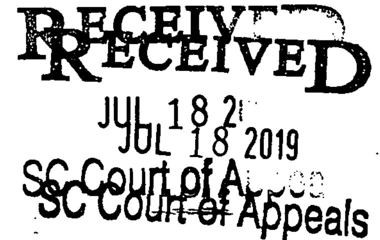
Charleston, South Carolina

July 8, 2019

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
Appellate Case No. 2019-00025



Rita Brooks, Respondent,

v.

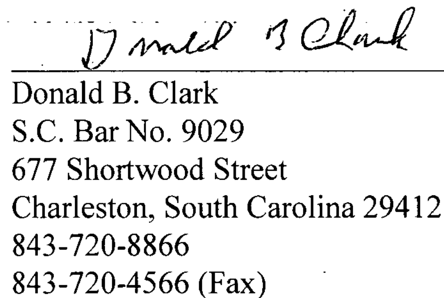
Velocity Powersports, LLC, American Honda Finance Corporation and American Honda Motor Co. Inc., Defendants,

of which Velocity Powersports. LLC, is the Appellant.

CERTIFICATE OF COUNSEL

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

July 8, 2019



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