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Nov 29 2021

SC Court of Appeals

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.

NOTICE OF MOTION FOR RECONSIDERATION AND REHEARING PURSUANT TO
RULES 221 AND 240, SCACR

Pursuant to Rules 221 and 240, SCACR, Appellant Velocity Powersports, LLC (Appellant) respectfully files this Petition for reconsider and rehearing regarding its Order filed November 10, 2021. *Brooks v. Velocity Powersports*, No. 2019-000025, (S.C. Ct. App. November 10, 2021) (Unpublished Opinion No. 2021-UP-400).

Rule 221(a), SCACR, authorizes a party who believes the Court overlooked or misapprehended points of law and/or facts to petition for rehearing. *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933). For the following reasons, Appellant submits the Court exceeded its authority by not following the appropriate standard of review and the limitations imposed, addressing issues not properly preserved for review and misapprehending law to support its view of the matter.

ARGUMENT

1. THIS COURT EXCEEDED ITS ROLE BY SUBSTITUTING ITS OWN VIEW OF THE FACTS.

The Parties in their respect briefs agreed the matter is an action of law that upon review is subject to corrections of law and affirmation of findings reasonably supported by facts. *Epworth Children's Home v. Beasley*, 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005), and *Jefferies v. Phillips*, 316 S.C. 523, 451 S.E.2d 21 (Ct. App. 1994).

The lower court's opinion was limited to sixteen (16) mixed findings of facts and conclusions of law. This Court in its opinion set forth its own findings well beyond any findings of the lower court. It is not the place of this Court to substitute its own view as to the facts. *Jones v. Leagan*, 681 S.E.2d 6, 384 S.C. 1 (S.C. App. 2009), citing, *United Farm Agency v. Malanuk*, 284 S.C. 382, 385, 325 S.E.2d 544, 546 (1985). This is not a matter in equity despite the Court's treatment as such. This Court committed error when failed to adhere to the more stringent law standard and made numerous and erroneous findings in accordance with its own view.

2. THIS COURT IMPROPERLY CONSIDERED ISSUES NOT PRESERVED FOR APPEAL.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). This Court improperly considered issues not raised at the lower court.

The words "pad" or "padding" were not used before the lower court and cannot be found in the Record on Appeal. The concept only appeared for the first time in the matter in Respondent's Brief. The concept and issue not having been raised before the lower court, was not preserved for appeal. The Court erred in considering the issue.

Additionally, an issue not raised below but determined by this Court is whether a business must do business with a customer or can it elect not. This Court, in essence, determined that a business must do as commanded by a customer and perform services even when told by the customer it will not agree to pay for the demand services. This Court's findings are inconsistent with the lower Court's limited finding that Appellant "was unable or unwilling to perform the repairs to the watercraft." No one asked for a determination that a business cannot decline business.

Likewise, this Court concluded on its own that "[it became unreasonable for Velocity to seek reimbursement for the initial tune-up service once they began the teardown." The lower court made no finding or conclusion about the tear down.

"[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." *Langley v. Boyter*, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct.App.1984), *rev'd*, 286 S.C. 85, 332 S.E.2d 100 (1985), *but cited with approval in Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991). This Court, in error, has chosen to speak although not spoken too.

3. THIS COURT ERRED BY IMPLICITLY FINDING APPELLANT HAD TO PERFORM WORK AFTER RESPONDENT'S REFUSAL TO PAY.

The lower court found and concluded:

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; (Order, ¶¶ 4 and 5).

Ignoring the findings of the lower court and the facts of the case, this Court determined “Velocity’s adamant pursuit of accumulating repair costs and storage fees for a broken and disassembled Ski constituted an unfair and deceptive act.” This was error.

The undisturbed finding by the lower court was that on May 22, 2012, Appellant notified Respondent its intention to charge storage fees. (Order, ¶7). Thus, Respondent had the opportunity to pay for “summarization” before any storage fees were charged or before any teardown occurred. Respondent’s refusal to pay for services rendered resulted in invocation of the terms of the service agreement.

This Court erred as a matter of law by determining “pursuit of ...storage fees...constituted an unfair and deceptive practice.” “Generally, parties are free to contract for terms upon which they agree.” *Broach v. Carter*, 399 S.C. 434, 732 S.E.2d 185 (S.C. App. 2012), citing, *Huckaby v. Confederate Motor Speedway, Inc.*, 276 S.C. 629, 630, 281 S.E.2d 223, 224 (1981) (“[P]eople should be free to contract as they choose.”).” The charging of storage fees is a common event. The South Carolina Legislature has enacted several statutes dealing with the imposition of storage fees dealing with vehicles in various situations. *See*. S.C. Code Ann. §56-19-840; §39-20-45; and §16-11-760. This Court committed an error of law by determining a standard contract term is an unfair trade practice.

4. **THERE WAS NO ASCERTAINABLE LOSS.**

This Court erred by determining Brooks obligation to pay under a third-party contract was an ascertainable loss.

Under the UTPA “[a]ny person who suffers any ascertainable loss of money ... as a result of the use or employment by another person of an unfair or deceptive method, act or practice ... may bring an action individually, but not in a representative capacity, to recover actual damages.”

S.C. Code Ann. § 39-5-140(a). Actual damages include special or consequential damages which are the natural and proximate result of the deceptive conduct. *Taylor v. Medenica*, 324 S.C. 200, 479 S.E.2d 35 (S.C. 1996) citing, *Fields v. Yarborough Ford, Inc.*, 307 S.C. 207, 414 S.E.2d 164 (1992). The payment of her third-party loan obligation was neither the natural or proximate cause of anything done by Appellant. Respondent paid nothing for services and had no actual damages. There was no competent evidence showing the existence or amount of alleged damage.

5. APPELLANT WAS ENTITLED TO RECOVER STORAGE FEES.

Respondent conceded she did not plead a statutory defense or other defense to the counterclaim asserted by Appellant. No defenses having been pled to the counterclaim for breach of contract, Appellant was entitled to recover under the cause. *See Costa and Sons Const. Co. v. Long*, 306 S.C. 465, 469, 412 S.E.2d 450, 453 (Ct.App.1991). It was an error of law to consider a defense not pled.

The Court further erred by concluding “because Velocity’s actions constitute an unfair trade practice and therefore, Velocity was not entitled to storage costs.” This determination defines the established law that the first to breach cannot later complain of a subsequent breach by the other party. It also, adopts a concept not found in South Carolina jurisprudence. This Court, in essence, has adopted the new principle that an alleged unfair trade practice is a complete and absolute bar to the recovery by the alleged violator from the wrongful acts of the accuser. There is no such recognized bar to recovery by Appellant and this Court was in error for adopting such.

6. THERE WAS NO BASIS FOR A DETERMINATION OF WILLFULNESS.

Under South Carolina law American Honda Finance Corporation had the right to take possession of its collateral due to the non-payment by Respondent. *See Kirby v. Home Motor Co.*, 295 S.C. 7, 366 S.E. 2d 259 (S.C. App 1987). Thus, American Honda had the right and did

instruct Appellant to proceed with conducting a further evaluation of the Ski which required tear down. Thus, following the instructions of an authorized person is not conduct of a knowing violation. It was an error of law to so determine.

CONCLUSION

For these reasons, Appellant respectfully requests that the Court should reconsider its decision and either grant the Petition for Rehearing and/or reverse the decision of the trial court in its entirety in this matter.

RESPECTFULLY SUBMITTED,
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APPEAL FROM BERKELY COUNTY
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Dale E. Van Slambrook, Master In Equity

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Rita Brooks,

Respondent,

v.

Velocity Powersports, LLC
American Honda Finance
Corporation and American
Honda Motor Co., Inc., of
whom Velocity Powersports
LLC is Appellant,

Appellant.

PROOF OF SERVICE

I certify that I have served Appellant's Motion for Reconsideration on Rita Brooks by depositing a copy of it in the United States Mail, postage prepaid, on November 29, 2021 addressed to her attorneys of record:

Edward J. Dennis, IV
112 Stoney Avenue
Moncks Corner, South Carolina 29461

Donald B. Clark
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November 29, 2021

MARY LEIGH ARNOLD, PA

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November 29, 2021

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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RE: Rita Brooks vs. Velocity Powersports, LLC and Honda Motorcompany
Civil Action No. 2012-CP-08-2981
Appellate Case No. 2019-00025

Dear Madam Clerk:

Enclosed for filing please find Appellant's Motion for Reconsideration along with a Proof Service relating to the same which I am filing via email through ctappfilings@sccourts.org. The filing fee of \$50 is being transmitted with a hard copy via regular mail.

Should you have any further questions, please do not hesitate to contact me.

MARY LEIGH ARNOLD PA.

s/Mary Leigh Arnold

Mary Leigh Arnold

Cc: Edward Dennis, IV, Esq.
Donald B. Clark, Esq.