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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Berkeley County
Court of Common Pleas

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

Court of Common Pleas Cas No. 2012-CP-08-2981
South Carolina Court of Appeals Appellate Case No. 2019-000025
Opinion No. 2021-UP-400 (S.C. Court of Appeals filed November 10, 2021

Rita Brooks, Respondent,

v.

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

of which Velocity Powersports LLC is the Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

The undersigned hereby certifies that a Petition for Rehearing was made and finally on by the Court of Appeals December 16, 2021.

QUESTIONS PRESENTED FOR REVIEW

I. **Did the Court of Appeals err by determining a business must perform services for a consumer that the consumer refuses to pay for or the business commits an unfair trade practice when business declines to perform the service for which it knows it will not be paid?**

II. **Did the Court of Appeals err by exceeding its authority and substituting is view for that of the lower court, making incorrect factual determinations and addressing issues not properly preserved?**

III. **Did the Court of Appeals err by determining an unfair trade practice is committed by a business after the customer first breached its agreement, fails to show potential for repetition or that an ascertainable harm is proximately caused by the business?**

IV. **Did the Court of Appeals err by holding the recovery for a customer is a complete bar to any recovery by a business?**

V. **Did the Court of Appeals err in determining a statutory defense was available when none was pled?**

INTRODUCTION

Pursuant to Rule 242 of the South Carolina Rules of Appellate Procedure, Velocity Powersports, LLC ("Velocity") seeks certiorari regarding the Court of Appeals' decision in *Rita Brooks v. Velocity Powersports, LLC*, Op. No. 2021-UP-400, (S.C. Ct. App., filed November 10, 2021 (Appellate Case No. 2019-000025). The issues concerning this petition arise out of services performed by a business at the request of a customer for which the customer refused to pay and the business then declining to perform further services for the customer when told by the customer it would not pay for services. The Court of Appeals' Opinion has the potential of impacting businesses throughout the state requiring them to perform services knowing they will not be paid or be at risk of being accused of unfair trade practices. Petitioner respectfully submits that the Court of Appeals under the

unique circumstances presented created new policies and principles not recognized before while ignoring other well-established principles. Certiorari in this matter should be granted.

STATEMENT OF THE CASE

Rita M. Brooks ("Brooks), took her 2007 Honda, Model ARX12T Jet Ski ("Ski") (R. p. 2) to Velocity for service on April 9, 2012. (R. p. 71, ln 10-12) Brooks delivered the Ski to Velocity "for the purpose of certain repairs and a 'summerization' or 'tune-up.'" (R. pp. 2 and 72)

Velocity performed the summerization or tune-up. (R. p. 2) Velocity billed Brooks "for the parts and labor attendant to the performance of such 'summerization' or 'tune-up.'" (R. p. 2) Nothing was billed for except work relating to the summarization and tune-up. Brooks refused to pay Velocity for the services billed. (R. pp. 2 and 125)

Velocity was unable or unwilling to perform the additional repairs beyond the summarization sought by Brooks. (R. p. 2) Velocity communicated to Brooks that with regard to the potential additional repairs 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. 205, ln 21) Brooks refused to agree to pay for the requested repairs if not covered by warranty. (R. pp. 178-179)

Velocity contacted Brooks on May 22, 2012, and advised her she needed to pay for the work performed and pick-up the Ski. (R. p. 86, ln 6-25; R. p. 179, ln 3-11; R. p. 200, ln 14-20: R. p. 202, ln 18-25) Velocity notified Brooks of its intention to charge for storage fees if the Ski was not picked up. (R. p. 2) Velocity memorialized in writing to Brooks its intention to charge storage starting a certain date if Brooks did not pick-up the Ski before

that date. (R. pp. 2, 125, ln 22 – p. 126, ln 16) Velocity gave Brooks the opportunity after the May 2012 time period to pick up her Ski and take it home. (R. p. 131) Brooks refused to pick-up the Ski. (R. p. 125, ln 16-21; R. p. 179 ln1-6; R. p. 200, ln 21-22) Brooks refused to pay the invoice for services rendered. (R. 2, R. p. 125). Brooks continued to demand the additional services requested be performed by Velocity despite her refusal to pay. (R. p. 2)

Brooks brought this action 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) Velocity answered, counterclaim and asserted a number of affirmative defenses. (R. pp. 23-30)

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 Brooks. (R. pp. 2-4) Velocity timely filed a Notice of Appeal. On November 10, 2021, without oral argument, the Court of Appeals issue an unpublished opinion affirming in part, reversing in part and remanding the matter. Velocity timely filed for reconsideration. The Court of Appeals denied the request for reconsideration on December 16, 2021.

ARGUMENT

I. NO SHOES, NO SHIRT NO SERVICE - A PRACTICE THE COURT OF APPEALS HAS IMPLICITLY DETERMINE WOULD BE AN UNFAIR TRADE PRACTICE UNDER ITS OPINION.

It is generally acknowledged that a business has the right to refuse service to a customer as long as it does not run afoul of anti-discrimination laws protecting persons on

the basis of national origin, sex, religion, color or race, age, disability of gender identity.[1] The Court of Appeals appears to postulate that a business must perform work requested by a customer no matter what or the business commits an unfair trade practice.

Correctly, the Court of Appeals acknowledged is not an unfair trade practice for a business to charge for work performed. However, the Court went on to determine it was an unfair practice to pursue payment for the repair costs and storage fees. This was error.

The lower court found and concluded, in part:

> 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; (R., p. 2, Order, ¶¶ 4 and 5).

The breakdown of the undisturbed findings by the lower court are: specific services of a summerization were request by Brooks; Velocity performed those services; Velocity charged for those services; Brooks refused to pay for the services performed; Brooks sought repairs beyond the summerization; and Velocity decline to perform the additional repairs. Further undisturbed facts are that on May 22, 2012, Velocity notified Brooks of its intention to charge storage fees on a future date if the Ski was not retrieve. (R, p. 2, Order, ¶7). Brooks was given the opportunity to pay for "summarization" before any storage fees were charged. Brooks continued to decline to do so and continued to insist further work be performed. In essence, Court of Appeals determination is that a business

[1] See *Masterpiece Cakeshop, LTD. V. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 201 L. Ed 2d 35 (2018). While the opinion in *Masterpiece* is not on point it did address a baker's refusal to bake a wedding cake for a gay couple, where Court determined under the specifics of the case the baker had the right to refuse service.

must perform services for a customer it demands despite failure to pay for prior services agreed upon, and has no recourse of any kind.

""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.")." Brooks contracted for certain services that were performed. After agreeing to pay, Brooks refused. She breached the contract by refusal to pay which behavior the Court of Appeals' opinion condones. Likewise, Brooks agreed to pay for storage fees if she failed to timely retrieve the Ski. Brooks refused to retrieve the Ski before any storage fees would be imposed.

The only oppressive behavior here is that of Brooks. Velocity's election not to perform any further services for Brooks was justified and non-discriminatory. It was much like the concept of no shoes, no shirt, no services. No payment, no services is not unfair trade practice.

The Court of Appeals decision, however, validates Brooks refusal to pay for services rendered and refusal to agree to be responsible for the costs of the additional services she was requesting. The opinion, in essence, allows a customer to hold a business hostage and force the business to provide services or otherwise be a risk of committing an unfair practice. The overreaching decision should be reviewed and reversed.

II. THE COURT OF APPEALS EXCEEDED ITS BOUNDARIES BY SUBSTITUTING ITS VIEW OF THE FACTS, MAKING INCORRECT FACTUAL DETERMINATIONS AND ADDRESSING ISSUES NOT PROPERLY RAISED BEFORE THE TRIAL COURT.

A. The Court of Appeals exceeded its role by substituting its own view of the facts.

The Court of Appeals review was limited and it was not in a position to make its own findings of fact. This matter is an action of law that upon review is subject to corrections of law and affirmation of findings reasonably supported by facts. *see, 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 is limited to sixteen (16) mixed findings of facts and conclusions of law. The Court of Appeals set forth its own separate findings well beyond any findings of the lower court. It is not the place of the appellate 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). The Court of Appeals erred when it substituted its factual view for that of the lower court.

B. The Court of Appeals made incorrect factual determinations.

Not only did the Court of Appeals substitute its opinion for the lower court it made incorrect factual determinations. An example is the Court of Appeals determination "Velocity's adamant pursuit of accumulating repair costs…"

There is nothing in the record that repair costs imposed were anything but $219 for the summerization. Brooks testified she believed the summerization was supposed to be a cost of $249.00 but she received an invoice for $219 that she refused to pay. (R. pp. 123-124)

There is nothing in the record to support the concept of "adamant pursuit" by Velocity. Velocity sent a letter about the invoice about outstanding charges owed by Brooks. The characterization by the Court of Appeals is inaccurate.

The Court of Appeals deemed itself the trier of fact and made the finding that the services rendered by Velocity were subsequently rendered useless. No such finding was made by the lower court. Brooks made no request that the lower court make such a finding. The Court of Appeals erred by *sua sponte* making such a determination.

C. The Court of Appeals addressed issues not properly before it.

As former Chief Appellate Judge Alex Sanders wrote, "[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), *quashed on other grounds*, 286 S.C. 85, 332 S.E.2d 100 (1985). *See also Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 331, 730 S.E.2d 282, 286 (2012).

Here, however, the Court of Appeals exceeded the proper bounds of its inquiry, essentially serving as a 12th man who left the bench for the playing field to raise questions and create issues never brought forth by Brooks at the lower court. The record before the Court of Appeals was devoid of any facts or argument regarding the concept of bill padding. The first time the spurious claim "Velocity was clearly guilty of bill padding" was raised by Brooks in her brief before the Court of Appeals. (Respondent's Brief, p. 18) The Court of Appeals improperly latched on to this argument and equated bill padding with the concept of services rendered useless by subsequent acts.

"It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised and ruled upon by the trial court to be preserved." *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006). Nor may an argument be raised on appeal unless it has been presented to the lower court for its consideration. *Wilder Corp. v. Wilke*,

330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). The consideration of issues not raised below exceeded the bounds of the Court of Appeal's authority, and the Supreme Court should grant certiorari to review and reverse.

III. THE COURT OF APPEALS ERRED IN DETERMING THE ELEMENTS OF AN UNFAIR ACT EXISTED.

A. There was no unlawful unfair trade practice committed.

The Court of Appeals' lynchpin for determining an unfair act occurred was its determination beyond the lower courts findings that the services Velocity performed were rendered useless by a subsequent act. This was an improper determination.

One of the many flaws in the Court of Appeals opinion is the failure to recognize the Unfair Trade Practices Act focuses on practices not alleged resulting consequences. "An 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" *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 269, 536 S.E.2d 399, 407 (Ct.App.2000)

The Court of Appeals conclusion that an unfair act was established is based on an activity later in time that impacts an activity prior in time. "Charging for services subsequently rendered useless equates to charging for services never rendered at all." *Rita Brooks v. Velocity Powersports, LLC*, Op. No. 2021-UP-400, (S.C. Ct. App., filed November 10, 2021).

This issue appears to one of first impression. Under the facts presented there are no cases directly on point. The Court of Appeals drew analogy to cases dealing with bill padding. That did not happen here. A direct act or practice is different than an act potentially impacts a prior act. The facts of this case are nothing like the direct act or

practice of charging for fees for work not performed. The Court erred in finding an unfair act was committed.

B. The unique facts involved only affect the parties.

"An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the act's embrace." *Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 453, 814 S.E.2d 643, 655 (Ct. App. 2018) (quoting *Noack Enters., Inc. v. Country Corner Interiors, Inc.*, 290 S.C. 475, 479, 351 S.E.2d 347, 349-50 (Ct. App. 1986), cert. denied, S.C. Sup. Ct. Order dated Nov. 9, 2018. "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).

There is a lack of any evidence to support an impact on the public interest. There is difference between what the lower court found to be the alleged offending act and what the Court of Appeals determined to be the offending act. Notwithstanding, what transpired here was a unique experience. It was an experience put into motion by Brooks alone as a result of her refusal to pay for work she requested and was performed. A situation arising because Brooks insisted that Velocity perform work she refused to pay for. 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. It was reversible error to determine the element of repetition was established.

C. There was no ascertainable loss caused by Velocity because Brooks caused any 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).

Any alleged losses that existed were caused by the actions and inaction of Brooks. Brooks is the one that refused to pay for services rendered. Brooks refused to retrieve her Ski before the imposition of storage costs. Brooks is the cause of any damages she claimed to have suffered.

D. 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 of Appeals erred in determining a willful violation occurred. As determined, 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 it performed which is why prior to undertaking further work Velocity sought Brooks' approval. Under these circumstances nothing existed that Velocity should have known its actions or inactions rose to the level of offensive behavior. An expectation that

a business does not have to provide free work to a customer is not a willful violation. The decision is in error.

IV. THE DETERMINATION BY THE COURT OF APPEALS THAT ANY RECOVERY BY VELOCITY IS COMPLETELY BARRED, IS A NOVEL AND UNSUPPORTABLE HOLDING.

***Quare*: Why is a business barred from recovery when a customer breaches first and before any alleged claim of unfair trade practices?**

The Court of Appeals committed an error of law when it determined that certain actions constituted an unfair trade practice and therefore precluded Velocity from any recovery. Stated differently, the Court of Appeals held a finding of unfair trade practices against a party bar any recovery by that party.

The Court of Appeals cites to no authority for this holding. There is none. This is a new principle of law adopted by the Court of Appeals without authority.

Indeed, this holding defies the recognized principle of law that the first to breach a contract cannot later complain of an alleged subsequent breach by the other party. *See, Silver v. Aabstract Pools & Spas, Inc.,* 376 S.C. 585, 594, 658 S.E.2d 539, 543 (Ct. App. 2008) ("Where a contract is not performed, the party who is guilty of the first breach is generally the one upon whom all liability for the nonperformance rests." (internal quotation marks omitted); and *Willms Trucking Co., Inc. v. JW Constr. Co., Inc.*, 314 S.C. 170, 178, 442 S.E.2d 197, 201 (Ct.App.1994) ("Where a contract is not performed, the party who is guilty of the first breach is generally the one upon whom all liability for the nonperformance rests.").

Breach of contract is established by showing the existence of a contract, the breach of said contract, and the damages that result from said breach. *Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E. 2d 602 (1962). Brooks breached her agreement

with Velocity by requesting services then openly and defiantly refusing to pay for the services. She also knowingly and willing caused storage fees to accrue after refusing to retrieve the Ski after notice her failure to do so after a certain point in time would trigger such. This is a breach of her contract entitling Velocity to recover.

A breach of contract by Brooks was actually determined by the lower court's findings ignored by the Court of Appeals that Velocity did accomplish the summarization and charged for such but Brooks declined to pay. Findings which are the law of the case. See, *Sims v. Hall*, 357 S.C. 288, 293, fn. 2, 592 S.E.2d 315, 318, fn. 2 (Ct. App. 2003) ("Unappealed rulings become the law of the case") The improper finding that a subsequent act barred any recovery is reversible error.

V. IF NO DEFENSE WAS PLED NONE WAS AVAILABLE AND SHOULD NOT HAVE BEEN CONSIDERED.

Undisputed in this matter is the fact Books asserted no defenses to Velocity's counterclaims and never moved to amend under the Rule 15, SCRCP to include any. Rule 8(c), SCRCP requires a party to set forth affirmative defenses, thus "[t]he failure to plead an affirmative defense is deemed a waiver of the right to assert it." *See, Whitehead v. State,* 352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002); and *Costa and Sons Const. Co. v. Long,* 306 S.C. 465, 469, 412 S.E.2d 450, 453 (Ct.App.1991). Brooks was not entitled to benefit from an affirmative defense without having pled it. Nor was it appropriated for the lower court or the Court of Appeals to consider a defense not pled. The lower court and Court of Appeals should be reversed.

CONCLUSION

For the above reasons, Petitioner requests this Court grant the Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED,
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