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NO. COA06-325

NORTH CAROLINA COURT OF APPEALS

Filed: 16 January 2007

GRACE R. WALDON and  
ENVIRONMENTAL WATER SOLUTIONS,  
INC., a North Carolina  
Corporation,  
Plaintiffs

v.

Union County  
No. 01 CVS 1455

DANNY L. BURRIS, JESSE JAMES  
WALDON, JR. and ENVIRONMENTAL  
WATER SOLUTIONS, INC., an  
Oklahoma Corporation,  
Defendants

Appeal by defendants from judgment entered 25 October 2005 by Judge Christopher M. Collier in Union County Superior Court. Heard in the Court of Appeals 18 October 2006.

*Weaver, Bennett & Bland, P.A., by Michael David Bland, for plaintiff-appellees.*

*Wishart, Norris, Henninger & Pittman, P.A., by William A. Navarro and Steven B. Ockerman, for defendant-appellants.*

CALABRIA, Judge.

The instant case involves a second appeal by Danny L. Burris and Environmental Water Solutions, Inc., an Oklahoma Corporation (collectively "defendants"). Defendants appeal from a modified judgment entered awarding Environmental Water Solutions, Inc., a North Carolina Corporation ("plaintiff"), actual damages, punitive damages, treble damages under N.C. Gen. Stat. § 75-16, and treble

damages pursuant to 15 U.S.C.A § 1117. We remand in part and affirm in part.

The complete facts are set forth in *Waldon v. Burris*, COA No. 04-598, 2005 WL 1949624 (2005) ("*Waldon I*"). The facts relevant to this appeal are as follows: Grace Waldon and Environmental Water Solutions, Inc. a North Carolina Corporation (collectively "plaintiffs") brought an action against defendants alleging (1) misappropriation of corporate opportunity, (2) constructive fraud, (3) constructive trust, (4) unfair and deceptive practices and (5) violation of the Lanham Act. These claims arose in connection with a contract procured by defendants to operate a waste water treatment facility on the Tinker Air Force Base in Oklahoma.

In 1998, Grace Waldon ("Grace") and her husband, Jesse Waldon ("Jesse"), began an unincorporated business to act as the sales and marketing arm of their current business. Danny Burris ("Burris") was authorized to act as a selling agent in Oklahoma for the business and negotiated a contract for waste management at Tinker Air Force Base. Subsequently, the Waldons incorporated their company as Environmental Water Solutions, Inc. ("EWSI-NC") in June of 1998.

In March of 1999, defendant Burris incorporated his own company in Oklahoma and named it Environmental Water Solutions, Inc. ("EWSI-OK"). In the spring of 2000, defendants Burris and Jesse held a shareholders meeting for EWSI-NC in which they redistributed the shares of the company. Prior to the shareholder meeting, Grace owned 51% of the company and Jesse owned 49% of the

company. After the meeting, Jesse owned 51% of the company and Burris owned 49% of the company. Grace was unaware that the meeting had occurred or that ownership of the company had been redistributed.

In April 2000, EWSI-NC's bid to manage the wastewater treatment plant at Tinker Air Force Base was accepted. Instead of signing the contract in the name of plaintiff, EWSI-NC, Burris signed the contract in the name of his company, EWSI-OK.

In August of 2000, Jesse informed Grace that he had issued her shares of EWSI-NC to himself and the remaining shares to Burris and that he sent the corporate records to Oklahoma. Grace requested that the records be returned to North Carolina. Grace regained control of EWSI-NC and instituted an action against Jesse, Burris, and EWSI-OK as an individual, and on behalf of the corporation. At trial Grace testified that the EWSI-NC records indicated Burris and Jesse conspired to cut her out of her profits in the contract by taking control of EWSI-NC. At the close of all the evidence, the plaintiffs were granted a directed verdict against Jesse based upon the entry of default taken against Jesse and the evidence presented in the case. The jury returned a verdict against defendants and awarded damages to plaintiffs.

In their initial appeal, defendants assigned error to the portion of the judgment entered awarding treble the amount of \$1,114,000.00 in damages under Issue #6 because those damages were not awarded for violation of N.C. Gen. Stat. § 75-1.1. A separate panel of this Court held that the following questions submitted to

the jury established a *prima facie* case of unfair and deceptive practices and that there was an error in the damages awarded. The damages awarded under Issue #12 were the damages that the trial court should have trebled:

9. Did the defendant do (**at least one of**) the following:

(1) Secretly take the Tinker AFB contract from EWSI-NC and divert the contract to [EWSI-OK], or

ANSWER: YES

(2) Wrongfully obtain the Tinker AFB contract by submitting supporting documents either procured from or prepared by agents of EWSI-NC, or

ANSWER: YES

(3) Wrongfully obtain the Tinker AFB contract by claiming [EWSI-NC's] skilled employees, or

ANSWER: YES

(4) Violate the provisions of 18 U.S.C. 1001?

ANSWER: YES

10. Was the defendant's conduct in commerce or did it affect commerce?

ANSWER: YES

11. Was the defendant's conduct a proximate cause of the plaintiff's injury?

ANSWER: YES

12. In what amount, if any, has the plaintiff EWSI-NC been injured?

ANSWER: \$75,000.00

Upon remand, the trial court corrected the error and trebled the damages awarded under Issue #12. However, the trial court went further and awarded damages under Issue #8 and punitive damages under Issue #16. Defendants appeal from the amended judgment. Defendant Jesse Waldon did not appeal.

*I. Punitive Damages*

Defendants initially assign error to the punitive damages awarded under issue #16(a), which reads:

16(a) What amount of punitive damages, if any, does the jury in its discretion award to the plaintiff EWSI NC?

ANSWER:\$300,000.00

Defendants argue that plaintiffs may not recover treble damages under Issue #12 for violation of N.C. Gen. Stat. § 75-1.1 and the punitive damages awarded under Issue #16(a) because both awards are based upon the same conduct. We agree.

"Where the same source of conduct gives rise to a traditionally recognized cause of action . . . and as well gives rise to a cause of action for violation of G.S. 75-1.1, damages may be recovered either for the [traditionally recognized cause of action] or for violation of G.S. 75-1.1, but not for both." *United Laboratories v. Kuykendall*, 335 N.C. 183, 191-92, 437 S.E.2d 374, 379 (1993). One aspect of the doctrine of election of remedies is that it prevents double redress for a single wrong. *Id.* at 192, 437 S.E.2d at 374. "Thus, a party may not recover punitive damages for tortious conduct and treble damages for a violation of Chapter 75 based on that same conduct." *Id.*

Plaintiffs' allegations against defendants included a claim of constructive fraud and a claim of unfair and deceptive practices under N.C. Gen. Stat. § 75-1.1. In order to establish a claim of constructive fraud, plaintiffs had to establish "proof of circumstances in which (1) the parties to a transaction [had] a special confidential or fiduciary relationship, and (2) [the]

special relationship surrounded the consummation of the transaction in which the defendant is alleged to have taken advantage of [the] position of trust to the plaintiff's detriment." *Stephenson v. Warren*, 136 N.C. App. 768, 773, 525 S.E.2d 809, 812 (2000). In order to prevail on a claim of unfair and deceptive practices under N.C. Gen. Stat. § 75-1.1, plaintiffs had to establish that "(1) defendants committed an unfair or deceptive act or practice, (2) in or affecting commerce and (3) plaintiff was injured as a result." *Phelps-Dickson Builders, L.L.C. v. Amerimann Partners*, 172 N.C. App. 427, 439, 617 S.E.2d 664, 671 (2005).

In the case before us, the same conduct gave rise to plaintiffs' claims of both constructive fraud and unfair and deceptive practices. Defendant Burris, as plaintiffs' agent in Oklahoma, was in a special fiduciary relationship with plaintiffs. This relationship placed defendant Burris in a position to negotiate the contract with Dynpar on behalf of plaintiffs. However, he used his position to obtain the contract for the benefit of his corporation, EWSI-OK, thereby taking advantage of his position of trust with plaintiffs. Further, this same conduct established defendant's unfair and deceptive practice in or affecting commerce by using his position of trust to procure a contract intended for plaintiffs. Plaintiffs were injured as a result.

Plaintiffs argue that to prove punitive damages, a plaintiff must prove an element of intentional conduct and because a claim under § 75-1.1 does not require intentional conduct, the conduct

necessary to prove a claim under § 75-1.1 is different from conduct that may necessitate a punitive damage award. We disagree.

Although § 75-1.1 may not require that a party intended its actions to violate § 75-1.1, intentional conduct may constitute a violation of § 75-1.1. This same intentional conduct may both violate § 75-1.1 and be the basis for an award of punitive damages. When the same conduct supports an award of treble damages based upon a violation of G.S. § 75-1.1 as well as an award of punitive damages, a plaintiff is required to elect between the two awards. See *United*, 335 N.C. at 191-92, 437 S.E.2d at 379. The trial court erred by awarding plaintiffs both treble damages and punitive damages. We therefore remand to the trial court for entry of judgment in accordance with this opinion.

## *II. Amended Judgment*

Defendants next assign error to the trial court's inclusion of damages awarded pursuant to issue #8 in the amended judgment when those damages were not included in the original judgment. Issue #8 reads as follows:

8. What amount of money damages is the plaintiff EWSI NC entitled to recover from Defendants for wrongful use of the name Environmental Water Solutions, Inc.?

Answer:\$100,000.00

Defendants argue that the trial court's judgment exceeded the scope of the mandate issued by this Court in *Waldon I*. We disagree.

"As a general rule, when an appellate court passes on questions and remands the case for further proceedings to the trial court, the questions therein actually presented and necessarily



involved in determining the case, and the decision on those questions become the law of the case." *Creech v. Melnik*, 147 N.C. App. 471, 473, 556 S.E.2d 587, 589 (2001) (internal quotation omitted). "However, the law of the case doctrine does not apply to dicta, but only to points actually presented and necessary for the determination of the case." *Id.* at 474, 556 S.E.2d at 589.

In *Waldon I*, the question before this Court was whether the damages awarded pursuant to issue #6 were awarded based on a violation of § 75-1.1 and could be trebled under § 75-16. This Court held that issue #6 was not awarded based upon a violation of § 75-1.1 and could not be trebled but that the damages awarded pursuant to issue #12 were awarded for violation of § 75-1.1 and were the damages to be trebled. The opinion in *Waldon I* specifically addressed the issue of trebling the damages awarded pursuant to issue #6 but not the damages awarded under issue #8. The law of the case doctrine did not preclude the trial court from considering the damages awarded pursuant to issue #8. *See Creech*, 147 N.C. App. 471, 556 S.E.2d 587 (holding that the law of the case doctrine did not prevent the trial court from considering whether the attorney could contract on behalf of the minor and whether the contract was valid because the prior appeal addressed only whether the summary judgment motion was properly granted). Thus, the trial judge had the authority to enter a new judgment which included the damages awarded under issue #8.

Remanded in part, affirmed in part.

Judges HUNTER and HUDSON concur.

The Judges participated in this decision and submitted this opinion for filing prior to 1 January 2007.

Report per Rule 30(e).