

No. COA 15-1103

TWENTY-SEVENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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JOSEPH LEE GAY, Individually and on )  
Behalf of All Persons Similarly Situated, )

Plaintiff, )

v. )

From Lincoln County

PEOPLES BANK, )

Defendant. )

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PLAINTIFF-APPELLANT'S BRIEF

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debit before the credit, which resulted in a temporary negative balance (\$170.69 – \$248.79) or the Bank charged an overdraft fee on a positive account. *See* (R E p 1572). The contract prohibited both. Accordingly, the Court should reverse the lower court’s faulty and impermissible factual determination and should remand for trial Mr. Gay’s contract claims concerning hold fees, overdraft fees on positive accounts, and the Bank’s practice of posting debits before credits.

IV. THE LOWER COURT ERRED IN DISMISSING MR. GAY’S UNFAIR AND DECEPTIVE TRADE PRACTICES CLAIM BECAUSE THE BANK MISREPRESENTED TO CUSTOMERS THAT DEBITS WERE POSTED CHRONOLOGICALLY AND VICTIMIZED CUSTOMERS TO MAXIMIZE UNAUTHORIZED FEES

The lower court erred in dismissing Mr. Gay’s Unfair and Deceptive Trade Practices Act, N.C. GEN. STAT. §§ 75-1.1 *et seq.* (“UDTPA”), claim because (1) the controlling documents prohibited the Bank’s overdraft scheme, *see supra* Parts II-III, and (2) even if the Bank technically disclosed its reordering and hold fee scheme, its practices were nevertheless *unfair and deceptive*.

Significantly, the Bank’s own employees acknowledged that its overdraft scheme is both unfair and deceptive. *See* (R E pp 1542-45) (Ollis acknowledged that immediately memo posting debit transactions to customers’ online banking accounts is deceptive.); (R E p 1552) (Ollis acknowledged that only a single peer bank charged hold fees, expressed concern that this practice was unfair and deceptive, and acknowledged that online memo posting was a “source of

confusion” for customers.); (R E pp 1547-50) (notes from a Board meeting indicating that there was no “good way” to explain to the Bank’s customers why information on the online banking website appears differently than how the Bank actually posts transactions). Reversing the lower court’s summary judgment is necessary because even if the contract permitted the Bank’s actions, the Bank must still “employ good business practices which are neither unfair nor deceptive.” *Nelson v. Hartford Underwriters Ins. Co.*, 177 N.C. App. 595, 609, 630 S.E.2d 221, 231 (2006).

Establishing a violation under UDTPA requires, *inter alia*, an unfair or deceptive act or practice. *Walker v. Fleetwood Homes of North Carolina, Inc.*, 362 N.C. 63, 71-72, 653 S.E.2d 393, 399 (2007). In determining whether an act is unfair or deceptive, a court “must look at the facts surrounding the transaction[,] the impact on the marketplace,” *Bernard v. Cent. Carolina Truck Sales, Inc.*, 68 N.C. App. 228, 230, 314 S.E.2d 582, 584 (1984), and its effect on an average consumer. *Canady v. Mann*, 107 N.C. App. 252, 260, 419 S.E.2d 597, 602 (1992). “A practice is deceptive if it has the capacity or tendency to deceive.” *Walker*, 362 N.C. at 72, 653 S.E.2d at 399 (internal alteration omitted). A practice is unfair when it “is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.” *Id.* (citation and internal quotation marks omitted).

Here, the EFT Disclosures unambiguously provide that customers should treat debit transactions as “immediate” and “simultaneous” withdrawals. *See supra* Part II. The Bank furthered its unfair and deceptive scheme by displaying debit transactions in real-time to a customer’s online account immediately after a transaction occurred (even on weekends). *See* (R pp 297, 321, 375). This *reinforced* the average consumer’s understanding that the Bank processed debit transactions chronologically. *See* (R E pp 1542-45) (A long-time customer indicated to Ollis that the Bank’s disclosures and memo posting practice represented that electronic debits were processed chronologically); (R p 376) (Ollis admitted that customers should treat electronic debits as instantaneous debits from their account). Contrary to these representations, however, the Bank always posted debits from highest to lowest amount without regard for the order customers initiated them, (R p 323), increasing the number of fees. (R pp 373). Moreover, the Bank amplified the effect of its scheme by posting debits before credits to quickly deplete accounts. *See supra* Part III (citing R E p 1572). This practice even created unauthorized overdraft fees on positive accounts. *See* (R E p 1572) (Mr. Gay was charged a \$34 overdraft fee on 9 January 2012 that he could not have incurred but for the Bank posting debits before credits).

The Bank also charged Mr. Gay hold fees even though Mr. Gay did not overdraw his account and maintained a positive balance throughout the day. *See*

*supra* Part III; *see also* (R E p 1556) (the Bank charged Mr. Gay an unauthorized \$32.00 hold fee for a single \$9.23 purchase made against a \$17.60 balance on 21 August 2008.); (R E p 1561) (the Bank charged Mr. Gay an unauthorized \$33.00 hold fee due to a single \$4.40 purchase made against a \$5.39 balance on 17 October 2008).

The Bank's unfair and deceptive overdraft scheme unquestionably victimized consumers. The Bank abused its power and position over Mr. Gay to elicit undue profits. *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 264, 266 S.E.2d 610, 622 (1980) ("A party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position."), *abrogated on other grounds by Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988). Indeed, almost every court throughout the country considering analogous state consumer protection claims, and *at least one court considering North Carolina's UDTPA*, has found similar overdraft schemes to be unfair or deceptive. *See, e.g., In re Checking Account Overdraft Litig.*, 694 F. Supp. 2d 1302, 1325-26 (S.D. Fla. 2010) (holding that plaintiffs stated a claim under North Carolina's UDTPA in an analogous overdraft case because the bank *applied* the contract unfairly); *In re Checking Account Overdraft Litig. (MDL)*, 2013 WL 5774287, at \*14 (unpublished) (denying summary judgment, holding that the overdraft scheme was unfair given the

purposely *vaguely-worded* account agreements); *In re HSBC Bank, USA, N.A., Debit Card Overdraft Fee Litig.*, 1 F. Supp. 3d 34, 56 (E.D.N.Y. 2014) (holding that the bank's practice of always ordering debit transactions from high to low constituted a *bad faith application* of the contract and unfair conduct under California's consumer protection statute); *Hughes v. TD Bank, N.A.*, 856 F. Supp. 2d 673, 680-81 (D.N.J. 2012) (finding that the bank's practice of always reordering debit transactions high to low was "outside the norm of reasonable business practice in that it will victimize the average consumer" in holding that plaintiff stated a claim under New Jersey's consumer protection statute); *White v. Wachovia Bank, N.A.*, 563 F. Supp. 2d 1358, 1369 (N.D. Ga. 2008) (holding that plaintiffs stated a claim under Georgia's analogous consumer protection statute where the bank shrouded its overdraft scheme in "broadly worded 'largest-to-smallest'" language).

Accordingly, the lower court erred in holding that the Bank's overdraft scheme is neither unfair nor deceptive or that there are no genuine issues of material fact.<sup>5</sup>

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<sup>5</sup> Should this Court find that the lower court erred in granting summary judgment on Mr. Gay's conversion claim, *see infra* Part V, the Court should also reverse the lower court's dismissal of Mr. Gay's UDTPA claim because "[a]cts of conversion may constitute unfair and deceptive trade practices." (R p 115) (Murphy, J.).