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SUPREME COURT OF ARKANSAS

No. CV-17-377

APPRENTICE INFORMATION SYSTEMS, INC., AND DAVID RANDALL LAMP A/K/A RANDY LAMP APPELLANTS V. DATASCOUT, LLC APPELLEE	Opinion Delivered: April 26, 2018 APPEAL FROM THE BENTON COUNTY CIRCUIT COURT [NO. 04CV-13-1075-5] HONORABLE XOLLIE DUNCAN, JUDGE REVERSED.

ROBIN F. WYNNE, Associate Justice

Apprentice Information Systems, Inc., and David Randall Lamp (collectively, "AIS") appeal from a final judgment awarding damages to appellee DataScout, LLC. This appeal is a companion to two other appeals decided today, *Apprentice Information Systems, Inc. v. DataScout, LLC*, 2018 Ark. 284 (Case No. CV-16-575) (interlocutory appeal of injunction) and *Apprentice Information Systems, Inc. v. DataScout, LLC*, 2018 Ark. 280 (Case No. CV-17-514) (appeal of attorney-fee award). For the reasons that follow, we reverse.

The trial in this case was bifurcated, and the facts leading to the finding of liability and the award of injunctive relief are recited in Case No. CV-16-575. Following the trial on liability, the circuit court entered its findings of fact and conclusions of law on May 23, 2016. The court found that AIS had violated the Freedom of Information Act (FOIA), Ark. Code Ann. §§ 25-19-101, et seq., and the Arkansas Deceptive Trade Practices Act

(ADTPA), Ark. Code Ann. §§ 4-88-101 et seq., and had tortiously interfered with DataScout's business expectancy.

A bench trial was held on the issue of damages on October 31, 2016. The circuit court entered its amended findings of fact and conclusions of law on January 26, 2017,[1] and its judgment on January 27, 2017.[2] The court awarded DataScout $632,526 in compensatory damages for AIS's violation of the ADTPA and its intentional interference with a valid contractual relationship or business expectancy. The court awarded punitive damages in the amount of $1,265,052. AIS presents the following points on appeal: the circuit court clearly erred in (1) finding that AIS violated the ADTPA; (2) finding that AIS engaged in tortious interference with a valid business expectancy; (3) awarding punitive damages; (4) finding that AIS is an undeclared *de facto* custodian of records for the counties it serves; and (5) concluding that county officials are not indispensable parties to this case. AIS challenges the circuit court's findings on liability, and for the reasons set out in Case No. CV-16-575, we reverse the findings that AIS engaged in tortious interference with a valid business expectancy and that it violated FOIA.

The remaining claim, violation of the ADTPA, is also reversed for the reasons that follow. The circuit court concluded that AIS had violated the ADTPA "by engaging in

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[1] The findings of fact and conclusions of law entered on May 23, 2016, following the trial on liability were incorporated by reference into the amended findings of fact and conclusions of law regarding damages.

[2] An amended and restated judgment was entered on November 13, 2017.

unconscionable, false or deceptive acts, in conducting its business with county collectors and assessors across the State of Arkansas." The court went on to find as follows:

> AIS and Lamp have violated the Arkansas Deceptive Trade Practices Act and tortuously [sic] interfered with DataScout's business expectancy in the following ways:
>
> (a) AIS knew that DataScout was a competitor in providing bulk data to companies and individuals;
>
> (b) AIS knew that DataScout was a competitor in creating websites for Arkansas county officials that provided free public access to public data;
>
> (c) AIS knew that DataScout's business model and business goal was to have a one-stop shop of public data available for paid subscribers and that to provide its services, DataScout required public data at a reasonable fee and within a reasonable time after a request for that data;
>
> (d) AIS knew DataScout wanted access to the bulk data for AIS's 66-67 Arkansas collector clients;
>
> (e) AIS failed to act promptly on and interfered with DataScout's request for collector data;
>
> (f) DataScout is a consumer. During the business to business negotiations between the parties, AIS admitted its intent was to provide goods (data) and services to DataScout, even though the proposed business to business relationship initially anticipated failed, AIS was for all intents and purposes providing goods (data) to DataScout when the county official was unable to extract the data requested; AIS used the county officials who had the bulk data extract function as a "straw man"; AIS extracted the data, sent it to the county to forward to DataScout or allow DataScout to access; AIS set the floor price for the county official to charge DataScout;
>
> (g) AIS was the *de facto* custodian of the records requested by DataScout and held itself out as the custodian of the requested records instead of notifying DataScout pursuant to Ark. Code Ann. § 25-19-105(a)(3);
>
> (h) AIS failed to provide collector records to DataScout even though permission had been given by the majority of AIS's collectors by December 1, 2011,

and further failed to provide DataScout the White County collector's records even though the collector specifically directed AIS to make these records available to DataScout;

(i) AIS established a business model that allowed AIS to have complete control over county officials' bulk data while the county officials did not have complete control over that data unless they obtained a bulk data extract function; even though AIS developed a bulk data extract function for its assessor clients, those clients could not extract personal property assessor data even if they had the bulk data extract function;

(j) Only a small minority of AIS's 100+ assessor and collector clients obtained the bulk data extract function; AIS actively discouraged its clients from obtaining the bulk data extract function with· claims of potential problems and the high cost to obtain the bulk data extract function; moreover, AIS claimed that it relied on the income it received from mortgage companies to hold down the clients' maintenance costs;

(k) As long as its clients did not have the bulk data extract function, AIS remained the "gatekeeper" for requests for public data; AIS had complete control over the clients' databases while the clients could not extract public data in electronic form;

(l) By remaining the "gatekeeper" for clients without a bulk data extract function, AIS was able to set the price paid by requestors for public data; as an alternative to the bulk data extract function for responding to FOI requests, AIS offered its assessor and collector clients Option 1, whereby AIS extracted the data requested; collector clients were told that choosing Option 1 meant "no out of pocket cost" to the county; AIS told its assessor clients that if they chose to pay an annual fee for AIS to extract data for requestors (Plaintiffs' Exh 7- Option 2), such an option might "prevent the County from being reimbursed for the FOI expense"; no such warning was stated if assessors chose Option 1 that like the collectors' Option 1 "allows the County [to] receive payment for the download expense prior to releasing the file."

(m) AIS did not out-compete DataScout by lowering its fees charged to paid subscribers; instead, AIS effectively set the fees that DataScout had to pay for public data, fees that were far in excess of what DataScout obtained like data from county officials who had a bulk data extract function, and who had complete control over their data; by setting the high fees that DataScout had to pay to obtain public data

that only AIS had complete control over, AIS also effectively reduced the frequency that DataScout could obtain fresh data, a key to paid subscribers;

(n) Prior to 2014, AIS had unfettered access to its clients' data at no cost while both before and after 2014, AIS was able to ensure that DataScout was paying AIS's high shop rates for data when only AIS, not the county official, could extract the data requested;

(o) All of DataScout's requests for data were proper FOI requests;

(p) AIS decided that it was not required to file a FOI request to obtain public data (Exh 16, Notes p. 2 of 6); none of the companies to whom AIS was selling the data were ever required to file a FOI request to obtain the public data requested; AIS decided whether or not a request was a FOI request and further decided whether the request was to be considered a "special request" pursuant to Ark. Code Ann. § 25-19-109.

On appeal, AIS contends that it did not engage in any false or deceptive conduct and that the circuit court erroneously rested its decision on perceived wrongful conduct toward the counties, not DataScout. Furthermore, AIS argues that the ADTPA applies only to consumer-oriented practices, and none was proven here. The ADTPA prohibits any "unconscionable, false, or deceptive act or practice in business, commerce, or trade." Ark. Code Ann. § 4-88-107(a)(10) (Repl. 2011). The elements of such a cause of action are (1) a deceptive consumer-oriented act or practice which is misleading in a material respect and (2) injury resulting from such act. *Skalla v. Canepari*, 2013 Ark. 415, at 14, 430 S.W.3d 72, 82 (citing Ark. Code Ann. § 4-88-113(f)). Here, the circuit court clearly erred in finding that DataScout was a consumer for purposes of the ADTPA. AIS and DataScout were competitors in the market of selling counties' public data, and there is simply no "consumer-oriented act" as required for a cause of action under the ADTPA. *See Skalla*,

supra; *Stonebridge Collection, Inc. v. Carmichael*, 791 F.3d 811 (8th Cir. 2015) (trial court properly dismissed ADTPA claim where the plaintiff failed to establish that defendants' acts of conversion and fraud were consumer-oriented or impacted consumers in any way). DataScout argues for a broader interpretation of the ADTPA and relies on *Baptist Health v. Murphy*, 365 Ark. 115, 226 S.W.3d 800 (2006). In that case, this court affirmed the circuit court's finding of an ADTPA violation for the "unconscionable" policy of denying practice rights to physicians who held ownership interests in another local hospital, where Baptist Health had the "upper hand because of exclusive-provider contracts" and the "power to disrupt the relationships between patients, who are at Baptist's mercy, with their physicians." We find that case to be distinguishable in that the patient-consumers' rights were at the heart of the unconscionable conduct, whereas here, DataScout sued over its thwarted business model, not a specific harm to consumers. Accordingly, we reverse the circuit court's finding that AIS violated the ADTPA and the award of compensatory damages.

Finally, having no basis to award compensatory damages, the circuit court erred in awarding punitive damages to DataScout. *Bayer CropScience LP v. Schafer*, 2011 Ark. 518, at 13, 385 S.W.3d 822, 831 ("[P]unitive damages are dependent upon the recovery of compensatory damages, as an award of actual damages is a predicate for the recovery of punitive damages."). The judgment is reversed in its entirety.

Reversed.

Friday, Eldredge & Clark, LLP, by: *William A. Waddell, Jr.*, *Robert S. Shafer*, and *Joshua C. Ashley*, for appellants; and

Ryan Owsley, for appellants.

H. Clay Fulcher; *The Lingle Law Firm*, by: *James G. Lingle*; and *Brian G. Brooks, Attorney at Law, PLLC*, by: *Brian G. Brooks*, for appellee.