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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2023-001661

Brandi Clarkson, Appellant,

v.

J. King Real Estate, LLC and Jason Ernest King, Respondents.

INITIAL REPLY BRIEF

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INTRODUCTION

The Respondents are satisfied with Clarkson's Statement of Issues on Appeal. *See* Rule 208(b)(2), SCACR. Clarkson, however, is not satisfied with the Respondents' presentation and analysis of Clarkson's South Carolina Unfair Trade Practice Act ("SCUTPA") claim, nor their presentation of the facts.

ARGUMENT

I. THE DISPOSITION OF THIS CASE IS CONTROLLED BY *BENEFICIAL FINANCIAL, I, INC.*

The Respondents' three-page table of authorities belies their insistence that this case is merely a "simple contractual dispute." Conspicuously absent from this table of authorities, however, is *Beneficial Financial I, Inc. v. Windham*, 431 S.C. 256, 847 S.E.2d 793 (Ct. App. 2020).

In *Beneficial Financial I, Inc*, the South Carolina Court of Appeals observed that a SCUTPA claim can arise from a breach of contract. In that case, this court held, in pertinent part,

> In its answer, Beneficial admitted it was in the business of providing mortgages to homeowners. According to the pleadings and Windham's affidavit, Beneficial force-placed hazard insurance on Windham's home in breach of its contract with Windham, prejudicing Windham by raising his mortgage payments so substantially Windham was no longer able to pay down his principal. Instead, Windham found himself with a pending foreclosure. Beneficial's unfair practice of force-placing hazard insurance in violation of a mortgage contract has the potential for repetition... [t]herefore, we affirm the circuit court's grant of summary judgment to Windham on his counterclaim against Beneficial for a violation of the SCUTPA.

Id. at 270, 847 S.E.2d at 801.

As far as the State of South Carolina is concerned, the issue is settled: a breach of contract can serve as the basis for a SCUTPA claim. *Id.* Where the breach is offensive to public policy or is immoral, unethical, or oppressive, and the method of breach is capable of repetition, a breach of contract gives rise to a valid SCUTPA claim. *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 489 (Ct.App. 2006); *see Crary v. Djebelli*, 329 S.C. 385, 388, 496 S.E.2d 21, 23 (1998). Clarkson presented evidence that the Respondents breached a contract in a manner that a reasonable jury could find offensive to public policy or immoral, unethical, or oppressive. Clarkson further presented evidence that this breach is capable of repetition and has, in fact, been repeated. Therefore, Clarkson presented sufficient evidence for her SCUTPA claim to be sent to the jury.

Because the holding in *Beneficial Financial I, Inc.* has not been overruled or modified in any way by South Carolina appellate courts to date, it is, at present, the definitive statement on SCUTPA claims stemming from a breach of contract. Despite citing thirty-three (33) separate cases in their brief, including a fifty (50) year-old case from the Seventh Circuit of the United States Court of Appeals, the Respondents failed to find occasion to address controlling precedent.

The Respondents, instead, rely heavily on federal case law to support their arguments on the proper interpretation of the SCUTPA, but the cases the Respondents cite appear, on occasion, to have nothing to do with the arguments propounded. For example, the Respondents claim that there is a distinction between "legal and colloquial 'unfairness'" under the SCUTPA, and argue that the "Appellant never presented evidence of legal 'unfairness,' which is why her [SC]UTPA [*sic*] necessarily failed." (Initial Br. Resp't, p. 20). In support of this proposition, Respondents cite *Wingard v. Exxon Co., U.S.A.*, 819 F. Supp. 497 (D.S.C. 1992). *Wingard*, in turn, cites *Miller v. W.H. Bristow, Inc.*, 739 F. Supp. 1044, 1055 (D.S.C. 1990) for the claim that "[t]he SCUTPA does not prohibit all business activities that someone may consider 'unfair.'"

A cursory review of *Miller* reveals that the text quoted by the Respondents is simply a musing on the distinction between societal norms and individual feeling; unfairness, in the context of the SCUTPA, is not dictated by the "plaintiff's perspective." *Id.* at 1054.

More importantly, no distinction between "legal and colloquial unfairness" is articulated in *Miller*, and none is articulated in *Wingard*. No distinction between "legal and colloquial unfairness" has been articulated by *any* South Carolina court in the context of the SCUTPA. This distinction was fabricated whole cloth by the Respondents.

The Respondents further claim that "Judge Hocker properly considered and relied upon" *Wingard* to find that the Appellant's SCUTPA claim "necessarily failed" because the "Appellant never presented evidence of legal 'unfairness.'" (Initial Br. Resp't, p. 20). If this is true, then the Respondents merely admit one more way in which the trial court misunderstood and misapplied the SCUTPA, thereby supporting the Appellant's argument that the trial court's grant of directed verdict as to its SCUTPA claim was controlled by an error of law.

In their initial brief, the Respondents insinuate that an unfair trade practice must be a "public-facing trade practice." (Initial Br. Resp't, p. 27). Once again, Respondents' attempt to manufacture a split between genera of unfairness is devoid of legal support. There is no basis in South Carolina law for distinguishing "public-facing" trade practices from other unfair trade practices, and the plain language of the SCUTPA undercuts the Respondents' attempt.

§ 39-5-10(b) provides that "trade" or "commerce" in the context of the SCUTPA "shall include any trade or commerce *directly or indirectly affecting the people of this State*." [emphasis added]. For purposes of applying the SCUTPA, it does not matter if a deal in which unfair practices are employed "is a private deal;" if the unfair act or practice even *indirectly* affects the people of the State of South Carolina, it may give rise to a SCUTPA claim. (T. p. 257, lines 11 -14). If the

legislature had intended the SCUTPA to apply to only those unfair trade practices that are "public-facing" or affecting consumers, it would have placed the Act in Title 37. It did not, and therefore, the Respondents' argument that their breaking of a "private" contract with Clarkson, "even if it was intentional, willful, and malicious... is insufficient to fall within the definition of unfair or deceptive act" is dead wrong. (T. p. 258, lines 1 – 7). As the Court of Appeals found in *Beneficial Financial, I, Inc.*, a malicious breach of a "private" contract is sufficient to sustain a SCUTPA claim.

Although the Respondents concede that they are engaged in trade and commerce and that their conduct is capable of repetition, they maintain that their conduct is not unfair, citing differences between their actions and those described in other South Carolina cases. (Initial Br. Resp't, p. 27).

The Respondents' conduct need not mirror the conduct of previous litigants in order to be "unfair" within the meaning of the SCUTPA. As there are an infinite number of ways to answer a mathematics problem incorrectly, so, too, are there endless ways in which parties can deviate from fair conduct in trade and commerce. Even so, there are striking similarities between the evidence of unfairness presented at trial and the evidence recounted in other South Carolina cases. As in *Beneficial Financial I, Inc.* and *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 595 S.E.2d 461 (2004), this case, at its core, is about a stronger party using its position of strength in an asymmetrical relationship to abuse a weaker party.

In *Beneficial Financial, I, Inc.*, the stronger party, a mortgage company, abused the weaker, a mortgagee, by force-applying hazard insurance on the mortgagee's home in breach of their contract, thereby unduly financially burdening the mortgagee. 431 S.C. at 270, 847 S.E.2d 801. In *Singleton*, the stronger party, a car dealership, presented the weaker party, a consumer, with

contradictory adhesion contracts, purporting to have both sold a vehicle to the consumer outright while also allowing the dealership to repossess the vehicle. 358 S.C. at 380, 595 S.E.2d at 467.

In this case, the Respondents acted in ways that resemble the actions of the stronger parties in both *Beneficial Financial I, Inc.* and *Singleton*. The Respondents abused their status as the stronger parties by breaching a contract and refusing to disburse funds owed to Clarkson under that contract, thereby unduly financially burdening Clarkson. (T. p. 248, lines 1 – 23). The Respondents further abused their status as the stronger parties by presenting Clarkson with a one-sided adhesion "Settlement Agreement" that contradicted the terms of her Broker-Salesperson Agreement, with the Settlement Agreement presented as the sole remedy for receiving *any* funds due and owing to her. (T. p. 60, lines 9 – 21). The Respondents' breach of contract was no "mere breach," as Respondents represent; it was an oppressive act against a party known to be in need of funds and perceived to be too weak to object. (T. p. 250, lines 21 – 23). Such a breach is well within the scope of the SCUTPA.

A breach of contract can give rise to a claim under the SCUTPA. Clarkson presented copious evidence (identified in detail in the Initial Brief of the Appellant) that King and JKRE engaged in conduct that was offensive to public policy, immoral, unethical, or oppressive and capable of repetition. Therefore, the Court's grant of directed verdict as to Clarkson's SCUTPA claim was erroneous.

II. KING TOOK AWAY OR DIVERTED THE BENEFITS OF ONGOING BUSINESS TO WHICH CLARKSON WAS SOLELY ENTITLED.

The Respondents ignore that under the plain terms of the Broker-Salesperson Agreement, Clarkson was the only party with a reasonable expectation of benefits after "capping." By the time Clarkson represented to King that she intended to leave JKRE, King had congratulated her

for "capping" for the year. Clarkson had earned 100% of her commissions.

King acknowledged that Clarkson had the relationships with client and represented to Clarkson that he was "looking to her to keep the wheels on the bus." (Exhibit 8). When King prohibited Clarkson from communicating with clients under contract with threats of interference, Clarkson suffered the loss of identifiable expectations. *See United Educational Distributors, LLC v. Educational Testing Services*, 350 S.C. 7, 564 S.E.2d 324 n.1 (2002); (Exhibit 10). King succeeded in diverting or taking ongoing business. *Id.*

III. CLARKSON WAS FORCED OUT OF JKRE.

The Respondents mischaracterize Clarkson's departure from JKRE as "quitting." The record reflects that Clarkson was willing to finish up any remaining administrative details, and King represented to Clarkson that he wanted her to do so. (Exhibits 7, 8). However, when King received a demand for adequate assurance of performance in response to his anticipatory repudiation, he prohibited Clarkson from communicating with clients under contract to close with threats of interference. (Exhibits 9, 10).

At trial, Clarkson emphatically denied that she had quit JKRE before finishing the work required to earn her commission, stating, "All of [the transactions] were finished with the exception of going to the closing table." (T. p. 140, lines 21 – 22). Clarkson maintained that she was "kicked out" while she and King negotiated the terms of her exit from JKRE. (T. p. 141, lines 5 – 7).

The implication of the Respondents' claim that Clarkson "quit" is that her choice to depart JKRE was both unilateral and unduly burdensome to JKRE. This implication ignores the evidence in the record that Clarkson had completed all of her duties with regards to the non-novated properties, that Clarkson remained willing to perform duties not required to obtain commissions

at King's request, and that King's conduct subsequent to Clarkson "capping" for 2020 precipitated Clarkson's resignation. (T. p. 56, line 20 – p. 57, line 19 and Exhibit 5).

> Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause.

McGill v. Moore, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009).

The plain language of the Broker-Salesperson Agreement controlled the relationship between Clarkson and JKRE. While Clarkson would have preferred to have attended the closings for Concord Place Road, Old Town Road, and Trinity Three Road, her attendance at closings was a mere courtesy to her clients. Nothing in the Broker-Salesperson Agreement or S.C. Code Ann. § 40-57-5 *et seq.* required her to attend a closing to earn a commission. Instead, Clarkson's commissions were earned when contracts were signed (Broker-Salesperson Agreement par. 4 and 6) and payable upon collection (par. 7 and 8). By the King prohibited Clarkson from communicating with clients under contract, her real estate services for the non-novated properties had been completed.

When the initial complaint was filed, only one transaction, Green Street, had closed. When JKRE failed to pay Clarkson her commission on the Thursday following the closing in accordance with page 6, Section (IV)(2)(f) of the Policy Manual (Exhibit 2), suit was filed on that single breach. Clarkson reserved the right to supplement, with the expectation that the Respondents would honor the Broker-Salesperson Agreement.

Respondents ignore that the initial complaint was limited to a single transaction while suggesting that Clarkson's lawsuit was premature. Respondents contend that they paid partial commissions to Clarkson when they know full well that they did not. (Initial Br. Resp't, p. 6). The

suggestion that Respondents offered to pay any sum with no strings attached is belied by their multiple answers asserting payment and accord and satisfaction as defenses.

CONCLUSION

The Respondents are satisfied with Clarkson's statement of the issues on appeal. The first issue on appeal concerns the standard articulated in *Beneficial Financial I, Inc.*, wherein this Court held that a breach of contract that satisfies the elements of the SCUTPA may serve as the basis for a SCUTPA claim. Clarkson has presented evidence that the Respondents' breach of contract satisfies the elements of the SCUTPA. Therefore, the trial court erred in granting a directed verdict to the Respondents as to Clarkson's SCUTPA claim.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the Initial Reply Brief on J. King Real Estate, LLC and Jason Ernest King by depositing a copy of it in the United States Mail, postage prepaid, on March 11, 2024, addressed to their attorney of record, Shaun C. Blake, Post Office Box 11803, Columbia, South Carolina 29211.

March 11, 2024

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March 11, 2024

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Re: Brandi Clarkson v. J. King Real Estate, LLC and Jason Ernest King
Appellate Case No.: 2023-001661

Dear Shaun:

Enclosed herewith and served upon you as attorney for the Respondents is a copy of the Initial Reply Brief.

Please acknowledge receipt of a copy of this document by signing the enclosed copy of this letter and returning it to me in the envelope provided.

Sincerely,

J. Gregory Studemeyer

Enclosures
cc: The Honorable Jenny Abbott Kitchings via email and Confirmed by U.S. Mail
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