THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY

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.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Appellant's issues on appeal relate solely to the trial court's grant of Respondents' motions for directed verdict and the trial court's denial of Appellant's Motion for New Trial.

This case proceeded to trial on the third version of Appellant's complaint, her Second Amended and Supplemental Complaint dated August 24, 2022 (the "***Third Complaint***", R. p. 107). This pleading asserted three claims: (1) breach of contract against J. King Real Estate, LLC ("***JKRE***"); (2) tortious interference with prospective contractual relations against Jason Ernest King ("***King***"); and (3) violation of the South Carolina Unfair Trade Practices Act ("***UTPA***") against both Respondents. On September 30, 2022, Respondents answered the Third Complaint and asserted affirmative defenses, and JKRE asserted a counterclaim for breach of contract. (R. 119). Neither party filed any dispositive motion in response to these pleadings.

The jury trial in this case began on July 24, 2023. At the close of Plaintiff's case-in-chief, Respondents jointly moved for directed verdict on Appellant's UPTA claim, and King moved for directed verdict on Appellant's claim for tortious interference with prospective contractual relations. (R. 336-380). Judge Hocker duly considered and granted these motions. (Id).

Prior to closings, Appellant moved Judge Hocker to reconsider his grant of Respondents' motions for directed verdict, which Judge Hocker denied. (R. pp. 450-452). On July 26, 2023, Judge Hocker submitted Appellant and JKRE's breach of contract claims to the jury, who awarded Appellant actual damages of $16,338.22 and JKRE actual damages of $379.68. (R. p. 453).

Appellant filed her Motion for New Trial on August 2, 2023. (R. p. 129). Respondents submitted their Memorandum in Opposition to Plaintiff's Motion for New Trial on August 7, 2023. (R. pp. 142 -156). Following a post-trial hearing, Judge Hocker issued a written order denying Appellant's Motion for New Trial on September 18, 2023. (R. pp. 3-18).

STANDARD OF REVIEW

"The grant or denial of new trial motions rests within the discretion of the circuit court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." Brinkley v. S.C. Dep't of Corr., 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct.App.2009). The sole basis of Appellant's Motion for New Trial was Appellant's contention that Judge Hocker erred when granting Respondents' motions for directed verdict. In substance, Appellant's Motion for New Trial was a request for Judge Hocker to reconsider his grant of Appellants' Motions for Directed Verdict and to grant a new trial based on this reconsideration.

When reviewing the trial court's ruling on a motion for a directed verdict, this court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. First S. Bank v. S. Causeway, LLC, 414 S.C. 434, 444, 778 S.E.2d 493, 498 (Ct.App.2015). When the evidence yields only one inference, a directed verdict in favor of the moving party is proper. Id. On the other hand, the trial court must deny a motion for a directed verdict when the evidence yields more than one inference or its inference is in doubt. McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). However, this rule does not authorize the submission of speculative, theoretical, and hypothetical views to the jury. Proctor v. Dep't of Health and Envtl. Control, 368 S.C. 279, 292–93, 628 S.E.2d 496, 503 (Ct.App.2006). The issue must be submitted to the jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror. The Huffines Co., LLC v. Lockhart, 365 S.C. 178, 188, 617 S.E.2d 125, 130 (Ct.App.2005).

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ARGUMENT

A. THIS IS A SIMPLE CONTRACTUAL DISPUTE OVER A DIFFERENCE OF LESS THAN $10,000, WHICH A JURY RESOLVED BY AWARDING APPELLANT $3,187 MORE THAN JKRE TENDERED TO HER, WITH "NO STRINGS ATTACHED," IN OCTOBER 2020.

This case arises out of a dispute over contractual commission splits between a real estate brokerage and one of its salespersons that arose because Appellant quit and went to work for another brokerage firm before six residential transactions that she was working for JKRE closed. (R. pp. 109-110, ¶¶ 20, 22; R. p. 313, line 9 – page 317, line 17). Beginning on May 31, 2018, JKRE and Appellant were parties to a Broker-Salesperson Agreement, that provided, in relevant part:

> 8. Commissions from the party or parties for whom the services may have been performed, shall be distributed ***provided however, that the Salesperson has performed their duties as it relates to that transaction***. The Salesperson also agrees that if he has a balance on his account with Broker that commissions may be retained by Broker for payment of that account. ...
>
> 13. This contract and the association created hereby may be terminated by either party hereto, at any time upon notice given to the other; but the rights of the parties to any commissions which accrued prior to said notice, shall not be divested by the termination of this contract, ***except that the commission of said salesperson on transactions in process, but not closed, may be subject to deductions for necessary client services, clerical and administrative work which will be carried out at the discretion of the Broker.***

(R. 454-456 ¶¶ 8, 13) (emphasis added). Appellant refuses to accept the fact that her contract with JKRE never guaranteed her 100% of the commissions if she chose to quit before the transactions she was working were closed and JKRE was required to do the work to bring those transactions to closing.

The only valid disputes in this case have ever been: (1) whether JKRE breached its contract by withholding the incorrect amount of deductions from Appellant's share of the commissions; and (2) whether JKRE could recover the cost of replacing it locks once Appellant quit. As

explained herein, that dispute is over a difference of ~$6,000, and after three days of trial, a Lexington County jury resolved that dispute. (R. p. 566). JKRE has accepted the verdict and paid its obligation to the trial court pending dismissal of this appeal. (R. pp. 20-22). This appeal is simply Appellant's latest effort to contort a contract dispute into an intentional tort or UTPA claim so she can pursue treble damages, punitive damages, and attorneys' fees; in order to maintain the legal distinctions between contract law and more lucrative litigation under tort doctrines and the UTPA, courts must oppose meritless efforts such as Appellant's. *See* Allied Distributors, Inc. v. Latrobe Brewing Co., 847 F. Supp. 376, 379 (E.D.N.C. 1993) ("Proof of unfair or deceptive trade practices entitles a plaintiff to treble damages, and thus constitutes a boilerplate claim in most every complaint based on a commercial or consumer transaction in North Carolina."); Bessinger v. Food Lion, Inc., 305 F. Supp. 2d 574, 583 (D.S.C. 2003) ("the court cannot find that the defendants' decisions to discontinue selling the plaintiffs' products either offends established public policy or was 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.' If it were, every breach of contract action would give rise to SCUTPA liability."); Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 843 F. Supp. 1027, 1054 (D.S.C. 1993) (quoting East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986) ("The integrity of contract must be maintained, or contract law will 'drown in a sea of tort.'")).

1. Appellant voluntarily terminated the Broker-Salesperson Agreement and left JKRE before the closing of the six transactions at issue in her lawsuit.

Around July 2019, Appellant began to have discussions weekly conversations with Dan Lang ("***Lang***"), the broker-in-charge of another brokerage firm known as Fathom Realty ("***Fathom***"). (R. p. 313, line 9 – p. 317, line 17). In May or June 2020, Appellant set up and attended a meeting with Lang so that she and another JKRE salesperson could evaluate entering into a broker-salesperson agreement with Fathom. (Id). Appellant quit her position with JKRE on

July 9, 2020, and she transferred her salesperson license to Lang, her new broker-in-charge, on July 10, 2020. (R. p. 109, ¶ 20; R. p. 318, line 16 – p. 320, line 19).

On July 13, 2020, Appellant had her attorney write to JKRE and demand "$36,927.0 in commissions on transactions which have not yet closed." (R. pp. 472-473). While this letter acknowledged that the Broker-Salesperson Agreement specifically provides that Appellant's commissions can be reduced as provided in paragraph 13, Appellant dismissed offhand the terms of Appellant's contract, saying: "Simply put, that dog won't hunt." (R. p. 472).

Appellant prematurely filed her lawsuit against JKRE eight days later, claiming that JKRE had failed to pay her commissions even though five of the six transactions that were in progress when she quit had not closed. (R. pp. 540-544). Two of those six transactions – the Whittaker and Sato transactions – became the subject of novation agreements dated July 29, 2020, which transferred the client relationship from JRKE to Fathom. (R. 545-546). Neither Respondent received a penny of commissions to split with Appellant on either transaction; only Appellant and Fathom received commissions from the Whittaker and Sato transactions. (R. p. 292, line 7 – p. 293, line 3; p. 401, line 19 – p. 403, line 8; p. 446, line 3 – p. 448, line 15). The Broker-Salesperson Agreement plainly states that JRKE is never liable for any commission payment to Appellant for a potential closing unless and until JKRE receives a commission from that transaction:

> In no case shall the Broker be personally liable to the Salesperson for any commission, nor shall said Salesperson be personally liable to said Broker for any commissions, but when the commission shall have been collected from the party or parties for whom the service was performed, said Broker shall hold the same in trust for said Salesperson and himself to be divided according to the terms of this agreement.

(R. p. 455 ¶ 7).

Green Street - the only transaction at issue that closed prior to Appellant's lawsuit - closed on July 14, 2023. (R. p. 111 ¶ 31). JKRE paid Appellant 100% of the entire commission JKRE

earned, minus a $50.00 transaction fee that Appellant approved, on July 23, 2020; Appellant accepted this check as "payment in full" of her claim to any commission on the Green Street transaction. (R. p. 112, ¶¶ 38-39; R. p. 327, line 10 – p. 328, line 22; R. p. 476-477). As a result of this accord and satisfaction between JKRE and Appellant, the Green Street commission was not in dispute at trial.

After Appellant quit, King performed 14.75 hours of client services, valued at $2,552, to bring Concord to its closing on July 28, 2020. (R. p. 112 ¶ 40; R. p. 403, line 14 – p. 410, line 18; R. pp. 547-548). However, of the $5,550.00 of commission JKRE earned on the Concord Place closing, JKRE only retained $1,487.50 as provided in paragraphs 8 and 13 of the Broker-Salesperson Agreement; JKRE paid Plaintiff the remaining $4,062.50 in commissions on August 5, 2020, October 1, 2020, and October 12, 2020. (R. p. 403, line 14 – p. 411, line 15; R. pp. 550-554).

Likewise, after Appellant quit, King performed 25.45 hours of client services, valued at $4,403, to bring Old Town to its closings on July 30, 2020. (R. p. 113 ¶ 44; R. p. 406, line 9 – p. 407, line 4; R. pp. 547-548). However, of the $9,411.44 of commission JKRE earned on the Old Town closings, JKRE only retained $2,402.86 as provided in paragraphs 8 and 13 of the Broker-Salesperson Agreement; JKRE paid Plaintiff the remaining $7,008.58 of commission on August 5, 2020, October 1, 2020, and October 12, 2020. (R. p. 403, line 14 – p. 411, line 15; R. pp. 550-554).

Finally, after Appellant quit, King performed 81.5 hours of client services, valued at $14,100, to bring Trinity to its closing on September 25, 2020. (R. p. 114 ¶ 53; R. 407, line 5 – p. 410, line 3; R. pp. 547- 549). However, because the total commission JKRE received was merely $4,260.00, JKRE retained only $2,180.00 as provided in paragraphs 8 and 13 of the Broker-

Salesperson Agreement, and JKRE sent Appellant the remaining $2,080.00 of commission on October 1, 2020, and October 12, 2020. (R. pp. 552-554).

2. Appellant wishes to twist a small contract dispute into a tort and a UPTA claim, but the trial court properly denied her wish.

As detailed above, JKRE performed over $21,000 in client services after Appellant quit, but it retained only $6,070 pursuant to paragraphs 8 and 13 of the Broker-Salesperson Agreement. Since the transactions were closed, Respondents have not disputed that Appellant was entitled to $13,151 of commissions JKRE received from the Concord, Old Town, and Trinity closings. (R. p. 554). However, Appellant refused to cash any of JKRE's commission checks to her for these final three transactions; instead, her attorney repeatedly returned the commission checks to JKRE even after JKRE plainly stated it was tendering the non-disputed payment with "no strings attached." (R. p. 331, line 1 – p. 334, line 6; R. pp. 552, 554;). Specifically, in King's letter to Appellant on October 12, 2020, he stated:

> Your attorney keeps mailing the checks I send you back to the attorney J. King Release Estate had to hire to deal with your frivolous lawsuit against it. I cannot imagine why this money was returned other than some senseless desire to stir disagreement between us and carry on with that premature lawsuit you filed. I have been simply trying to timely issue the payment to you that I have calculated as due under the contract. Your refusal to accept it now without any strings attached is baffling to me.
>
> My letter did not say that you agreed that this was "full payment." I simply said that I believe that this is the full payment J. King Real Estate could owe you (without regard to what you owe it) from the proceeds of the closings referenced on the checks. The amount of the check is the commission paid minus the deductions for necessary client services, clerical and administrative work done by J. King Real Estate after you terminated the contract and filed a lawsuit before these closings occurred. I understand that you disagree that your contract means what it plainly says, and that you feel J. King Real Estate is not entitled to make deductions for the work it had to perform to accomplish those closings after you terminated the contract. This is simply the payment that J. King Real Estate has calculated as due to you on those three closings. If you desire to pursue some frivolous lawsuit against J. King Real Estate and waste both of our time and money, that is a shame, but I suppose the lawyers can sort that out.

(R. p. 554).[1]

Due to the fact Appellant's claims were not ripe when she filed suit, JKRE responded to Appellant's initial lawsuit with a motion to dismiss. (R. pp. 34-35). Faced with this motion and once it became apparent that there was only ~$6,000 of commissions in actual dispute between her and JKRE, Appellant amended and supplemented her Breach of Contract and UTPA claims to assert that JKRE improperly recovered transaction fees from her commissions -- the same transaction fees that Appellant initially pled were part of the established "course of dealing" between her and JKRE. (R. p. 541 ¶ 12).

At trial, Appellant admitted that she completed an Agent Commission Worksheet on every transaction that she closed while she was a Salesperson for JKRE. (R. p. 310, lines 2-24). Each Agent Commission Worksheet that Appellant prepared indicated the actual amount Appellant claimed was due to her from that transaction under the Broker-Salesperson Agreement. (R. pp. 467, 494-538). Each Agent Commission Worksheet was an agreement between JKRE and Appellant establishing the portion of the commission that JKRE is to pay Appellant. (R. p. 421, lines 13-25). At trial, the parties also stipulated as evidence the fact that JKRE recovered forty-four transaction fees (totaling $2,150.00) pursuant to the Agent Commission Worksheets. (R. p. 213, lines 4-24). On forty-two occasions, Appellant's worksheets stated that JKRE was entitled to recover a $50 transaction fee from her part of the commission; and on two occasions, Appellant's worksheets stated that JKRE was entitled to recover a $25 transaction fee from her part of the

[1] Appellant now argues that JKRE's efforts to perform its obligation under the Broker-Salesperson Agreement and deliver what it calculated as due Appellant from each transaction is evidence of an effort to "coerce a fee split," which Appellant contends should be actionable under the UTPA. (App. Br. 23-25). Appellant's faulty reasoning ignores the plain language of the Broker-Salesperson Agreement that describes the fee split and is unsupported by any case precedent.

commission. (Id).

Immediately after she quit and transferred her salesperson license to Lang, Appellant sent an email to King on July 10, 2020, that confirmed JKRE was entitled to continue to recover its transaction fee from the unclosed transactions: "Although you interpret what the contract says much differently I should receive the commission earned ***minus the $50 transaction fee.***" (R. p. 558) (emphasis added). In short, Appellant's mid-litigation claim that she is entitled to recover the transaction fees was a reversal of all her dealings with JKRE prior to her first Amended and Supplemental Complaint.

When Appellant was asked to explain her mid-litigation reversal and contest over the $2,150 of transaction fees, Appellant testified that fighting with JKRE over the transaction fees while she worked for JKRE was simply not worth it, and that she did not ask for the transaction fees until her attorney said, "hey, Brandi, look at this" when lawsuit was already underway:

> Q. And earlier you testified, you told the jury that at every chance you got you contested this $50 transaction fee. At every closing, correct?
>
> A. I did.
>
> Q. Didn't transaction -- you didn't, you didn't argue about it here though, correct? On July 10th when you were setting out what your ask of Mr. King is?
>
> A. Mm hmm.
>
> Q. You didn't contest it then, correct?
>
> A. I was not contesting it then. The thing with the $50 transaction fee is it didn't matter how much you contested it, he wasn't taking it off. Was it worth not getting paid to save -- or was it worth just giving him the $50. It's no different than the argument we just had in here. Some things are just worth it. So, yes, I did dispute it. I put on record I disputed it. But am I going to quit or throw a complete conniption fit over $50? Probably not.
>
> Q. Ma'am, when you filed this lawsuit on July 21st you didn't contest the transaction fee in it, correct?

> A. At that point in time my attorney was aware that I was upset about the transaction fees. But I wasn't quite aware of just how illegal him withholding transaction fees without my consent was. So that's why you see that we didn't ask for the transaction fees until a little bit later when my attorney advised me, hey, Brandi, look at this.

(R. p. 240, line 3 – p. 241, line 7).

Appellant's first Amended and Supplemental Complaint filed on October 29, 2020, also added a claim against JKRE for intentional interference with prospective contractual relations. (R. pp. 38 - 48). When JKRE served an interrogatory asking Appellant to "[i]dentify and describe each expected contract that you have been unsuccessful in acquiring," Appellant merely directed JKRE to paragraphs 1 to 71 of her first Amended and Supplemental Complaint. (R. p. 489, #8.) However, Appellant's pleading makes no mention of any prospective contracts at all, but rather it only refers to the same transactions she put at issue in her breach of contract claim against JKRE. (R. p. 47).

Once Appellant's case came up for trial in February 2022, Appellant filed a Motion to Serve a Second Amended and Supplemental Complaint on February 4, 2022. (R. p. 89). This amendment sought: (1) to add King as an individual defendant; (2) to drop the tort claim against JKRE and make King the target of Appellant's claim for tortious interference with prospective contractual relations; and (3) to amend her UTPA claim to include King as a defendant. (R. p. 89; pp. 99-101, ¶¶ 74-88). JKRE opposed this Motion as an improper amendment and a tactic to delay trial. (R. pp. 102-106).

At the trial in July 2023, Judge Hocker properly granted Respondents' Motion for Directed Verdict on both the tort and the UTPA claim. (R. p. 253, line 23 – p. 368, line 17). The jury considered Appellant's claims to payment for commissions, including her dispute over the transaction fees, as a part of Appellant's claim for breach of contract against JKRE. In addition to awarding JKRE the damages it sought for Appellant's breach of contract, the jury awarded Appellant $16,338.22 on her claim for breach of contract against JKRE. (R p. 407; R. p. 566).

Appellant's award was $3,187 more than the undisputed payment Respondent delivered twice to Appellant, with "no strings attached," in October 2020. (R. p. 553).

B. APPELLANT FAILED TO MEET HER BURDEN TO PRESENT SUFFICIENT EVIDENCE TO SUBMIT HER CLAIM OF TORTIOUS INTERFERENCE WITH PROSPECTIVE CONTRACTUAL RELATIONS TO THE JURY.

In order to submit her claim against King for intentional interference with prospective contractual relations to a jury, Appellant was required to present material evidence tending to establish the following issues in the mind of a reasonable juror: 1) an intentional interference with prospective contractual relations; 2) for an improper purpose or by improper methods; and 3) an injury that results therefrom. Eldeco, Inc. v. Charleston Cty. Sch. Dist., 372 S.C. 470, 480, 642 S.E.2d 726, 731 (2007). Appellant was required to present material evidence that could establish she was "unsuccessful in acquiring an expected contract due to a third party's intentional and wrongful actions." United Educ. Distributors, LLC v. Educ. Testing Serv., 350 S.C. 7, 15, 564 S.E.2d 324, 328 (Ct.App.2002). Appellant failed to satisfy any element of her burden of proof for this claim, and so Judge Hocker properly granted King's Motion for Directed Verdict and denied Appellant's Motion for New Trial.

1. Appellant presented no evidence of a prospective contract.

Appellant has never identified – at trial or in this appeal – a single prospective contract to support her tort claim. (R. p. 6 ¶ 9; App. Br. pp. 28-29). "The plaintiff must actually demonstrate, at the outset, that [she] had a truly prospective (or potential) contract with a third party...." United Educ. Distributors, LLC, 350 S.C. at 16, 564 S.E.2d at 329. Put another way, a "prospective contractual relation is something less than a contractual right, something more than a mere hope. In short, it is a reasonable probability that contractual relations will be realized." Id. at 16, 564 S.E.2d at 329 (quoting SNA, Inc. v. Array, 51 F.Supp.2d 554, 567 (E.D.Pa.1999) (internal

quotations omitted)). Appellant has only ever complained of the fact that she did not receive 100% of the commissions she claims due under the Broker-Salesperson Agreement for the Green Street, Concord, Old Town, and Trinity closings. However, Appellant's rights, if any, arose out of existing contracts; and the actual losses she claims are identical to the losses she seeks in her breach of contract claim against JKRE. For this reason alone, her tort claim failed as a matter of law.

2. As a salesperson, Appellant was not a party to any contract with any real estate client, and she lacked the legal capacity to contract directly with any prospective real estate clients.

More fundamentally, Appellant fails to understand that she never had a contract with any of the clients associated with Green Street, Concord, Old Town, or Trinity, and she lacked the capacity to enter into a contract with these clients – or any other prospective clients –as a matter of law. South Carolina's limitations on her license is fatal to her tort claim.

The rights and relationships of brokerage firms, brokers-in-charge, subordinate salespersons, and clients are governed by a statutory framework that the South Carolina Legislature overhauled in 2016. S.C. Code. Ann. § 40-57-5 to 810 (2017). JKRE is a "real estate brokerage firm." (R. p. 165, lines 3-24); S.C. Code Ann. § 40-57-30(24). King is JKRE's owner and its "broker-in-charge." (Id.; R. p. 206, lines 1-2); S.C. Code Ann. § 40-57-30(4). Appellant became a real estate "salesperson" around May 2018. (R. p. 311, lines 16-20); S.C. Code § 40-57-30(26). Appellant became an "associated licensee" of King once she entered into the Broker-Salesperson Agreement with JKRE dated May 31, 2018. (R. p. 454).

Under our real estate law, "Clients" contract with real estate brokerage firms. S.C. Code Ann. §§ 40-57-30(6); 40-57-135(B). The broker-in-charge is responsible for all associated licensees and for maintaining the real estate trust account. S.C. Code §§ 40-57-135(A); 40-57-136. Associated licensees, like Appellant, cannot contract directly with or accept payment directly from

clients; associated licensees can only sign-up clients for the brokerage firm, and associated licensees can only be paid for activities requiring a real estate license from their broker or brokerage firm. S.C. Code Ann. § 40-57-135(B). In other words, the contract is always between the client and the brokerage firm. S.C. Code Ann. § 40-57-135(E)(1) (stating that Associated licensees "may not advertise, market, or offer to conduct a real estate transaction involving real estate owned, in whole or in part, by another person ***without first obtaining a written listing agreement between the property owner and the real estate brokerage firm with whom the licensee is associated***.") (emphasis added).

Appellant has always known this to be true. Pursuant to S.C. Code Ann. § 40-57-370, an associated licensee is required to provide a "meaningful explanation" of agency relationships offered by the licensee's brokerage firm at the first practical opportunity. S.C. Code Ann. § 40-57-370(A)(2) specifically requires salespersons, like Appellant, to present all potential clients the Disclosure of Brokerage Relationships Form prescribed by the South Carolina Real Estate Commission. At trial, Appellant acknowledged that she understood that none of the client contracts were legally with her, and that she explained this reality to each of the clients associated with the Green Street, Concord, Old Town, and Trinity Road transactions when she presented the Disclosure of Brokerage Relationships Form to them:

> Q. Brandi Clarkson does not enter into real estate agreements with clients. The brokerage firm does, correct?
>
> A. The brokerage firm signs as well, yes.
>
> Q. All right. And you are not a party to that contract at all, correct?
>
> A. Not as far as the signature goes.
>
> Q. Right. When you meet with clients –
>
> A. Mm hmm.

Q. -- South Carolina LLR requires you to give them the Disclosure of Real Estate Brokerage Relationship, doesn't it?

A. Correct.

Q. The first time you meet them, right?

A. Yes.

Q. Okay. And the first substantive conversation you have with them you have to explain to them whose client they are, don't you?

A. Yes.

Q. And in bold you tell them, in other words when you choose to work with any real estate licensee your business relationship is legally with the brokerage firm and not with the associated licensee. Is that right?

A. That's what that says.

Q. You get every client to sign this document, don't you?

A. I do.

Q. And you have Ms. Levine sign this document.

A. Mm hmm.

Q. Mr. Collins, the Millers signed this document. Every client you have ever worked with at the brokerage firm, first you gave this document to them and explained to them they're the brokerage firm's clients, not yours, correct?

A. That's correct.

(R. p. 325, line 24 – p. 327, line 9).

When Appellant transferred her salesperson license to Lang on July 10, 2020, she became his associated licensee. South Carolina's real estate law prohibited Appellant from continuing to work with JKRE's clients once she moved her license on July 10, 2020. S.C. Code Ann. § 40-57-135(C)(3) (stating: "A licensee may not conduct real estate business under another name or at an address other than the one for which his license is issued.") At trial, Lang confirmed that Appellant

could not lawfully perform any work for any of the clients on the Green Street, Concord, Old Town, or Trinity transactions once Appellant transferred her license to him:

> Q. On July 13th, did Fathom Realty have a signed agreement with the owner of the Concord Place property?
>
> A. We did not have a brokerage relationship with the owner of that property.
>
> Q. How about the parties in the transaction of the Green Street property?
>
> A. We did not have a brokerage relationship.
>
> Q. Did you have a brokerage relationship with anyone on the Old Town Road property on July 13th?
>
> A. No, sir. Not that I know.
>
> Q. Did you have a brokerage relationship with anyone on the Trinity Three Road transaction?
>
> A. Not at that time. No, sir.
>
> Q. Not at that time. And on July 13th, Ms. Clarkson was a subagent of Fathom Realty, correct?
>
> A. On July 13th her license was with Fathom Realty.
>
> Q. And at that point you were her broker-in-charge, correct?
>
> A. That is correct.
>
> Q. And on July 13th, was Fathom Realty ready, willing, and able to take all the necessary measures to complete the closings on any of those four transactions?
>
> A. We would have been ready, willing, and able if there would have been a transfer of some sort of agency relationship, but that didn't happen for those transactions.
>
> Q. So you were not able to conduct those transactions on July 13th, correct?
>
> A. Correct.
>
> Q. And was Ms. Clarkson able to conduct those transactions on July 13th?

A. She could not provide services that a real estate brokerage -- I'll put it this way. She could not conduct real estate services for anyone outside of her current brokerage.

Q. Which was Fathom Realty.

A. Correct.

***

Q. I wasn't referring to the earning of commission. I was referring to providing the real estate services necessary to complete these closings. Was she able to perform those with Fathom Realty on July 13th?

A. There would have been no -- on July 13th anything she would have been doing would have been on behalf of Fathom Realty. She can't, she can't work for J. King Real Estate at that time.

Q. She can't work with J. King Real Estate's clients at the time either, correct?

A. That's correct.

(R. p. 443, line 4 - p. 445, line 23). Therefore, Appellant's claim that she was a party to a contract or any potential contract that King could have interfered with is not supported by any evidence or South Carolina's real estate law.

3. Appellant presented no evidence that King did anything other than pursue JKRE's rights and obligations under its contracts with its clients.

"There can be no finding of intentional interference with prospective contractual relations if there is no evidence to suggest any purpose or motive by the defendant other than the proper pursuit of its own contractual rights with a third party." United Educ. Distributors, LLC, 350 S.C. at 14, 564 S.E.2d at 328. King, as JKRE's sole owner and broker-in-charge, is under statutory and fiduciary duties to act on behalf of the brokerage firm and its clients at all times. For example, King is required to supervise all employees and associated licensees to ensure compliance with the real estate laws, and he must prevent and curtail improper practices by those he supervises. S.C. CODE ANN. § 40-57-135(A)(1), (3). King is also obliged to review and approve all forms of

contractual and disclosure documents routinely used by JKRE. S.C. CODE ANN. § 40-57-135(A)(2). Only King is permitted to receive and handle funds paid from a real estate transaction. S.C. CODE ANN. § 40-57-135(A)(7). King is also obligated to be available to the public to discuss or resolve complaints and disputes that arise during the course of real estate transactions being conducted by JKRE's associated licensees. S.C. CODE ANN. § 40-57-135(A)(4). Therefore, none of King's conduct could be wrongful or tortious, since he was required to act on behalf of JKRE and its clients at all time and ensure compliance with South Carolina's real estate laws.

4. Appellant presented no evidence to circumvent King's corporate shield.

Finally, Appellant presented no evidence at trial that King ever acted outside of his professional capacity for the Broker as its sole member and broker-in-charge. Therefore, Judge Hocker properly conclude that Appellant presented no basis for a jury to determine that King was not entitled to the benefit of the corporate shield afforded to him under South Carolina's limited liability company law. S.C. Code Ann. § 33–44–303 ("A member or manager is not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager."); Dutch Fork Dev. Grp. II, LLC v. SEL Props., LLC, 406 S.C. 596, 606, 753 S.E.2d 840, 845 (2012) (an LLC manager may be held personally liable for tortious interference with a contract if it is determined he is acting in his individual capacity as a separate entity from the LLC).

C. APPELLANT FAILED TO MEET HER BURDEN TO PRESENT SUFFICIENT EVIDENCE OF ANY "UNFAIR" TRADE PRACTICE.

The private right of action under the UTPA is a remedy created by the South Carolina Legislature. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or

will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Id.

This court has previously analyzed the South Carolina Legislature's intent in adopting the UTPA:

> The legislature intended in enacting the UTPA to control and eliminate "the large scale use of unfair and deceptive trade practices within the state of South Carolina." ... To this end, the act authorizes the Attorney General to bring an action in the name of the State to enjoin unfair or deceptive acts or practices in the conduct of any trade or commerce when to do so "would be in the public interest." .... The requirement of Section 39–5–140(b) that the clerk of court notify the Attorney General of any action brought by a private party pursuant to Section 39–5–140(a) indicates that the private cause of action created by the latter section was intended by the legislature to serve the same objective and to be similarly restricted in scope.

Noack Enterprises, Inc. v. Country Corner Interiors of Hilton Head Island, Inc., 290 S.C. 475, 477–78, 351 S.E.2d 347, 349 (Ct.App.1986) (internal citations omitted). In S.C. Code Ann. § 39–5–20(b), the Legislature specifically instructs our courts to be guided by the decisions of the Federal Trade Commission and the Federal Courts construing the Federal Trade Commission Act ("***FTCA***").

In construing the FTCA, "most federal courts have applied the definition of 'unfair' set forth in Spiegel, Inc. v. F.T.C., 540 F.2d 287 (7th Cir. 1976)." Bessinger, 305 F. Supp. a 582. "A practice is unfair when it offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." Spiegel, Inc., 540 F.2d at 293. Even an intentional breach of contract is not "immoral, unethical, oppressive or unscrupulous;" if courts were to ignore this distinction, it would improperly allow contract law to be engulfed by the UTPA. Bessinger, 305 F. Supp. 2d at 582 (quoting McMaster v. Ford Motor Co., 122 S.C. 244, 115 S.E. 244, 246–47 (1921)).

1. Appellant never presented material evidence of an "unfair" trade practice as that term is legally, rather than colloquially, defined.

Appellant mischaracterizes Judge Hocker's Order Denying Plaintiff's Motion for New Trial (the "***Order***"). The Order does not, as Appellant suggests, conclude that the potential for

repetition does is insufficient to satisfy the public interest requirement under UTPA. (App. Br. 18-20). Here, Appellant commits a strawman fallacy. The Order properly denies Appellant's Motion for New Trial because Appellant failed to present material evidence of an "unfair" trade practice, not because the Appellant failed to demonstrate the capability of repetition. Specifically, the Order acknowledges, "While Plaintiff has produced evidence that demonstrates that JKRE is capable of repeating its breach of contract with other agents, that merely addresses the public interest component under SCUTPA." (R. p. 13, ¶ 39). Paragraph 39 of Order correctly concludes, "The capability of repetition does not make a practice unfair or deceptive in the first instance:

> **The fact that the defendants in this case could repeat their acts, none of which may be inferred to have violated the applicable laws, cannot be deemed to have affected the public interest *unless* they are first adjudged unfair or deceptive trade practices**. The potential for repetition is only used to satisfy the public interest component necessary to bring an unfair trade practice within the scope of the UTPA. Otherwise, any act, regardless of its blatant legality, would become an unfair trade practice merely by its capability to be repeated. Such is not, and could not be, the import of the UTPA …."

Wingard v. Exxon Co., U.S.A., 819 F. Supp. 497, 506 (D.S.C. 1992) (emphasis in the Order).

Appellant contends, incorrectly, that the Order cites no authority for the rule of law that a breach of a private contractual agreement – even if it has been repeated or is capable of repetition – is insufficient to establish a claim under SCUTPA on its own. (App. Br. p. 16). Immediately after stating this rule of law, the Order discusses its basis, including: (1) the South Carolina Legislature's mandate that our courts follow the Federal Courts and their construction of the Federal Trade Commission Act; (2) the district court's holding in Bessinger; and its reliance on McMaster. (R. pp. 12-23, ¶¶ 35-37).

The Order also relies on this court's reasoning in Ardis v. Cox, 314 S.C. 512, 518–19, 431 S.E.2d 267, 271 (Ct.App.1993):

A deliberate or intentional breach of a valid contract, without more, does not

> constitute a violation of the SCUTPA. Otherwise, every intentional breach of a contract within a commercial setting would constitute an unfair trade practice and thereby subject the breaching party to treble damages.

(internal quotations omitted). (R. p. 13 ¶ 38). Appellant attempts to distinguish Ardis (App. Br. 16-17), but Appellant's reasoning fails because she continues to conflate legal and colloquial "unfairness." Appellant never presented evidence of legal "unfairness," which is why her UTPA necessarily failed.

In particular, Judge Hocker properly considered and relied upon Wingard, which focused on the requirement that the trade practice be "unfair" rather than the public interest requirement. In Wingard, the district court conceded that Exxon's acts were capable of repetition, and therefore the public impact requirement of UTPA was satisfied. Id. at 505. However, the district court correctly noted that even if commercial conduct is unfair "in the sense that it is somewhat harsh, the SCUTPA does not prohibit all business activities that someone may consider unfair." Id. at 506 (quoting Miller v. W.H. Bristow, Inc., 739 F.Supp. 1044, 1055 (D.S.C. 1990)).

Like our UTPA, North Carolina's UDTPA, N.C. Gen. Stat. § 75-1.1, is modeled after the Federal Trade Commission Act. Dowless v. Warren-Rupp Houdailles, Inc., Nos. 87-3199(L), 87-3200, 1989 U.S. App. LEXIS 21768, at *16 (4th Cir. Jan. 30, 1989). The United States Court of Appeals for the Fourth Circuit, construing N.C. Gen. Stat. § 75-1.1, has noted: "In a sense, unfairness inheres in every breach of contract when one of the contracting parties is denied the advantage for which he contracted, but this is why remedial damages are awarded on contract claims. If such an award is to be trebled, the North Carolina legislature must have intended that substantial aggravating circumstances be present." United Roasters, Inc. v. Colgate-Palmolive Co., 649 F.2d 985, 992 (4th Cir. 1981).

In United Roasters, the Fourth Circuit held that the intentional breach of a contract, and the

failure to promptly disclose that breach, does not rise to the level of an unfair trade practice. Id.; *Accord* SciGrip, Inc. v. Osae, 838 S.E.2d 334 (N.C. 2020) ("[A]n intentional breach of contract, standing alone, simply does not suffice to support the assertion of an unfair and deceptive trade practices claim."); Ellis v. Louisiana-Pac. Corp., 699 F.3d 778, 787 (4th Cir. 2012) ("Egregious or aggravating circumstances must be alleged before the provisions of the [UDTPA] may take effect.").

Similarly, in Broussard v. Meineke Disc. Muffler Shops, 155 F.3d 331, 347 (4th Cir. 1998), the Fourth Circuit held:

> Likewise, the district court should not have allowed the UTPA claim to piggyback on plaintiffs' breach of contract action. It has been said that because 'proof of unfair or deceptive trade practices entitles a plaintiff to treble damages,' a UTPA count 'constitutes a boilerplate claim in most every complaint based on a commercial or consumer transaction in North Carolina.' Allied Distributors, Inc. v. Latrobe Brewing Co., 847 F. Supp. 376, 379 (E.D.N.C. 1993). To correct this tendency, and to keep control of the extraordinary damages authorized by the UTPA, North Carolina courts have repeatedly held that 'a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under [the UTPA,] N.C.G.S. § 75-1.1.' Branch Banking & Trust Co. v. Thompson, 107 N.C. App. 53, 418 S.E.2d 694, 700 (N.C. Ct. App. 1992) ... And the courts have consistently recognized that § 75-1.1 does not cover every dispute between two parties. The courts differentiate between contract and deceptive trade practice claims, and relegate claims regarding the existence of an agreement, the terms contained in an agreement, and the interpretation of an agreement to the arena of contract law." Hageman v. Twin City Chrysler-Plymouth Inc., 681 F. Supp. 303, 306-07 (M.D.N.C. 1988). Given the contractual center of this dispute, plaintiffs' UTPA claims are out of place.

155 F.3d 331, 347 (4th Cir. 1998). Judge Hocker appropriately analyzed the evidence Appellant presented at trial and refused to allow Appellant to "piggyback" a UTPA claim on her breach of contract claim in the absence of any material evidence.

In denying Appellant's motion for a new trial, Judge Hocker found this court's decision in Columbia E. Assocs. v. Bi-Lo, Inc., 299 S.C. 515, 386 S.E.2d 259 (Ct.App.1989) instructive. (R. p. ¶ 40). In that case, the operator of a shopping center brought an action alleging breach of

commercial lease agreement and violation of Unfair Trade Practices Act against supermarket operator Bi-Lo. The trial court found that Bi–Lo had breached its lease agreement with Columbia East by its cessation of operation and the refusal to sublease to a competing supermarket chain damaged Columbia East in the amount of $400,000. This court affirmed the grant of directed verdict in favor of Bi–Lo on the SCUPTA claim, despite the fact that a large grocery store operator like Bi-Lo is plainly capable of breaching other lease agreements, and so the act complained of in this case was "capable of repetition." Nevertheless, the court affirmed the grant of directed verdict, holding that "a deliberate or intentional breach of a valid contract, without more, does not constitute a violation of the Unfair Trade Practices Act." Id. (quoting Key Co., Inc. v. Fameco Distributors, 292 S.C. 524, 357 S.E.2d 476 (Ct.App.1987)).

In Key, the owner of coin-operated video game machines alleged a nightclub owner violated SCUTPA by continually disconnecting the machines and displaying them in undesirable locations in violation of the terms of their contract. 292 S.C. 524, 357 S.E.2d 476 (Ct.App.1987). After the Plaintiff took its machines, the nightclub owner moved in machines from another operator. A jury awarded plaintiff actual damages, and the trial court judge trebled the damages and awarded attorney fees and costs.

On appeal, this Court reversed that decision, holding that deliberate or intentional breach of the contract with video machine owner, without more, did not constitute violation of SCUTPA. Key Co., 292 S.C. at 528, 357 S.E.2d at 478 ("An intentional breach of a valid contract is not, without more, a violation of the UTPA.") Judge Hocker found it instructive that this court held a SCUTPA claim did not exist in Key, even though it is axiomatic that the nightclub owner could have repeated its conduct with other machine providers. (Order ¶ 41).

2. Appellant's actual knowledge and repeated assent to the transaction fee establishes that the charge is not, as a matter of law, an "unfair" trade practice.

Appellant points to JKRE's deduction of the transaction fees as evidence of an "unfair" trade practice. (App. Br. 20-23). However, as detailed above, Appellant entered into forty-four written agreements with JKRE specifically allowing each transaction fee. (R. pp. 467; 494-538). She knew of the transaction fee on every occasion, and she did not like it, but she decided it was not worth fighting with JKRE or terminating her contract with JKRE. (R. p. 327, line 22 - p. 329, line 7). Appellant's testimony, stipulation to facts, and the Agent Commission Worksheets established that Appellant knew of every transaction fee JKRE deducted, agreed to a fee on each of the 44 occasions it was assessed while the Broker-Salesperson Agreement was in effect, and continued to approve of a $50 transaction fee on unclosed transactions even after she quit. Therefore, the transaction fee cannot be, as a matter of law, material evidence that could establish a "deceptive practice" or practice that "offends established public policy and ... is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." Spiegel, Inc., 540 F.2d at 293.

Appellant contends that the transaction fee is not permitted under the Broker-Salesperson Agreement or the commission schedule and policies and procedures incorporated into it, and therefore the fee is unfair. If true, then Appellant's remedy is to pursue a breach of contract claim – which she accomplished. However, Appellant admits that other brokerage firms charge agents a transaction fee. (R. p. 556, #4). She further admits that she is incapable of admitting or denying "the extent of this practice in the real estate industry in South Carolina." (Id). Appellant has failed to present material evidence that could establish that the charge of a transaction fee "offends established public policy and ... is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." Spiegel, Inc., 540 F.2d at 293.

Appellant also argues that King is engaged in the "unauthorized practice of law" based on his testimony that the transaction fee is, in part, for his review to ensure that the paperwork met legal requirements. (App. Br. 21-23). Appellant contends that this allegation supports submitting a UTPA claim to a jury. However, Appellant cites to no authority that suggests a civil jury may decide whether an individual is engaged in the unauthorized practice of law in a civil case. *See* Matrix Fin. Servs. Corp. v. Frazer, 394 S.C. 134, 138, 714 S.E.2d 532, 534 (2011) (the unauthorized practice of law applied in a civil case by a trial judge sitting in equity). Under S.C. Code § 40-5-310, the unauthorized practice of law is a felony. The Constitution commits to the South Carolina Supreme Court the duty to regulate the practice of law in South Carolina. S.C. Const. art. V, § 4; In re Unauthorized Practice of Law Rules, 309 S.C. 304, 305, 422 S.E.2d 123, 124 (1992).

More fundamentally, there was no evidence offered at trial that showed King did anything other than what the South Carolina Legislature and the Real Estate Commission requires of licensed brokers-in-charge. Appellant's argument is nothing more than playing semantics with King's testimony. As discussed above, the practice of real estate occurs within the confines of a regulated industry, and both the South Carolina Legislature and the Real Estate Commission place legal compliance requirements on King as the licensed broker-in-charge for JKRE and his associated licensees. For example, King is required to review and approve all forms of listing agreements, agency agreements, offers, sale contracts, purchase contracts, leases, options, contract addenda, or other contractual or disclosure documents routinely used by JKRE. S.C. Code § 40-57-135(A)(2). King is also required to ensure that associated licensees prepare all offers and counteroffers in writing, have them dated and signed by the offerors, and promptly present them to the offerees or the offerees' representative, while ensuring that: (a) changes or modifications

made during negotiations are in writing and initialed and dated by both parties before proceeding with the transaction; (b) all of the terms and conditions of the transaction are included in the offer to purchase; and (c) if associated licensees obtain a written acceptance of an offer or counteroffer, true, executed copies will be promptly delivered to all parties. S.C. Code § 40-57-135(K)(4). King is also required to ensure his associated licensees have made his or her true position clearly known in writing to all parties involved and to have sufficient evidence of this available on request for the Real Estate Commission. S.C. Code § 40-57-135(K)(7). Appellant presented no material evidence that King engages in the "practice of law;" he simply engages in the business of being a broker-in-charge.

3. Appellant's analogy to "bill padding" is misplaced, and the Order correctly distinguished this court's decision in Barnes v. Jones Chevrolet Co.

Appellant mistakenly compares her case to the "bill padding" UPTA case of Barnes v. Jones Chevrolet Co., 292 S.C. 607, 609, 358 S.E.2d 156, 158 (Ct.App.1987), which is readily distinguishable. In Barnes, the dealership charged a customer for parts and services it did not provide or perform, and the dealership did not disclose its "bill padding" to the customer. Id. The evidence at trial showed that the repairman and the owner of Jones Chevrolet were skimming and pocketing the cost of the parts not replaced and labor not performed. Id. This court held such deceptive, unfair dealings with a customer seeking auto repairs is an "unfair" trade practice. Id. at 613, 358 S.E.2d at 159.

Unlike Barnes, Appellant presented no evidence to dispute either King's work performed, the necessity of it, or the value of it. While Appellant dislikes the hourly rate King testified was appropriate, she presented no evidence to rebut King's testimony or methodology, even when Lang, her current broker-in-charge, took the stand at trial. (R. p. 448, lines 19-25). Rather, the only evidence at trial was that King spent 121.7 hours sending 330 emails and 122 text messages and

conducting 54 phone calls, to bring Concord, Old Town, and Trinity to closing. (R. pp. 547-549; R. p. 403, line 14 – p. 411, line 15). Instead of padding, the unrefuted evidence was that JKRE spent over $21,000 of time to bring those transactions to closing, and it only deducted $6,070 for those services. While King testified he calculates his effective hourly rate at work to be $173 hours, he deducted from Appellant's commissions at a rate less than $50 per hour. (R. p. 409, line 2 – p. 411, line 6; R. p. 547-549). The only evidence submitted at trial demonstrates that Respondents engaged in bill cutting, not bill padding.

Similarly, Appellant's citation to and reliance on Singleton v. Stokes Motors, Inc., 358 S.C. 369, 595 S.E.2d 461 (2004) is misplaced. In that case, the Singletons decided to purchase a Silverado from Stokes Motors. Id. at 372, 595 S.E.2d at 462. Stokes had the plaintiffs sign a sales contract; as part of the purchase price, the Singletons were to trade-in their Dakota and make a cash down payment of $1,600. The sales contract did not indicate that the sale was contingent upon credit approval. However, at the same time, the dealership had the Singletons sign a separate bailment agreement, which unlike the sales contract, provided that they were accepting Silverado subject to credit approval. The Singletons were allowed to drive off the lot in the Silverado, having given Stokes the Dakota trade-in and only $800 of the $1,600 required cash down payment. Id

Three weeks later, the Singletons returned to Stokes because Stokes claimed that the loan paperwork could not be completed due to Mr. Singleton's failure to produce proof of income. The salesperson had the Singletons sign a new sales contract that only required $800 as the required cash down payment and told them that their credit had been approved. Stokes never asked the Singletons to sign another bailment agreement during this second meeting. Instead, the Singletons were permitted to drive away in the Silverado again. Id.

Ultimately, Stokes could not verify Mr. Singleton's employment. In addition, contrary to

Stokes's statements at the second meeting, the Singletons' credit was never approved. Therefore, Stokes repossessed the Silverado from the Singleton home before the first payment on the truck was even due. After the Silverado was repossessed, Mrs. Singleton went to Stokes to demand the return of the $800 down payment and the Dakota trade-in. Stokes refused to return either. Id.

The type of transaction described in Stokes is commonly called a "yo-yo" sale. The South Carolina Supreme Court observed that "the 'yo-yo' or 'spot-delivery' sale typically proceeds in the following way:

> The consumer believes a vehicle's installment or sale is final and the dealer gives the consumer possession of the car 'on the spot.' The dealer later tells the consumer to return the car because the financing has fallen through. If the consumer does not return the vehicle or agree to rewrite the transaction on less favorable terms, the dealer repossesses the vehicle."

Id. at 380, 595 S.E.2d at 467 (additional quotations omitted). "Yo-yo sales are unlawful in at least seven states and several other states have issued regulations and administrative interpretations to car dealers on the subject. Such transactions are fundamentally unfair because they give all of the power to the dealer, and none to the customer." Id.

Barnes and Stokes are two cases that illustrate what an constitutes an "unfair" trade practice. By comparing deceptive, public-facing trade practices, e.g. a car dealership engaging in a "yo-yo" transaction or fraudulent "bill padding, to a mere commission dispute between Appellant and JKRE, the flaw in Appellant's reasoning is laid bare. Therefore, Judge Hocker properly granted Respondents' Motion for Directed Verdict and denied Appellant's Motion for a New Trial.

4. Appellant's pointing to Ms. Miller's personal experiences and feelings toward King fails to identify any material evidence that could establish an "unfair" trade practice in the mind of a reasonable juror.

Darelene Miller, one of JKRE's customer on the Trinity transaction, testified that she felt King was incompetent, and she expressed frustration that he was communicating separately with

her and her husband, who divorced her and moved to Virginia before the transaction. (R. p. 224, line 14 – p. 229, line 3). She never accused Respondents of doing anything deceptive at all. (Id.) Appellant's citations to the record in her brief do not substantiate her characterizations of the testimony. (App. 27-28).

Clarkson submitted no evidence that King "attempted to sabotage" the Trinity closing. While Clarkson accused King of asking the Millers to come to closings that "were never scheduled," Clarkson also admitted that she had no first-hand knowledge of this, as she was not a party to any of the communications between King and the closing attorney. Rather, the unrefuted evidence is that King spent over 81.5 hours of work from July 10, 2020, to September 25, 2020 to bring Trinity to closing. (R. pp. 547-549; R. p. 407, line 5 – p. 410, line 3). Instead of "sabotaging" the Trinity closing, King accomplished getting Trinity closed, and then he repeatedly tried to pay Appellant her portion of the Trinity commission pursuant to paragraphs 8 and 13 of the Broker-Salesperson Agreement. Appellant cannot manufacture a UTPA claim for herself by pointing to Ms. Miller's personal problems or to Ms. Miller's belief that King was incompetent.

CONCLUSION

Therefore, Respondents respectfully requests that Judge Hocker's rulings be affirmed in all respects; that Respondents be awarded their costs of the court reporter's transcript and the costs of printing allowed under Rule 222, SCACR; that Respondents be awarded attorneys' fee on appeal set by the Supreme Court; and the case be remanded to the trial court with instructions to rule on King's pending Verified Motion for Award of Costs and Reasonable Attorneys' Fees filed on September 29, 2023, which is still pending at the trial court. (R. pp. 157-160).

[Signature on Next Page]

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s/ Shaun C. Blake
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COUNSEL FOR RESPONDENTS

March 26, 2024

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY

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.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondents complies with Rule 211(b), SCACR.

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