

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Eugene C Griffith, Jr , Circuit Court Judge

Case No 2008-CP-24-01221

RFT MANAGEMENT CO , LLC,

Appellant,

v

TINSLEY & ADAMS, LLP, &
WELBORN D ADAMS, INDIVIDUALLY,

Respondents

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SC Court of Appeals

REPLY BRIEF OF APPELLANT

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Argument and Citation of Authority

Appellant, RFT Management Co , LLC (“RFT”) hereby respectfully submits its Reply Brief in response to the Brief of Respondents, Tinsley & Adams, LLP, and Welborn D Adams (collectively referred to as “T&A” herein)

I THE TRIAL COURT ERRED IN NOT GRANTING RFT’S MOTION FOR JNOV OR FOR A NEW TRIAL ON THE CONFLICT OF INTEREST CLAIM

Based on undisputed, uncontradicted evidence in the record and upon apposite case law, RFT argued in its main Brief that T&A committed malpractice by representing RFT while subject to a conflict of interest which had not been adequately disclosed or waived RFT will explain below that there is nothing in the record or in T&A’s brief which would support a contrary conclusion

A Evidence in the Record Establishes Beyond Dispute That T&A Was Subject to a Conflict of Interest

During argument on the parties’ motions for directed verdicts on the malpractice cause of action, the trial court viewed as very critical RFT’s contention that the existence of a “conflict was not contradicted factually ”¹ In fact, the court asked counsel for both parties whether the issue of the existence of a conflict of interest presented a factual question or a legal question ² Attorneys for both parties responded that it presented a legal question and not a factual question ³ Indeed, T&A’s counsel confirmed that he wanted the court to “rule as a matter of law whether or not a conflict existed ”⁴ He thereupon admitted that “[t]here is always an inherent conflict

¹ R App p 18, lines 8-12

² R App p 16, lines 13-24

³ R App p 16, line 25 – p 17, line 2

⁴ R App p 18, line 24 – p 19, line 4

when one lawyer represents more than one person ,” and the trial court agreed⁵ Nonetheless, based upon some unidentified case, T&A’s attorney then reversed his position and argued that the issue was factual⁶ T&A’s problem is that regardless of whether the issue as to the existence of a conflict of interest may in some circumstances be factual in nature, T&A admitted that the facts essential to the existence of an inherent conflict of interest (an attorney simultaneously representing two clients) were present As T&A states in its brief,

The testimony of Respondent Adams and his expert, Tighe, support the Respondents’ position that there was no conflict of interest in this transaction *other than the inherent conflict in representing a buyer and a seller*, and that conflict was addressed in the disclosure reviewed and executed by RFT

Respondents’ Brief at 17 (emphasis added) This admission is critical because it confirms the existence of the conflict of interest, with the result that if the conflict was not adequately disclosed and validly waived, T&A’s liability for malpractice would have been established without factual dispute, and the jury should have been so instructed

B T&A Did Not Adequately Disclose Its Conflict of Interest

In its main brief, RFT cited directly on-point South Carolina case law and RPC 1.7(b)(2) and Comment 16, in order to identify the legal requirements for disclosing a conflict of interest Appellant’s Brief at 15-16 T&A basically ignored this discussion, relying entirely upon the Attorney Representation Disclosure form (“ARD”)⁷ as providing the required disclosure T&A presented no legal authority of its own At the hearing on the directed verdict motion, T&A

⁵ R App p 19, lines 12-15

⁶ R App p 20, lines 1-22

⁷ PX 9, R p 731

argued that in order to pass muster, the ARD need only have advised RFT that T&A was representing two parties⁸ Mr Tighe also opined that as long as a disclosure form notified the parties “that one lawyer is doing work for both sides ,” nothing else was needed⁹ T&A’s argument and Mr Tighe’s opinion make no sense If the only disclosure required at a real estate closing is that both parties be informed that they are being represented by the same attorney, without more, the *McNair* and *Bankers Trust* cases and Comment [16] to RPC 1.7(b)(2) would be rendered meaningless Appellant’s Brief at 15-16 & n 31 Those authorities clearly require more in the way of disclosure Expectedly, T&A has yet to cite any authority which supports its view as to the scope of its duties in disclosing the conflict of interest

In addition, RFT also took pains to explain that, on its face, the ARD discloses nothing and that the necessary implication from the language of the document and from the fact that Mr Roatch was required to acknowledge that there was no conflict, was that T&A advised RFT that there was then no conflict Appellant’s Brief at 16 RFT chose not to respond to this contention

Finally, there is the testimony of Defendant Adams When asked whether he told Mr Roatch at the closing that T&A had a conflict of interest, he testified “I did not tell him I had a conflict of interest because I did not believe I did ”¹⁰ And although Adams testified on direct that he “went over” the ARD with Mr Roatch, he recanted that testimony on cross-examination when confronted with deposition testimony in which he admitted that the ARD itself was the only communication he had had with Mr Roatch regarding conflict of interest¹¹

⁸ R App p 19, line 16 – p 20, line 6

⁹ Tighe Testimony, R p 638, line 24 – p 639, line 18

¹⁰ Adams Testimony, R p 603, lines 17-20

¹¹ R p 603, line 25 – p 604, line 17

Based upon the above points, RFT respectfully submits that evidence submitted by T&A at trial was insufficient to permit a reasonable juror to conclude that T&A's admitted conflict of interest was adequately disclosed to RFT. In fact, whether the ARD, as the sole communication regarding any type of conflict, constitutes a legally adequate disclosure presents a pure question of law which the trial court should have answered in RFT's favor.

C RFT Could Not Possibly Have Waived a Conflict of Which It Was Not Aware

T&A quotes the case of *Beal v Mars Larson Ranch Corp*, 586 P 2d 1378, 1384 (Idaho 1978) for the proposition that at a real estate closing, "if the parties have already agreed to the basic terms of the agreement and the attorney acts primarily as a 'scrivener' he may normally represent both parties after obtaining their consent." Respondents' Brief at 11. T&A also states that *Beal* was relied upon by this Court in *McNair*. *Id.* at 11-12. What T&A does not disclose is that the last four words of the above quotation, "after obtaining their consent," were italicized in *McNair* for emphasis, but are not italicized in T&A's brief. See *McNair*, 330 S C at 346, 499 S E 2d at 495. The words "after obtaining their consent" were emphasized by this Court in the *McNair* opinion for the obvious purpose of stressing the importance of obtaining informed consent to the conflict of interest. Instead of quoting from the *McNair* decision containing the emphasized language, however, T&A quoted directly from the *Beal* case in which the subject words were not emphasized, and then simply mentioned that *Beal* had been relied upon by the court in *McNair*. Respondents' Brief at pp 11-12. This juxtaposition of the cases was no more than an attempt to draw the Court's attention away from the importance which our courts have placed upon obtaining informed consent to a conflict of interest, which T&A failed to do in this case.

So T&A is left with nothing but the frivolous position that by signing a form which disclosed only that T&A would represent both buyer and seller but which did not mention the term “conflict of interest” and implied that there was no conflict of interest, RFT somehow waived T&A’s conflict of interest. Additionally, Mr. Freeman testified that by signing the ARD, Mr. Roach did not validly waive or consent to T&A’s conflict of interest.¹² There is no contrary evidence on the record. Given the undisputed facts in the record, that conclusion follows as a matter of law, even without considering Mr. Freeman’s testimony. Thus, the trial court should have directed a verdict or granted jnov in RFT’s favor based upon the conflict of interest. Alternatively, and at the very least, the trial court should have granted a new trial.

II T&A COMMITTED MALPRACTICE BY FAILING TO DISCLOSE, AND BY MISREPRESENTING, MATERIAL FACTS

In its main brief, RFT referred to numerous facts in the record of which T&A was aware at the time of the closing and which T&A either misrepresented or failed to disclose.¹³ RFT also referred to undisputed record evidence which reflected that the undisclosed and misrepresented facts were material, that they were relied upon by RFT in closing the transaction, and that, as a proximate result of the non-disclosures and misrepresented facts, RFT was damaged.¹⁴ In response, T&A did not dispute RFT’s contentions regarding materiality, reliance, and causation, and, instead, presented a number of other arguments which are not supported in the record or by applicable law. Each of those arguments is addressed below.

¹² Freeman testimony, R p 478, lines 8-24

¹³ See Appellant’s Brief at pp 19-24

¹⁴ *Id* at pp 22-24

A The ARD Form Did Not Relieve T&A from Its Duty to Disclose Material Facts to RFT

Focusing on language in the ARD in which RFT acknowledges that it did not retain T&A to negotiate the terms of the contract with the seller or “to provide substantive advice about how or whether to proceed with this transaction,”¹⁵ T&A claims that RFT relieved it from any obligation to provide information relating to the transaction. In other words, T&A and Tighe did not argue that Adams did not have a duty to disclose, but that any such duty was waived in the ARD. In fact, Adams never denied that he was subject to a duty of disclosure. And as the Fourth Circuit recognized in *Schatz v Rosenberg*, 943 F.2d 485 (1991), an attorney has a duty of full disclosure to his client, even if it requires the attorney to “tattle” on another client. *Id.* at 493 (citing *Crest Investment Trust Inc v Comstock*, 327 A.2d 891 (Md. App. 1974)).

More to the point, Adams admitted that there was no wording in the ARD stating that he was relieved from disclosing relevant information to Mr. Roatch.¹⁶ RFT’s expert, Mr. Freeman, testified unequivocally that T&A was subject to an absolute duty of disclosure.¹⁷ At times, T&A and its expert have unsuccessfully tried to equate “disclosing information” with “giving advice” in order to bring the failure to disclose within the coverage of the ARD’s language releasing T&A from an obligation to give advice. Mr. Freeman, however, clearly outlined the differences between the two concepts in his testimony.¹⁸ Even Mr. Tighe acknowledged that there is a

¹⁵ P X 9, R p 731

¹⁶ Adams testimony, R p 605, lines 1-10

¹⁷ Freeman testimony, R p 483, line 10 – p 495, line 18

¹⁸ R p 484, lines 13-21

difference¹⁹

Based upon the above uncontradicted evidence and the wording of the ARD, the only possible conclusion is that the ARD was legally ineffective to limit or to waive T&A's duty to make full disclosure to RFT of all material facts

B The Title Opinion Letter and the Deed Derivations Did Not Satisfy T&A's Disclosure Obligations

While T&A denies in its brief that it was raising as a defense an alleged failure of RFT to exercise due diligence in discovering its claims, (Respondent's Brief at 16), it then proceeds to cite certain inapposite cases *involving title disputes* for the proposition that notice of a deed and its contents constitutes notice of "whatever matters one would have learned upon the inquiry that the instrument made it one's duty to pursue" *Id* (citation omitted) While T&A's brief is far from clear on why this legal proposition was raised, RFT infers that T&A is claiming that RFT's claims are somehow barred because RFT did not follow some unidentified path of inquiry supposedly suggested by the documents²⁰ RFT's citation of the cases means nothing actually because they involve disputes between grantor and grantee and not a dispute between a party and its own attorney and because there is no evidence in the record as to what information the documents provided notice of, as to what action T&A believes RFT should have taken in order to make inquiry, or as to what would have been learned as a result of those actions Finally, as RFT explained in its main brief, an attorney does not satisfy his professional and fiduciary duties

¹⁹ Tighe testimony, R p 658, lines 8-10

²⁰ T&A claims that Mr Roatch received copies of the closing documents on the morning prior to the closing and, then, went over these documents with the attorney hired by RFT to review the buy-back agreement RFT denies that either of these events took place, and Adams testified that he could not identify which documents Roatch received prior to the closing nor could he identify which documents were discussed with RFT's attorney Adams testimony, R p 600, line 3 – p 601, line 10

of disclosure by providing a client a document full of legalize and then by gambling that the client would understand the full import of the language used Appellant's Brief at 30

C There Is No Dispute on the Record About Which Facts Were Not Disclosed or About T&A's Knowledge Thereof

In its main brief, RFT carefully chronicled through precise citations to the record each undisclosed fact in the chronological order in which it came to T&A's attention Appellant's Brief at 19-23 Having done so, RFT expected that if there were any contrary or conflicting evidence, T&A would identify such evidence and provide record citations of its own Other than citing inconsequential strongly disputed evidence regarding whether or not Mr Roatch may have been on notice that lots 28 and 31 were buy-back lots, T&A did neither Instead, T&A presented, without a single supporting reference to the record, the demonstrably erroneous and conclusory statement that "there was a disagreement among the witnesses as to what information Respondents had regarding the financial status of LGD " Respondents' Brief at 15 T&A did not identify the witnesses who had supposedly presented conflicting testimony, did not identify the supposedly conflicting testimony through citations to the record, did not explain why the testimony was conflicting, and did not relate the testimony to specific undisclosed facts The reasons why T&A elected to rely upon conclusory generalities over probative specific evidence requires no explanation

D There Is Nothing in the Record Which Prevents RFT from Arguing The Evidentiary and Legal Significance of "Flip Transactions", HUD-1's, or Deed Affidavits

(1) That T&A Had Orchestrated the Closing As an Illegal Flip Transaction Has Been a Part of this Case Since Its Inception

T&A argues that the issue of whether the closing was orchestrated as an illegal flip transaction "was never before the trial court " Respondents' Brief at 15 Contrary to this argument,

however, ¶25 of the Complaint specifically alleges the existence of

[k]nowledge by “LAW FIRM” and “ATTORNEY ADAMS” of “FLIP” transactions such as was undertaken here by “DEVELOPER” are among the most common mortgage fraud schemes and have been exposed as such²¹

Moreover, the manner and timing of the closing of this transaction has always been at the heart of this case. Thus, it is specifically alleged in great detail in the Complaint that unbeknownst to RFT, the seller (Lake Greenwood Developers) used most of the money paid by RFT for lots 28 and 31 in order to purchase those lots from their owners²². These allegations pleaded the essential elements of a “flip transaction”, defined by the Supreme Court as one “where proceeds from the second transaction are used to fund the initial transaction.” *In re Barbare*, 360 S C 560, 567-68, 602 S E 2d 382, 385-86 (2004). RFT submits that given the timing of the RFT, Robertson, and Grimshaw closings, and the false information in the HUD-1’s prepared by T&A, the transaction which was closed by T&A could only be characterized as an illegal “flip transaction” under the *In re Lathan*, *In re Barbare*, and *In re Johnson* cases cited in RFT’s brief at pp. 33-35. And as the Supreme Court noted in *In re Faysoux*, a lawyer’s “participating in a flip transaction would constitute misconduct.” 381 S C 637, 642, 675 S E 2d 428, 431 (2009).

Because of the language of the Complaint and clear case law, RFT can only assume that T&A is playing semantics with the words “flip transaction” and “illegal.” It argues apparently that if those words were not used or pled prior to trial, RFT may not rely upon the timing, arrangement, and orchestration of the closing as evidence of malpractice. The argument is frivolous. Those words are used only to describe the mechanism of the closing, flipping

²¹ Complaint at ¶25, R. p. 17

²² *Id.* at ¶¶ 14-17, 30, R. p. 14-15

property, and it is what occurred which renders T&A's conduct unethical and illegal, not the label which is used to describe the occurrence

**(2) RFT Had the Right to Rely upon the HUD-1's
and Deed Affidavits as Evidence of Malpractice**

T&A's argument that this Court should not consider the false and misleading HUD-1's and deed affidavits prepared by T&A as evidence of malpractice because they were not pled in the Complaint is based upon a misunderstanding of notice pleading requirements. The ultimate facts underlying RFT's claim are that T&A failed to disclose and misrepresented numerous material facts. The HUD-1's and affidavits were presented solely *as evidence* that certain facts had knowingly been misrepresented, or not disclosed by T&A. Even if the importance of these documents were not inferable from the allegations of the Complaint (which it clearly is), they do not constitute ultimate facts and need not have been pled. Rule 8(a) requires only "a short and plain statement of the facts showing that Plaintiff is entitled to relief." As this Court has explained

Under the rules of this state, only ultimate facts need to be pled, not all facts. At the pleadings stage, a litigant is not required to submit the evidence necessary to prove its case. "[U]nder our current pleading rules only ultimate facts are required to be stated in pleadings. Ultimate facts are those which the evidence upon trial will prove, and not the evidence which will be required to prove those facts."

Food Lion Inc v United Food and Comm Workers Internat Union, 351 S C 65, 79, 567 S E 2d 251, 258 (Ct App 2003) (citation omitted). In any event, the HUD-1 presented to RFT by T&A was attached to the Complaint as Exhibit F and referenced therein (R p 68)

E The HUD-1's and Deed Affidavits Were False and Misleading

T&A chose not to directly contest RFT's contentions as to why the HUD-1's and deed affidavits were improper, but instead argued that the HUD-1's complied with a closing attorney's standard of care, relying totally upon Tighe's conclusory opinion, and claiming generally that they were accurate

(1) The HUD-1's Were Not Prepared in Compliance with the Standard of Care

RFT submits that the *Barbare* and *Lathan* cases refute conclusively Tighe's opinion that the preparation of HUD-1's which fail to accurately show where sale proceeds are going and fail to disclose a flip transaction complies with a closing attorney's standard of care Tighe's bald "expert" opinion that the HUD-1's complied with that standard should therefore be ignored As, the United States Supreme Court noted in affirming the trial court's granting of judgment as a matter of law following a multi-million dollar jury verdict

When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable it cannot support a jury's verdict (emphasis added)

Brooke Group Ltd v Brown & Williamson Tobacco Corp, 509 U S 209, 242 (1993), see also, *Price v City of Charlotte N C*, 93 F 3d 1241, 1248-49 (4th Cir 1996) (vague, conclusory opinion evidence should not be considered in determining the sufficiency of the evidence to support a verdict), *City of San Antonio v Pollock*, 284 S W 3d 809, 816 (Tex 2009), *Integra Lifesciences I Ltd v Merck K GaA*, 496 F d3d 1334, 1342 (Fed Cir 2007) ("when an expert witness's statement of the law is incorrect, that view of the law cannot be relied upon to support the verdict") (citing *Brooke Group Ltd* 509 U S at 242), *Hynix Semiconductor Inc v Rambus*

Inc , 2008 WL 73681 at *5 (N D Cal 2008) (“a reasonable jury cannot credit testimony that fails to reflect reality ”)

Moreover, T&A’s attempt to establish the accuracy of the HUD-1’s is unavailing It argues that the HUD-1’s were not false or misleading because it retained the proceeds of sale in its trust account for LGD’s benefit and because LGD controlled disposition of the funds This type of argument has been flatly rejected by the Supreme Court Thus, in *In re Johnson*, the attorney actually disbursed all of the funds directly to the developer, rather than keeping them in his trust account This difference did not save the attorney’s license because, as the Supreme Court held, he “should have known that the short amount of time between [defendant’s] purchase and sale enabled [defendant] to fund his purchase of the property in the first transaction ” 375 S C at 503 n 2, 654 S E 2d at 274 n 2 So, too, here should T&A be charged with the same knowledge Indeed, because of its other knowledge of LGD’s money problems, T&A knew for a fact that LGD had to use RFT’s monies to satisfy the Grimshaw and Robertson buy-backs

T&A’s unsupported conclusion that RFT cannot establish as a matter of law that it was injured by the phony HUD-1’s can be, and is, refuted by the record in this case First, in proving proximate cause a party need not relate specific damages to each one of numerous nondisclosures and misrepresentations Thus, proximate causation can be shown to have resulted from the combined effect of all of those acts and omissions At page 24 of its main brief, RFT cites testimony by Mr Roatch to the effect that if he had had knowledge of any of the plethora of undisclosed or misrepresented facts (to include facts which would have been disclosed by an accurate HUD-1), he would not have closed the purchases of lots 28 and 31 This testimony is undisputed on the record, and, therefore, establishes reliance and proximate causation as a matter of law

**(2) Deed Affidavits Prepared by T&A Were False and
Caused Inflation of Appraisals Submitted to RFT**

At pages 37-38 of its main brief, RFT explains that the deed affidavits for Grimshaw, Robertson, and others were demonstrably false because while they purportedly showed what was paid in money or money's worth, they reflected that amount as the list price of \$235,000 00, instead of the actual true cash consideration of \$211,500 00²³ Blithely ignoring the language of the affidavits, T&A argues that the statute, S C Code Ann § 12-24-30(A)(2000), allows fair market value to be used as a surrogate for actual cash consideration, and that Adams used fair market value T&A made no attempt to explain the difference between what Adams says he did and what actually appears on the affidavits which he prepared In other words, if Adams had actually drafted the affidavits to reflect that consideration was determined by fair market value, he would have checked the appropriate place on the form Instead, he checked "money or money's worth" In addition, Adams testified that he did not use actual fair market value as determined by an appraisal, but instead substituted the listing price as fair market value (Adams testimony, R p 601, line 22 - p 602, line 15) The "listing price" is not the measure of fair market value

With respect to the causation issue, RFT cited expert testimony establishing that falsely inflated deed affidavits result in later appraisals also being inflated RFT then explained how the earlier inflated deed affidavit for lot 26 was used as a comparable in the later appraisals for lots 28 and 31 See Appellant's Brief at 38 T&A did not contest this evidence in its brief, and the evidence remains undisputed and uncontradicted T&A did not present expert appraisal evidence of its own, most likely because it was unobtainable

²³ Grimshaw deed, PX 35, R p 745, Adair deed, PX 47, R p 778, Adair Contract, PX 46, R p 771, Robertson deed, PX 42, R p 762

II RFT DID NOT CONSENT TO THE COURT'S DECISION TO NOT SUBMIT THE BREACH OF FIDUCIARY DUTY CLAIM TO THE JURY

T&A claims that RFT waived the breach of fiduciary duty claim because it did not object to the merger of the causes of action and because it did not object to the charge and verdict form which omitted breach of fiduciary duty. These purported grounds are based upon erroneous characterizations of what is in the record. During oral argument on directed verdict motions made at the close of RFT's evidence, its attorney argued to the Court that a jury could return a verdict on breach of fiduciary duty but not on malpractice, and vice versa,²⁴ because those claims are not based on all of the same legal principles.²⁵

At the close of all the evidence, the trial court denied RFT's motion for a directed verdict on the fiduciary duty cause of action.²⁶ RFT's counsel then repeated RFT's position that the jury could return a verdict on one cause of action but not the other.²⁷ T&A's counsel argued that the case of *Doe v Howe*, 367 S C 432, 626 S E 2d 25 (Ct App 2005), required that only the legal malpractice claim could be submitted to the jury.²⁸ At that point, the trial court commented that combining the two cases of action would simplify things for the jury.²⁹ RFT's counsel then responded that he could not "off hand" think of a circumstance which differentiated a malpractice claim from a breach of fiduciary duty claim, only to have his argument cut short

²⁴ R p 507, line 1 – p 508, line 14

²⁵ *Id*

²⁶ R p 674, lines 3-5

²⁷ *Id*, lines 10-14

²⁸ *Id*, lines 15-19

²⁹ R p 674, line 20 – p 675, line 5

Having denied RFT's motion for a directed verdict, the trial court decided to charge only legal malpractice³⁰ At no point during the entire discussion did RFT's attorney consent to there being no charge on breach of fiduciary duty

Because the trial court had denied RFT's directed verdict motion and had definitively ruled that there would be no charge on breach of fiduciary duty, RFT had no obligation to object to the verdict form or the jury charge for excluding that which the court had already excluded *See Thomasko v Poole*, 349 S C 7, 10-11, 561 S E 2d 597, 598-99 (2002), (where there has been a denial of a directed verdict motion, there is no need to object to subsequent jury instructions in order to protect the record) T&A also argues that even if the fiduciary duty claim had not been waived, it was not error to exclude it from the jury because it was based on the same operative facts as the malpractice claim RFT has searched diligently for case law supporting the trial court's election to merge the two causes of action, and it has found none The only instance in which a court can elect not to charge a cause of action that RFT is aware of occurs where a directed verdict has been granted, which was not done in this case Thus, the merger of the causes of action was error, particularly in view of RFT's objection that both claims be submitted to the jury

Finally, in its brief, RFT discussed several reasons why the fiduciary duty claim was not necessarily factually duplicative of the malpractice claim Appellant's Brief at pp 40-41 T&A ignored that discussion and has not contradicted it in any respect

III T&A PROVIDES NO MERITORIOUS GROUNDS FOR DENYING RFT A NEW TRIAL ON THE SECURITIES LAW CLAIM

T&A asks the Court to uphold the trial court's denial of a new trial on the Fourth Cause

³⁰ R p 675, line 14 – p 676, line 27

of Action for aiding and abetting a violation of the South Carolina Uniform Securities Act. The trial court directed a verdict on that claim on the sole ground that the transaction between RFT and the seller, LGD, did not constitute a security.³¹ T&A claims that the trial court's direction of a verdict on the securities cause of action was proper because of the absence of strict vertical commonality, because T&A had, if anything, only an ethical duty to provide disclosure, and because there was no evidence that T&A had actual knowledge of securities fraud or that it rendered substantial assistance to LGD.

A T&A's Argument that There Is No Evidence Establishing Strict Vertical Commonality Is Contrary to the Record

T&A failed at the close of RFT's case³² and at the close of all the evidence³³, to make the argument that the evidence was insufficient to establish the commonality element of an investment contract. Therefore, that ground was not the basis for the trial court's decision. Notwithstanding that failure, however, T&A's argument is refuted in RFT's brief at pp. 45-47, where RFT explains that evidence on the record establishes the existence of an investment contract, even under strict vertical commonality, and that, in any event, a sale of a security through "evidences of indebtedness" was present. Appellant's Brief at 45-46. T&A did not directly address either of these arguments.

³¹ R. p. 672, lines 7-17

³² R. p. 509, line 8 – p. 510, line 14, p. 511, line 19 – p. 512, line 23

³³ R. p. 663, line 20 – p. 665, line 13

RFT therefore submits that there was undisputed evidence on the record from which the trial court should have decided that the transaction involved the sale of a security³⁴

B There Was Sufficient Evidence from Which the Jury Could Have Concluded that T&A Aided and Abetted a Violation of the Securities Act

RFT disputes T&A's contention that there is no evidence that it aided and abetted LGD's violation of S C Code Ann §35-1-501 (Cum Supp 2010) T&A in its brief at p 22 n 8 does correctly cite *Andrews v Fitzgerald*, 823 F Supp 356 (M D N C 1993) for the proposition that in order to prove aider and abettor liability,

“Plaintiffs must establish three elements (1) a primary violation by another person, (2) the aider and abettor's knowledge of the primary violations, and (3) substantial assistance by the aider and abettor in the achievement or consummation of the primary violation”

Id at 381 (citing *Schatz v Rosenberg*, 943 F 2d 485, 495 (4th Cir 1991), *cert denied*, 503 U S 936 (1992)) Only the last two elements are at issue in this appeal, and, as to them, there is sufficient evidence to support submitting them to the jury

In order to show T&A's knowledge of the primary violation, it is not necessary to show *both* that T&A was aware of LGD's fraudulent course of conduct *and* that it knew that the course of conduct constituted a violation of §35-1-501 Rather,

a defendant's general awareness of its overall role in the primary violator's illegal scheme is sufficient knowledge for aiding and abetting liability Such knowledge may be proved by and inferred from

³⁴ Both parties mistakenly agreed that the issue of whether the sale of a security was involved presented an issue of law to be decided by the court R p 670, lines 14-23 *See e g State v Ribadeneira*, 817 P 2d 1105, 1110 (Ka App 1991), *Kaplan v Boston Investors Fund*, 1993 WL 818619 at *2 (Mass 1993), *Consol Mgt Gp, LLC v Dept of Corp*, 75 Cal Rept 3d 795, 804 (Ct App 2008)

circumstantial evidence, including facts available to the defendant's employees "Knowledge may be shown by circumstantial evidence, or by reckless conduct, but the proof must demonstrate actual awareness of the party's role in the fraudulent scheme"

Ahmed v Poster, 2009 WL 2581615 at *20 (W D N C 2009) (quoting *K&S Partnership v Continental Bank, N A*, 952 F 2d 971, 977 (8th Cir 1991)) In the following testimony, Stephen Gilbert testified about PX 20 for identification, an email which he "guessed" that he drafted and which explained LGD's 100% financing marketing scheme

Q Did you draft this email?

A I guess I don't remember drafting it I don't know who Ron Delk is

Q Do you deny drafting it?

A No

Q Okay Would you read it for the jury, please?

A "This is just a quick update to let you know we only have three lots remaining in our guaranteed return program In order to generate some immediate cash flow for cutting in the roads and the Town Center and finishing out the infrastructure on page two we're offering the following lots, lots 26 through 31, priced at 235,000 at a 10 percent discount, \$211,500 for a quick closing This comes from the fact Lake Greenwood Developers will guarantee they will purchase the lot back from you in one year if you desire for 250,000, a return of almost 20 percent *With the 10 percent discount you can get a 90 percent lot loan from the bank and not have to come out of pocket with any cash* We see this as a win, win situation because we feel the lots will appreciate more than that over the next year with this model home going on an adjacent lot and the interest we're getting in the Town Center If this

is of interest to you or someone you know please advise Thank you I look forward to hearing from you soon ”³⁵ (Emphasis added)

RFT also showed that T&A was aware that LGD was inflating contract prices in HUD-1’s and consideration paid in deed affidavits and that the HUD-1’s did not accurately show to whom the money was actually being paid It was inferable that T&A knew that the HUD-1 given to RFT was falsified in order to prevent disclosure of the details of LGD’s purchases of the Grimshaw and Robertson lots Similarly, T&A was aware that the sale to RFT was structured as a flip transaction and why it was set up that way, facts that were being concealed by LGD from RFT Based on the foregoing evidence there was a clear jury issue as to whether T&A was aware of LGD’s fraudulent business dealings

That LGD could not have consummated the sale to RFT without T&A’s assistance is also clear First, T&A had knowledge of, and failed to disclose to RFT, numerous facts regarding the transaction, knowledge of which by RFT would unquestionably have killed the deal Second, it is inferable that Gilbert chose T&A to close the transaction for obvious reasons, that T&A chose to represent both parties even though subject to a conflict of interest, and that T&A did not advise RFT to obtain separate counsel, all because Gilbert knew he could trust T&A to protect LGD’s interests and because an ethical, competent outside attorney would have exposed the fraudulent nature of the deal Third, T&A prepared the false HUD-1 which did not show money going to the Grimshaws or the Robinsons or how much money went to each Fourth, as a real estate attorney with many years of experience, Adams is chargeable with knowledge of the

³⁵ S Gilbert testimony, R p 291, line 4 – p 292, line 17, Adams’ secretary, Ms Lester, admitted receiving that email R p 425, lines 18-23 She also admitted that it was the type of email which she would have regularly forwarded to Mr Adams R p 425, line 24 – p 426, line 3 See, also, PX 63, R p 782 Adams admitted being aware of the contents of PX 63 R p 619, line 18 – p 621, line 11 In PX 63, the “sales price” is confirmed at \$211,500 00

Barbare and *Nathan* decisions and of the fact that inflated affidavits would lead to inflated appraisals and inflated property values, yet, he prepared false inflated affidavits and misleading HUD-1's on repeated occasions. Given these facts, RFT submits that it was at least a jury issue, if not an established undisputed fact, that the sale to RFT could not possibly have taken place without T&A's knowing assistance.

T&A cites *Schatz v Rosenberg*, 943 F.2d at 492, for the legally irrelevant proposition that an "ethical duty of disclosure does not create a corresponding legal duty under the federal securities laws." What T&A has failed to glean from *Schatz* was that the plaintiff in that case was not a client of the defendant attorneys. The cases reviewed by the Fourth Circuit in *Katz*, however, make clear that where, as in this case, the plaintiff is a client of the attorney who is alleged to be an aider and abettor, a fiduciary relationship exists which imposes a duty of full disclosure on the attorney under the securities laws, even if it requires the attorney to "tattle" on another client. See 943 F.2d at 493 (citing *Crest Investment Trust Inc v Comstock*, 327 A.2d 891 (Md App 1974)).

Finally, Professor Freeman did not opine on whether or not the transaction between Plaintiff and LGD was a security. Instead, he opined that it was in fact an evidence of indebtedness and an investment contract, and he recited the evidentiary facts which supported these ultimate facts. His testimony is not contradicted by other record evidence.

IV UNETHICAL REAL ESTATE CLOSINGS CAN VIOLATE THE UNFAIR TRADE PRACTICES ACT

A T&A's Conduct Did Not Constitute the Sale of Securities

T&A abruptly changes course and argues that the sale of lots 28 and 31 to RFT constituted the sale of a security, and was therefore exempt from the UTPA under S.C. Code

Ann 39-5-40(a)(1985) It ignores the fact that RFT is not asserting claims against T&A for selling securities It sued T&A because it committed malpractice while practicing law Nothing in the Uniform Securities Act purports to regulate or supervise attorneys in the provision of legal services, even if those services did aid and abet the sale of securities *by other parties* Thus, T&A cannot escape liability under the UTPA by mischaracterizing its malpractice in closing a real estate investment as a securities transaction In addition, until it is definitively decided that T&A was subject to supervision under the Securities Act and that the sale of a security was involved, dismissal of the UTPA claim would clearly be inappropriate

B Supervision by the Supreme Court Does Not Exempt the Legal Profession from the UTPA

In its main brief, RFT argued that decisions in *Taylor v Medenica*, 324 S C 200, 217, 479 S E 2d 35 (1996), and in *Camp v Springs Mtg Corp*, 307 S C 283, 285, 414 S E 2d 784 (Ct App 1991), establish that the UTPA applies to the legal profession Appellant's Brief at 42 RFT also argued that the only time court supervision could possibly exempt attorney conduct from the UTPA under S C Code Ann § 39-5-40(a)(1985) was where that conduct was specifically permitted or allowed by the Supreme Court Not the case here *Id* (citing *Dema v Tenet Physician Serv – Hilton Head Inc*, 383 S C 115, 123 n 6, 678 S E 2d 430, 434 n 6 (2009)) In its brief, T&A failed to offer any authority from any jurisdiction from which it could be concluded that the legal profession was exempt from the UTPA

C Adams Was the Primary, If Not Only, Perpetrator of the UTPA Violations

The evidence in this case establishes that Adams was directly responsible for the preparation of the phony HUD-1's and deed affidavits, for the organization and the timing of the simultaneous closings which concealed the "flip" transaction from RFT, for the many disclosures

which should have been, but were not, made, and for assisting LGD in the implementation of the plan to obtain 10% financing through the use of inflated deed affidavits and misleading HUD-1's. Abundant, uncontradicted evidence appears on the record which requires imposition of liability on Adams jointly and severally with his law firm. T&A discusses no contrary evidence in its brief. It does not offer any reason why Adams cannot be held liable personally for all damages, and it cites no case authority which supports the position that under the facts of this case, Adams cannot be held personally liable.

D The Public Interest Requirement Is Conclusively Satisfied by Undisputed Evidence

T&A argues that there is no evidence of unfair or deceptive acts or practices. RFT submits, however, that T&A's non-disclosures, falsified HUD-1's, and falsified deed affidavits constitute deceptive acts and practices as a matter of law. See *Ward v Dick Dyer & Assoc Inc*, 304 S.C. 152, 158, 24-29, 403 S.E.2d 310, 313 (Ct. App. 1991) (holding a nondisclosure constituted a "deceptive act" within the meaning of the UTPA.) Moreover, included within the definition of unfair acts and practices is conduct which is "unethical." *Bessinger v Bi-Lo, Inc*, 366 S.C. 426, 432, 622 S.E.2d 564, 567 (Ct. App. 2005) ("An act is 'unfair' when it is unethical.") As reflected by the above discussion, there is voluminous evidence of unethical conduct in this case. Indeed, the mere fact that T&A participated in the falsification of deed affidavits which are relied upon by appraisers and in setting property taxes conclusively establishes an adverse impact on the public interest.

Notwithstanding these undisputed facts and standing settled UTPA precedent on its head, T&A argues that proof that its conduct has been repeated or has the potential for repetition is not enough to establish an adverse effect upon the public interest. It could not be more wrong. The

public interest element of a UTPA claim was explained by the South Carolina Supreme Court as follows

Plaintiffs must allege and prove that the defendant's action adversely affected the public interest *Daisy Outdoor Adver Co Inc v Abbott*, 322 S C 489, 493, 473 S E 2d 47, 49 (1996) (citations omitted) *An impact on the public interest may be shown if the acts or practices have the potential for repetition* *Crary v Djebelli*, 329 S C 385, 387, 496 S E 2d 21, 23 (1998) (citation omitted) The potential for repetition may be shown in either of two ways (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence, or (2) by showing the company's procedures created a potential for repetition of the unfair and deceptive acts *Id* at 388, 496 S E 2d at 23 (citation omitted)

Singleton v Stokes Motors Inc , 358 S C 369, 379, 595 S E 2d 461, 466 (2004) (emphasis added), *see, also Hollman v Wolfson*, 384 S C 571, 683 S E 2d 495 (2009), *Estate of Carr ex rel Bolton v Circle S Enterprises Inc* , 379 S C 31, 664 S E 2d 83 (Ct App 2008) The repetitive nature of T&A's conduct was established in this case in a number of ways

First, RFT has shown that in addition to the HUD-1 provided to it, T&A prepared false HUD-1's for the Grimshaws and the Robertsons Second, RFT showed that it was T&A's regular practice to falsely inflate actual cash consideration in deed affidavits, causing inflated appraisals and property values Third, T&A also failed to disclose material facts to the Robertsons, to include how much was actually paid for their lot and by whom

E T&A's Bizarre, Novel Collateral Estoppel Theory Is Not Properly Before the Court And, in Any Event, Makes No Sense

T&A argues that since the same acts allegedly underlie the malpractice claim upon which the jury found for T&A as underlie the UTPA claims, T&A could not possibly be liable under the UTPA This argument is based upon pure speculation that because of the jury verdict, "there

would be no factual support for a SCUTPA claim, since surely an attorney who has committed unfair and deceptive trade practices toward a client would be liable for malpractice” Respondent’s Brief at 27 Just why T&A chose to place this argument in its brief defies understanding T&A provides no authority for the contention, and does not request the Court to uphold the trial court based on the argument

Perhaps one reason for the absence of such a request is that the first time this argument has surfaced in this case was in T&A’s appellate brief, with the result that the Court could choose to ignore it *I on L L C v Town of Mount Pleasant*, 338 S C 406, 421, 526 S E 2d 716, 724 (2000) Moreover, nothing in the verdict form explains the jury’s reasoning in finding for T&A on the malpractice claim³⁶ Conceivably, the jury could have found that T&A committed all of the acts claimed to be unfair or deceptive acts and practices, but that those acts did not constitute malpractice Or, again conceivably, the jury could have credited the testimony of T&A’s malpractice expert, but not RFT’s Or, the jury could have accepted the legally erroneous testimony of T&A’s expert that the ARD satisfied its disclosure duties under an attorney’s standard of care

The point is that the jury verdict does not necessarily exclude all possibility that if submitted to them, the jury could have entered a verdict on the UTPA claim in RFT’s favor Proof of the UTPA claim did not require expert testimony, nor did it require proof of, or compliance with, an attorney’s standard of care Thus, for example, the jury could have accepted Tighe’s non-probative opinion that the HUD-1’s and deed affidavits complied with the standard of care, notwithstanding the fact that they were misleading or contained inaccurate information

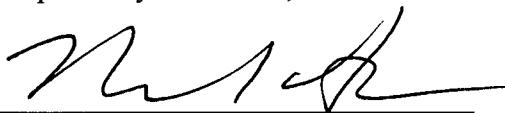
³⁶ Verdict Form, R p 9

In any event, T&A's estoppel argument not only is legally unavailable, it is based upon pure speculation about why the jury found for T&A

Conclusion

Based upon the points and authorities discussed above and in RFT's main brief, RFT submits that the trial court erred by not granting RFT's motion for judgment notwithstanding the verdict on the first cause of action for malpractice. RFT therefore requests the Court of Appeals to reverse the trial court and to remand this case with directions to enter judgment in favor of RFT on the malpractice claim. Alternatively, in the event that the Court does not reverse the trial court's denial of JNOV, RFT requests the Court to reverse the trial court's denial of RFT's motion for a new trial on the malpractice cause of action. RFT also requests the Court to reverse the trial court's denial of its motion for new trials on the breach of fiduciary duty, securities, and UTPA causes of action.

Respectfully submitted,



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Columbia, South Carolina
November 8, 2011

ATTORNEY FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
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Eugene C Griffith, Jr , Circuit Court Judge

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RFT MANAGEMENT CO , LLC

Appellant,

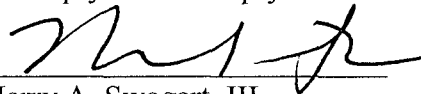
v

TINSLEY & ADAMS, LLP, &
WELBORN D ADAMS, INDIVIDUALLY,

Respondents

CERTIFICATE OF COUNSEL

The undersigned attorney for the Appellant hereby certifies pursuant to Rule 211(a),
SCACR, that Appellant's Brief and Appellant's Reply Brief comply with Rule 211(b)



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Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
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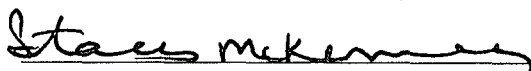
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PROOF OF SERVICE

I certify that I have served the Brief of Appellant and the Reply Brief of Appellant on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on November 8, 2011, addressed to the attorney of record, Matthew H Henrikson, Clarkson, Walsh, Terrell & Coulter, PA, at his Post Office Box 6728, Greenville, South Carolina 29606



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