THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2023-001661

Brandi Clarkson, Appellant,

v.

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

PETITION FOR REHEARING EN BANC

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INTRODUCTION

Paychecks due and payable to Brandi Clarkson ("Clarkson") by J. King Real Estate, LLC ("JKRE") and Jason Ernest King ("King") (collectively, "Respondents") have been withheld for nearly five (5) years. Clarkson's paycheck for $5,500.00 was due and payable on July 30, 2020. It has never been tendered by the Respondents. Clarkson's paycheck for $9,411.44 was due and payable on August 6, 2020. It has never been tendered by the Respondents. Clarkson's paycheck for $4,260.00 was due and payable on October 1, 2020. It has never been tendered by the Respondents.

Instead, for nearly half a decade, the Respondents have retained these payments and offered Clarkson payments designated as "payment in full" representing only 70% of the amount due. (R. p. 303, line 19 – p. 305, line 22; Ex. 65 – 69; R. pp. 550 – 554). At trial, Clarkson produced evidence to demonstrate that the Respondents' refusal to tender payment unless given monies to which they were not entitled was merely an escalation of an unlawful practice the Respondents had imposed on Clarkson and other agents for years. (R. p. 302, lines 20 – 25; p. 386, line 20 – p. 387, line 5; p. 414, lines 6 – 17).

This Court held that Clarkson failed to present evidence that would make it reasonably possible for the jury to find the Respondents acted unfairly or deceptively. Is it reasonably possible that the same jury that returned a verdict for Clarkson for breach of contract would *not* have concluded that withholding her paychecks to coerce a fee split was unfair?

In accordance with Rules 219 and 221, SCACR, Clarkson petitions the Court to order a rehearing *en banc* to maintain conformity with *Barnes v. Jones Chevrolet Co., Inc.*, 292 S.C. 607, 258 S.E.2d 156 (Ct. App. 1987) and *Turner v. Kellett*, 426 S.C. 42, 824 S.E.2d 466 (Ct. App. 2019),

and because the nature of "unfairness" in claims made pursuant to the South Carolina Unfair Trade Practices Act ("SCUTPA") is a question of exceptional importance.

ARGUMENT

I. Clarkson presented evidence sufficient to make it reasonably possibly for the jury to find the Respondents acted unfairly or deceptively.

An unfair trade practice is a practice "which is offensive to public policy or which is immoral, unethical, or oppressive." *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 269, 536 S.E.2d 399, 407 (Ct. App. 2000). A deceptive act is any act which has a tendency to deceive. *Id.*

Black's Law Dictionary defines "immoral" as "[i]nconsistent with what is right, honest, and commendable; contrary to standards of ethical rightness." Black's Law Dictionary (12th ed. 2024), *immoral.* It further defines "unethical" as "[n]ot in conformity with moral norms or standards of professional conduct." Black's Law Dictionary (12th ed. 2024), *unethical.* While "oppressive" is not defined, "oppression" is defined, in pertinent part, as "unjustly exercising authority or power so that one or more people are unfairly or cruelly prevented from enjoying the same rights that other people have." Black's Law Dictionary (12th ed. 2024), *oppression.*

Lastly, Black's Law Dictionary defines "extortion," in pertinent part, as "[t]he practice or an instance of obtaining something or compelling some action by illegal means, as by force or coercion." Black's Law Dictionary (12th ed. 2024), *extortion.*

In *Barnes*, the Court of Appeals found that there was "evidence of record that the repairman and the apparent owner of Jones Chevrolet were skimming and pocketing the cost of the parts not replaced and labor not performed." 292 S.C. at 612, 358 S.E.2d 159. It held that skimming and pocketing the cost of labor not performed constitutes "bill padding," and held further that bill padding "is an unfair trade practice and act." 292 S.C. at 612, 358 S.E.2d 159. In *Turner*, the Court

of Appeals noted that the Appellants "concede on appeal they committed an unfair trade practice within the scope of the Act by charging Turner for auto repairs that were never performed," and such concession was not challenged by the Court. 426 S.C. at 48, 824 S.E.2d at 469.

The jury was presented with the following evidence:

1. Clarkson joined JKRE as a newly licensed real estate agent in 2018. (R. p. 174, lines 11 – 13; Ex. 1).
2. Clarkson executed a Broker-Salesperson Agreement ("Agreement") and a Commission Schedule with JKRE and received JKRE's Policy Manual. (R. p. 174, lines 11 – 13; Ex. 1; p. 174, line 21 – p. 175, line 1; Exhibit 3).
3. JKRE used the Agreement, Commission Schedule, and Policy Manual with approximately 25 separate agents beginning in 2015. (R. p. 166, lines 7 – 12; p. 168, lines 8 – 13).
4. Both Clarkson and King testified that Clarkson was not an employee of JKRE. (R. p. 270, lines 9 – 16; p. 418, lines 4 – 22).
5. Both Clarkson and King testified that JKRE deducted a "transaction fee" from accrued commissions of agents prior to paying the agents. (R. p. 134, lines 23 – 25; p. 302, lines 20 – 25; p. 386, line 20 – p. 387, line 5; p. 414, lines 6 – 17).
6. King testified that the "transaction fees" were deducted from commissions for "legal requirements" reviews performed by King. (R. p. 387, lines 1 – 5; p. 391, lines 14 – p. 392, line 3).
7. King is not a licensed attorney. (R. p. 402, lines 11 – 12).
8. King did not list any "legal requirements reviews" on his purported time entries for Clarkson's last three transactions, but nonetheless assessed "transaction fees" on each transaction. (R. p. 547 – 548).

9. Clarkson testified that these "transaction fees" were not disclosed, either verbally or in writing, at any point prior to entering a broker-salesperson relationship with JKRE. (R. p. 244, lines 23 – p. 245, line 25).
10. Clarkson testified that the "transaction fees" were collected by JKRE to pay for King's secretary. (R. p. 133, line 20 – p. 134, line 7).
11. King testified that he authored the Agreement, Policy Manual, and Commission Schedule executed by every agent at JKRE; that he did not know if "transaction fees" were disclosed in any of these documents; and that agents were not informed of "transaction fees" in writing prior to earning their first commission. (R. p. 166, lines 13 – 15; p. 168, lines 1 – 13; p. 170, lines 10 – 12; p. 176, line 19 – p. 177, line 21; p. 178, lines 4 – 7).
12. Clarkson testified that she did not learn of these fees until she had earned her first commission, approximately four weeks into her employment relationship with JKRE. (R. p. 244, line 23 – p. 245, line 25; Ex. 17, R. p. 496).
13. Clarkson testified that the "transaction fee" was $50.00. (R. p. 133, lines 23 – 25).
14. Clarkson testified that payment of the "transaction fees" was a condition precedent to receiving her paycheck; JKRE would not tender accrued commission without payment by agents. (R. p. 246, line 20 – p. 247, line 7).
15. Clarkson testified that "transaction fees" were deducted from her commissions, over her objections, on numerous transactions. (R. p. 244, line 20 – p. 247, line 7; p. 306, lines 18 – 25).
16. Clarkson testified that she felt unable "to afford to pick up and go back – to pay all the fees again at another brokerage" after JKRE began to extract "transaction fees" from her commissions. (R. p. 135, lines 19 – 25).

17. Clarkson testified that she paid approximately $3,000.00 in "transaction fees" during her tenure with JKRE. (R. p. 196, lines 15 – 25).

18. The Agreement between Clarkson and JKRE provided that upon notice of termination, the rights of the parties to any commissions accrued prior to notice of termination would not be divested by termination, except that commissions on transactions in progress but not closed may be subject to deductions for "necessary client services, clerical, and administrative work." (Ex. 1, par. 13; R. p. 455 – 456).

19. Clarkson's commissions accrued upon execution of contracts between buyers and sellers, and were payable upon collection by JKRE. (Ex. 1, par. 6; R. p. 454).

20. Until Clarkson generated $20,000.00 in commissions for JKRE in a calendar year, JKRE was entitled to 30% of her commissions. Upon generating $20,000.00 in commissions for JKRE, Clarkson was entitled to 100% of the commissions she earned for the remainder of the calendar year. (R. p. 48, lines 3 – 5; p. 243, lines 1- 8 and Ex. 3; R. p. 175, lines 9 – 17).

21. King testified that Clarkson exceeded the $20,000.00 mark on June 29, 2020. (R. p. 180, lines 6 – 16).

22. After Clarkson gave notice of termination, King proposed that JKRE retain 30% of the commissions on transactions in which closings had yet to take place, and Clarkson refused to agree to modify the terms of the agreements between herself and JKRE. (R. p. 185, lines 7 – 21; p. 187, lines 18 – 21; p. 189, lines 3 – 11; p. 279, lines 9 – 19).

23. Following closings for the last three properties on which Clarkson worked, JKRE repeatedly tendered checks to Clarkson for approximately 70% of the accrued commissions, representing that the retention of approximately 30% of the accrued

commissions was for "necessary client service, clerical and administrative work." (R. p. 302, line 3 – p. 304, line 7).

In granting the Respondents' motion for a directed verdict on the basis that the Respondents' acts were not "unfair or deceptive," the trial court held that it was not reasonably possible for a jury to find that the Respondents' acts were immoral, unethical, or oppressive. To arrive at this conclusion, the trial court had to ignore Clarkson's testimony that she and other agents were, in fact, deceived and subjected to unfair acts. "Judging the credibility of testimony of witnesses is a function of the jury, not the court, as is determining the weight to be given that testimony." *Ravan v. Greenville County*, 315 S.C.447, 434 S.E.2d 296 (Ct.App. 1993).

Clarkson testified that she was a newly licensed agent when she joined JKRE, that she signed the Agreement with JKRE, and that the Agreement contained no mention of "transaction fees." Clarkson testified that she was not informed of any "transaction fees" until after she earned her first commission, and that the Respondents refused to release her commission until she allowed the Respondents to retain a "transaction fee." She testified that when presented with the first demand for a "transaction fee," she did not feel "able to afford to pick up and go back – to pay all the fees again at another brokerage." Clarkson testified that the Respondents deducted the same "transaction fee" from other agents.

Thus, Clarkson testified that the Respondents repeatedly placed her and other agents in a dilemma: either acquiesce to the Respondent's demands for a $50.00 transaction fee and obtain partial payment of commissions already earned, or refuse to part with the "transaction fee" and receive nothing.

A jury could reasonably conclude that Clarkson's testimony is credible, and conclude King's testimony – including his claims that he was unaware of the contents of documents he authored and that his "transaction fees" were fees for "legal requirements reviews" – is not credible. A jury could reasonably conclude that the Respondents extorted Clarkson and the other agents, repeatedly obtaining monies to which they were not entitled through coercion. Likewise, a jury could reasonably conclude that the Respondents' withholding of 30% of Clarkson's final three commissions was merely an escalation of a longstanding unfair trade practice. In a country where tens of millions of citizens live paycheck-to-paycheck, a jury could reasonably conclude that the Respondents' practice of withholding commissions to coerce a fee split is oppressive. Such a practice is definitionally unfair.

Likewise, it is reasonably possible that a jury could find that the Respondents habitually skimmed and pocketed the cost of "labor not performed" from agents' commissions in the guise of "transaction fees." *Barnes*, 292 S.C. at 612, 358 S.E.2d 159. It is further reasonably possible that a jury could find that the Respondents skimmed and pocketed the cost of "labor not performed" in the guise of both "administrative fees" and "transaction fees" on Clarkson's last three commissions. *Id.*

CONCLUSION

Would any member of this Court find it unfair to have his or her next paycheck withheld to coerce a particular result? Clarkson presented evidence sufficient to make it reasonably possibly for the jury to find the Respondents acted unfairly or deceptively, and for the foregoing reasons, this Court should order a rehearing *en banc*.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the Petition for Rehearing En Banc on J. King Real Estate, LLC and Jason Ernest King by hand delivering copies of them on July 7, 2025, to their attorney of record, Shaun C. Blake, P.O. Box 11803, Columbia, South Carolina 29211.

July 7, 2025

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