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SC Court of Appeals

STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM LEXINGTON COUNTY

Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

Opinion No. 2025-UP-203 (S.C. Ct. App. filed June 25, 2025)

Brandi Clarkson,Petitioner,

v.

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

PETITION FOR WRIT OF CERTIORARI

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September 11, 2025

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 22, 2025.

QUESTION PRESENTED

1. When a contractee repeatedly withholds accrued commissions from a contractor in a manner declared unlawful by the South Carolina Payment of Wages Act, S.C. Code Ann. § 41-10-50, is such conduct “unfair and deceptive” within the meaning of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 et seq.?

STATEMENT OF THE CASE

ABBREVIATED PROCEDURAL HISTORY

This action was initiated by the filing of a summons and complaint on July 21, 2020. After two years of motions and hearings, the parties proceeded to trial on Petitioner Brandi Clarkson’s (“Clarkson”) second amended and supplemental complaint (“Complaint”), wherein Clarkson alleged that J. King Real Estate, LLC (“JKRE”) and Jason Ernest King (“King”) (collectively, “Respondents”) withheld earned commissions to coerce a fee split on three (3) separate occasions, and further alleged that JKRE and King had withheld unauthorized "transaction fees" from her on 58 transactions.¹ The Complaint asserted claims for breach of contract, intentional interference with prospective contractual relations, and violation of the South Carolina Unfair Trade Practices Act (“SCUTPA”). Respondents denied all material allegations and asserted counterclaims for prior material breach and conversion.

This matter came before the Hon. Donald B. Hocker for a jury trial from July 24 - 26, 2023. At the close of Clarkson’s case, Judge Hocker granted the Respondents’ motions for directed verdict on Clarkson's claims for violation of the SCUTPA and tortious interference with prospective contractual relations. The jury returned a verdict for Clarkson for \$16,338.22 on her claim for breach of contract and a verdict on the counterclaim for conversion for \$379.68.

On August 2, 2023, Clarkson filed a motion for new trial. On August 7, 2023, the Respondents filed a memorandum in opposition to Plaintiffs motion for new trial. On August 9, 2023, Clarkson filed a reply memorandum. On September 18, 2023, Judge Hocker issued an order denying Clarkson's motion for new trial.

On October 17, 2023, Clarkson timely served and filed notice of appeal. Oral argument took place on May 13, 2025. On June 25, 2025, the Court of Appeals issued an order affirming the judgment of the circuit court, holding that a directed verdict on Clarkson’s SCUTPA claim was

¹ Prior to trial, the Hon. Debra R. McCaslin issued an order denying JKRE’s motion to dismiss and motion for sanctions, specifically finding that Clarkson’s SCUTPA was “not frivolous,” and the Hon. H. Steven DeBerry, IV issued an order denying JKRE’s motion for summary judgment based on the existence of multiple genuine issues of material fact.

proper because Clarkson failed to present evidence that would make it reasonably possible for the jury to find the Respondents acted unfairly or deceptively. Clarkson seeks a writ of certiorari to review that decision.

MATERIAL FACTS

Both Clarkson and King testified that Clarkson was not an employee of JKRE, but was instead an independent contractor. (R. p. 270, lines 9 – 16; p. 418, lines 4 – 22).²

Clarkson joined JKRE as a newly licensed real estate agent in 2018. (R. p. 174, lines 11 – 13; Ex. 1). At the beginning of her working relationship with JKRE, 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). 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).

Withheld Commissions

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). 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).

Until Clarkson generated \$20,000.00 in commissions for JKRE in a calendar year, JKRE was entitled to 30% of her commissions, but after generating \$20,000.00 in commissions for JKRE in a calendar year, 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). King testified that Clarkson exceeded the \$20,000.00 mark on June 29, 2020. (R. p. 180, lines 6 – 16).

On July 9, 2020, Clarkson informed King that she intended to leave JKRE. (R. p. 185, lines 3 – 6). 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 this proposal. (R. p. 185, lines 7 – 21; p. 187, lines 18 – 21; p. 189, lines 3 – 11; p. 279, lines 9 – 19).

Despite Clarkson’s refusal, following closings for the last three properties on which Clarkson worked, JKRE repeatedly tendered checks to Clarkson for approximately 70% of the accrued commissions marked “Payment in full,” and King represented that the retention of

² The South Carolina Payment of Wages Act (“SCPWA”), S.C. Code Ann. §§41-10-10, *et seq.* does not apply to independent contractors. See *Adamson v. Marianne Fabrics, Inc.*, 301 S.C. 204, 391 S.E.2d 249 (1990). See also *Hennes v. Shaw*, 397 S.C. 391, 725 S.E.2d 501 (Ct. App. 2012).

approximately 30% of Clarkson's accrued commissions was for "necessary client service, clerical and administrative work." (R. p. 302, line 3 – p. 304, line 7). Clarkson declined to accept checks marked "Payment in full" for less than the full amount owed to her. (R. p. 303, line 19-p. 305, line 22 and Ex. 65-69, R. pp. 550-554).

Transaction Fees

Both Clarkson and King testified that JKRE deducted a "transaction fee" from accrued commissions of agents prior to paying 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). King testified that the "transaction fees" were deducted from commissions to compensate JKRE for "legal requirements" reviews King performed. (R. p. 387, lines 1 – 5; p. 391, lines 14 – p. 392, line 3). King is not a licensed attorney. (R. p. 402, lines 11 – 12). In time entries King drafted for Clarkson's last three transactions evincing "necessary client service, clerical and administrative work" allegedly performed by King, King did not record performance of any "legal requirements reviews," but JKRE nonetheless assessed "transaction fees" on each transaction. (R. p. 547 – 548).

Clarkson testified that these "transaction fees" were not disclosed to prospective agents, 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). 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).

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). Clarkson testified that she did not learn of these fees until she had earned her first commission, approximately four weeks into her relationship with JKRE. (R. p. 244, line 23 – p. 245, line 25; Ex. 17, R. p. 496).

Clarkson testified that the "transaction fee" was \$50.00. (R. p. 133, lines 23 – 25). 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). Clarkson testified that "transaction fees" were deducted from her commissions, over her objections, on numerous transactions, and that she paid approximately \$3,000.00 in "transaction fees" during her tenure with JKRE. (R. p. 244, line 20 – p. 247, line 7; p. 306, lines 18 – 25; p. 196, lines 15 – 25).

ARGUMENT

1. THE COURT OF APPEALS ERRED IN AFFIRMING THE CIRCUIT COURT'S GRANT OF A DIRECTED VERDICT BECAUSE IT WAS REASONABLY POSSIBLE THAT A JURY COULD FIND THAT RESPONDENTS' ACTS ARE UNFAIR AND DECEPTIVE.

To recover in an action under the SCUTPA, a plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected the public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s). *Estate of Carr ex rel. Bolton v. Circle S Enterprises, Inc.*, 379 S.C. 31, 43, 664 S.E.2d 83, 89 (2008) (citing S.C. Code Ann. § 39-5-10 - 560).

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.* "Trade" and "commerce," as used in the SCUTPA, include **"any trade or commerce directly or indirectly affecting the people of this State."** S.C. Code Ann. § 39-5-10. [emphasis added].

S.C. Code Ann. § 39-5-160 provides that **"[t]he powers and remedies provided by this article shall be cumulative and supplementary to all powers and remedies otherwise provided by law."** [emphasis added].

When a circuit court's ruling on a motion for a directed verdict is appealed, an appellate court must apply the same standard as the circuit court. *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322,331, 732 S.E.2d 166, 171 (2012). When ruling on directed verdict, "the [trial] court must view the evidence and all reasonable inferences drawn from the evidence in the light most favorable to the nonmoving party" and must deny the motion "[i]f the evidence at trial yields more than one reasonable inference or its inference is in doubt." *Kunst v. Loree*, 424 S.C. 24, 37-38, 817 S.E.2d 295, 301-02 (Ct. App. 2018). In essence, the court must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in his or her favor. *Estate of Carr ex rel. Bolton v. Circle S Enterprises, Inc.*, 379 S.C. 31, 38,664 S.E.2d 83, 86 (2008).

In granting the Respondents' motion for a directed verdict, the trial court held, and the Court of Appeals affirmed, that Clarkson failed to present evidence that would make it reasonably possible for a jury to find that the Respondents' acted unfairly or deceptively. To arrive at this conclusion, the trial court and the Court of Appeals had to ignore Clarkson's testimony at trial that she and other agents *were*, in fact, deceived and repeatedly subjected to unfair, deceptive, and oppressive acts. (R. p. 244, line 23 – p. 245, line 25; Ex. 17, R. p. 496; R. p. 276, line 1 – p. 278, line 16).

"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 Cnty.*, 315 S.C.447, 434 S.E.2d 296 (Ct.App. 1993); *see also Parrish v. Allison*, 376 S.C. 308,319,656 S.E.2d 382, 388 (Ct. App. 2007).

Though Clarkson was entitled to 100% of the commission she earned at the time of her resignation, 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. (R. p. 48, lines 3 – 5; p. 243, lines 1- 8 and Ex. 3; p. 175, lines 9 – 17; p. 180, lines 6 – 16; p. 185, lines 7 – 21; p. 187, lines 18 – 21; p. 189, lines 3 – 11). When Clarkson refused, the Respondents took approximately 30% of her accrued commissions anyways, all the while representing that the costs of “necessary client service, clerical and administrative work” just so happened to amount to the percentage they’d originally demanded. (R. p. 279, lines 9 – 19; p. 302, line 3 – p. 304, line 7).

It is reasonably possible that a jury could determine that the Respondents’ practice of repeatedly withholding earned commissions to coerce an unearned fee split is a practice “which is offensive to public policy or which is immoral, unethical, or oppressive.” *deBondt*, 342 S.C. at 269, 536 S.E.2d at 407.

Clarkson testified that she signed the Agreement with JKRE as a newly-licensed agent, that the Agreement contained no mention of “transaction fees,” and that she was not informed about “transaction fees” until after she earned her first commission. (R. p. 244, lines 23 – p. 245, line 25). Clarkson testified that the Respondents refused to release agents’ commissions until agents allowed the Respondents to retain a “transaction fee,” and that Respondents retained approximately \$3,000.00 in unauthorized fees from her over the course of her relationship with JKRE. (R. p. 244, line 20 – p. 247, line 7; p. 196, lines 15 – 25).

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. (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; p. 387, lines 1 – 5; p. 391, lines 14 – p. 392, line 3). 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,” and that such practice is an “unfair trade practice and act.” *Barnes v. Jones Chevrolet Co., Inc.*, 292 S.C. 607, 612, 258 S.E.2d 156, 159 (Ct. App. 1987). It is also reasonably possible that a jury could determine that Respondents’ practice of conditioning receipt of earned commissions on extracontractual payments by agents is a practice “which is offensive to public policy or which is immoral, unethical, or oppressive.” *deBondt*, 342 S.C. at 269, 536 S.E.2d at 407.

CONCLUSION

When an employer separates an employee from the payroll for any reason in South Carolina, the employer must “pay **all** wages due to the employee within forty-eight hours of the time of separation or the next regular payday which may not exceed thirty days.” S.C. Code Ann. § 41-10-50. [emphasis added]. If an employer fails to pay wages as required by S.C. Code Ann. § 41-10-50, “the employee may recover in a civil action an amount equal to three times the full amount of the unpaid wages, plus costs and reasonable attorney’s fees as the court may allow.” S.C. Code Ann. § 41-10-80(C).

Likewise, pursuant to SCUTPA,

Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by S.C. Code Ann. § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages. If the court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of S.C. Code Ann. § 39-5-20, the court shall award three times the actual damages sustained and may provide such other relief as it deems necessary or proper. Upon the finding by the court of a violation of this article, the court shall award to the person bringing such action under this section reasonable attorney's fees and costs.

S.C. Code Ann. § 39-5-140(a).

“The powers and remedies provided by [SCUTPA are] cumulative and supplementary to all powers and remedies otherwise provided by law.” S.C. Code Ann. § 39-5-160.

Clarkson and King testified that Clarkson was an independent contractor. As an independent contractor, Clarkson could not avail herself of the protections of the South Carolina Payment of Wages Act. *See Adamson v. Marianne Fabrics, Inc.*, 301 S.C. 204, 391 S.E.2d 249 (1990); *see also Hennes v. Shaw*, 397 S.C. 391, 725 S.E.2d 501 (Ct. App. 2012). Withholding commissions – whether as a condition precedent to dispensing commissions as a matter of course, or to strong-arm a contractor into a fee split - is “offensive to public policy or which is immoral, unethical, or oppressive.” The damages available to employees who suffer the same treatment by employers – treble damages, costs, and reasonable attorney’s fees – reflect the profoundly unfair nature of this conduct and demonstrate the need for a remedy beyond mere recovery of wrongly withheld wages; were these damages not available, every successful suit under S.C. Code Ann. § 41-10-10 *et seq.* would be a pyrrhic victory.

Following the Court of Appeals’ affirmation of the circuit court’s grant of directed verdict, when a contractee commits the exact conduct prohibited by S.C. Code Ann. § 41-10-50, there’s no practical recourse for the contractor to recover wages – no possibility of treble damages, no recovery of costs, and no recovery of reasonable attorney’s fees. Put differently, the most a contractor can hope for after the Court of Appeals’ decision is a pyrrhic victory. Such a profoundly unfair outcome cannot have been the intent of the Legislature.

For the reasons stated herein, Clarkson seeks a writ of certiorari to review the decision of the Court of Appeals.

[signature on following page]

Respectfully submitted,

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via email ctappfilings@sccourts.org
and Confirmed by U.S. Mail

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Brandi Clarkson, Petitioner
v.
J. King Real Estate, LLC and Jason Ernest King, Respondents

Dear Ms. Kitchings:

Enclosed herewith is a copy of a Petition For Writ Of Certiorari filed today with the Supreme Court.

Sincerely,

J. Gregory Studemeyer

Enclosure

cc: Shaun C. Blake, Esq.