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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Milton G. Kimpson, Circuit Court Judge

Appellate Case No. 2025-001220

Lower Court Case No. 2022-CP-40-04419

Ansel Jamahl Postell .....Respondent-Appellant,

v.

Campus Advantage, Inc. and EMRES II South Carolina, LLC
d/b/a The Rowan ..... Appellants-Respondents.

APPELLANTS-RESPONDENTS CAMPUS ADVANTAGE, INC. AND EMRES II SOUTH CAROLINA, LLC D/B/A THE ROWAN'S INITIAL BRIEF

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I. Whether the trial court erred in denying Defendants' motion for judgment notwithstanding the verdict on the South Carolina Unfair Trade Practices claim and trebling damages thereunder because no evidence establishes Defendants committed an unfair trade practice that adversely affected the public interest and, even if it did, no evidence supports a finding that such violation was willful and knowing?

II. Whether the trial court erred in denying Defendants' motion for judgment notwithstanding the verdict on the breach of contract claim because Respondent Postell failed to establish evidence to support such a claim on a theory that he actually pled?

III. Whether the trial court erred in denying Defendants' motion for a new trial absolute because the jury's verdict—totaling over 25 times the actual economic damages—is wholly inconsistent with the evidence and is grossly excessive?

IV. Whether the trial court erred in denying Defendants' alternative motion for a new trial *nisi remittitur* because the verdict is excessive?

STATEMENT OF THE CASE

This appeal arises out of an excessive and unwarranted jury verdict for Respondent Ansel Jamahl Postell ("Postell") against Appellants Campus Advantage, Inc. and EMRES II South Carolina, LLC d/b/a The Rowan (collectively, "Defendants")[1] based on the disposal of Postell's personal property after his apartment unit was inadvertently listed as vacant during the yearly turnover of apartment units. Though Postell had renewed his lease for the upcoming term, his unit was emptied during the turnover, amounting to approximately $27,500.00 in loss of personal property. Somehow, $27,500.00 turned into a total judgment amount of $931,850.71.

Postell filed this lawsuit on August 26, 2022, alleging claims for unlawful ouster, conversion of chattels, a violation of the South Carolina Unfair Trade Practices Act ("SCUTPA"), breach of contract, and negligence. Compl. Defendants answered the Complaint on September 28, 2022. Defs.' Ans.

After briefing and denial of Defendants' motion for judgment on the pleadings or, in the alternative, for summary judgment, the case proceeded to a four-day jury trial on September 16, 17, 18, and 19, 2024, in Richland County, South Carolina in front of the Honorable Milton G. Kimpson. *See generally* Trial Tr.[2] Following Postell's case in chief, Defendants moved for a directed verdict on the SCUTPA claim because no evidence supported a conclusion that

[1] Emres II South Carolina, LLC d/b/a The Rowan ("The Rowan") was the property owner and landlord of the apartment complex known as The Rowan at 1051 Southern Drive, Columbia, South Carolina. Campus Advantage was the property management company for The Rowan. Because Postell has cross-appealed on several post-trial issues, The Rowan and Campus Advantage will be referred to as "Defendants" throughout the briefing on their appeal and Postell's cross-appeal.

[2] Two different court reporters transcribed the four-day trial, so the trial days are not paginated in consecutive order in the transcripts. Because of this, Defendants reference different sets of pages in their initial brief. Defendants will ensure the Record on Appeal and citations to it in their final brief are correctly paginated in consecutive and chronological order.

Defendants had engaged in unfair or deceptive trade practices that affected the public interest. Tr. at 179:25–198:14. The trial court denied Defendants' motion the following morning without much discussion. Tr. at 136:24–137:3.

After Defendants' case, they renewed their motion for a directed verdict on Postell's SCUTPA claim and also sought a directed verdict on Postell's breach of contract and ouster claims. Tr. at 317:16–331:13, 335:10–343:20. The trial court agreed with Defendants that "this idea that [Defendants and Postell] could not come to an agreement on reimbursement" for property loss is not an unfair trade practice and cannot form the basis of a SCUTPA claim. *Id.* at 340:1–3, 343:7–11, 351:21–24. The trial court limited Postell's counsel's closing argument accordingly. *Id.* The trial court then directed verdict in favor of Defendants on Postell's ouster claim. *Id.* at 353:6–10.

Following closing arguments and deliberation, the jury returned a verdict in Postell's favor on his conversion of chattels, SCUTPA, breach of contract, and negligence claims. Jury Verdict. Despite providing evidence of only $27,500.00 in economic damages, the jury awarded Postell $230,000.00 in actual damages and $462,500.24 in punitive damages—nearly the exact number Postell's counsel blackboarded during his closing argument. *Id.* The trial court granted ten days for any post-trial motions.

On September 30, 2024, Defendants filed a motion for judgment notwithstanding the verdict ("JNOV") and for a new trial absolute, or, in the alternative, for a new trial *nisi remittitur*. Defs.' Post Trial Mot. That same day, Postell filed a motion for treble damages, attorney's fees, costs and interest under SCUTPA and Rule 68(b), SCRCP. Pl.'s Post Trial Mot. Postell opposed Defendants' post-trial motions and filed a memorandum in support of his post-trial motion on October 10, 2024. Pl.'s Resp. in Opp; Pl.'s Memo. in Supp. Defendants opposed Postell's post-trial motion on October 10. Defs.' Resp. in Opp.

Without a hearing on the post-trial motions, the trial court issued a written order eight months later, denying Defendants' motion for JNOV and a new trial absolute, or, in the alternative, a new trial *nisi remittitur*. Post-Trial Order. On Postell's request for treble damages, costs, and fees, the trial court granted the motion in part, trebling only the economic damages Postell supported with evidence at trial—$27,500.00 which then totaled $82,500.00 in treble damages—and deferring ruling on attorney's fees after further briefing and argument. *Id.* at 14–17.

Postell filed a motion to reconsider the treble damages award on May 30, 2025, Pl.'s Mot. to Recons., and a memorandum in support of his request for attorney's fees, costs, and interest on June 2, 2025, Pl.'s Memo. in Supp. The trial court held a hearing on Postell's outstanding motions on June 2, 2025. And on June 10, 2025, the trial court granted in part Postell's motion for fees, awarding him thirty-three percent of the SCUTPA treble damages, which totaled $27,225.00. Final J. Order. Postell moved to reconsider the trial court's ruling on attorney's fees, Pl.'s 2nd Mot. to Recons., and the trial court denied both outstanding motions, Order Den. Mot. to Recons.

Defendants timely appealed on June 18, 2025. Defs.' Notice of Appeal. Postell cross-appealed the orders relating to treble damages, attorney's fees, and costs under SCUTPA on June 25, 2025. Postell Notice of Appeal. This appeal follows.

STATEMENT OF THE FACTS

Postell first entered a one-year lease agreement with The Rowan on July 6, 2021, for a term ending on July 25, 2022, for a single unit (Unit 3007A) in a three-bedroom and three-bathroom apartment at The Rowan. Defs.' Ex. 12. After his school year at Benedict College ended, Postell returned home to Atlanta, Georgia, for the summer, leaving behind some belongings in his unit. Tr. at 154:10–14, 153:7–18; Pl.'s Ex. 12. Around the same time (May 2022), Postell requested a transfer to a new unit within The Rowan. Tr. at 101:20–102:2. Because of the transfer request,

the former property manager updated Postell's status to "transfer" on the "turn board" to signify that Postell would be moving out of Unit 3007A by the move-out date on July 25, 2022. Tr. at 289:20–290:9, 133:17–25. The turn board thus showed Unit 3007A as vacant.

The turn board is a property management spreadsheet used to track leasing status for the turn of the leasing term. Tr. at 177:16–178:24. The turn is a large-scale turnover of apartments in late summer around the end of the leasing term when The Rowan—indeed most complexes within the student housing industry—experiences the greatest volume of move-outs and move-ins. Pl.'s Ex. 1. The Campus Advantage policies and procedures, which require all site staff to participate in preparing the site for a new lease term, governed the 2022 turn. Pl.'s Exs. 1 & 5; Tr. at 194:21–195:11, 166:1–6.

By the time of the turn, Katie Floyd began as the new property manager for Campus Advantage at The Rowan. Tr. at 160:15–16, 179:2–180:25. Since her arrival, Floyd and her regional manager Nick Hooser developed a strategy for the turn to allow for an efficient leasing status assessment for all bedspaces as well as any required turnover maintenance and repair, which they communicated to all employees. Tr. at 197:9–200:25

As part of that strategy, on the first day of the turn on July 25, 2022, Defendants' employees were only to verify occupancy and complete move out inspections. *See, e.g.*, Tr. at 201:16–22. Later in the week, Defendants would conduct the "bag and tag" of vacating units. *Id.* During the "bag and tag," Campus Advantage employees were to place personal property left in a rental unit inside of a bag, document specifics of where and when the property was found, and include a description of the contents as well as where the property would be stored for later pickup. Tr. at 194:21–195:11; *see also* Pl.'s Ex. 1 at 14. The employees were also supposed to take pictures of the items. Tr. at 69:6–9

As for Postell, in early July 2022, he decided not to transfer to a new unit and instead renewed his lease for Unit 3007A on July 6, paying several months in rent. Defs.' Ex. 13; Tr. at 102:11–16. Despite renewing his lease, Postell inadvertently remained listed as vacating Unit 3007A on the turn board. Tr. at 289:23–290:9.

On July 25, the first day of the turn, Floyd assigned employees Carlton Brown and Ashanti Young to inspect Postell's unit. Young testified that Postell's unit appeared to be a "three or a four" on a scale of ten as to whether she thought someone still occupied the unit. Tr. at 89:10–20. Despite this and Floyd's specific instructions to call the leasing office to verify occupancy status if any questions arose, Brown and Young proceeded to violate Campus Advantage policies and procedures by failing to confirm Postell's occupancy status and then proceeding to remove some of his personal property without properly "bagging and tagging" and storing the items. *See* Tr. at 202:16–20, 93:13–24, 94:7–97:2. In fact, Brown improperly kept some of Postell's property for his own personal use. Tr. at 251:11–25.

Postell returned to his apartment on August 5, 2022, and discovered some of his items were missing. Tr. at 110:1–8. When Postell informed Defendants, they immediately responded. Defendants' staff accompanied Postell to Target that evening to purchase hundreds of dollars in essentials—bedding, linens, toiletries, among other items—to start replacing or compensating him for his lost property. Tr. at 105:24–106:1, 112:20–25; Defs.' Ex. 6.

That same night, after another staff member questioned him about the missing property, Brown returned the items he had taken from Postell's unit. Tr. at 230:23–231:10; *see also* Pl.'s Exs. 13 & 14; Defs.' Ex. 17. This included Postell's self-built computer and two monitors, two computer speakers, weighted vest, a footlocker, backpack, plastic storage tote, desk lamp, and his gaming chair. *Id.* Only the computer was damaged. Tr. at 127:24, 131:4–16.

Unfortunately, because Brown and Young did not correctly bag and tag Postell's property, some of Postell's other property was never recovered. Postell claims, in addition to his computer, he left approximately $20,000 of personal property in the unit when he left for the summer. *See, e.g.*, Tr. at 114:20–25; Pl.'s Exs. 8, 9, 11, & 12; Defs.' Ex. 15. But Young stated the only remaining items in Postell's unit were: 3 pairs of dress shoes; 1 safe; 3 button-up shirts; 3–4 empty shoe boxes; an assortment of rags and towels; 1 iron; 1 ironing board; 1 clothes hamper; 1 fitted sheet; and an assortment of cleaning supplies. Defs.' Ex. 2.

Within days, Floyd informed Postell and his mother that Defendants would pay the costs associated with replacing the missing personal property, but that Defendants needed receipts or other evidence to establish the value of the property. *See, e.g.*, Tr. at 259:21–261:3, 270:10–272:10. To this end, Postell's mother sent a list and valuation of items on August 18, 2022, but did not include any receipts. Defs.' Exs. 10 & 15; Tr. at 274:22–23.

Eight days later, Postell filed this lawsuit against Defendants. After a four-day jury trial, the jury awarded Postell $230,000.00 in actual damages and $462,500.24 in punitive damages. Jury Verdict. The trial court denied Defendants' motions for JNOV and for a new trial absolute, or, in the alternative, for a new trial *nisi remittitur*, and granted in part Postell's motions for treble damages and attorney's fees under SCUTPA. Post-Trial Order; Final J. Order. In total, the jury and the trial court awarded Postell $931,850.71. Final J. Order.

This matter comes before the Court on the heels of that grossly excessive award.

STANDARD

When reviewing the denial of a motion for directed verdict or a JNOV, the Court "must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Welch v. Epstein*, 342 S.C. 279, 299, 536 S.E.2d 408, 418 (Ct. App. 2000). The Court should reverse the trial court, however, "when there is no evidence to support the ruling" or "if no reasonable jury could have reached the challenged verdict." *Id.* at 299–300, 536 S.E.2d at 418–19 (citations omitted). "When the evidence yields only one inference, a directed verdict in favor of the moving party is proper." *Wright v. Craft*, 372 S.C. 1, 22, 640 S.E.2d 486, 498 (Ct. App. 2006) (citing *Long v. Norris & Assocs. Ltd.*, 342 S.C. 561, 568, 538 S.E.2d 5, 9 (Ct. App. 2000)).

"The denial of a motion for a new trial absolute or a new trial nisi for excessiveness of the verdict is a matter within the sound discretion of the trial judge." *Byrd v. McLeod Physician Assocs. II*, 427 S.C. 407, 413, 831 S.E.2d 152, 154 (Ct. App. 2019) (quoting *Soaper v. Hope Indus., Inc.*, 306 S.C. 531, 534, 413 S.E.2d 38, 40 (Ct. App. 1992), *aff'd as modified*, 309 S.C. 438, 424 S.E.2d 493 (1992)). A trial court's "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." *Abel v. Lack's Beach Serv.*, 446 S.C. 434, 462–63, 920 S.E.2d 283, 298 (Ct. App. 2025) (quoting *Swicegood v. Lott*, 379 S.C. 346, 355–56, 665 S.E.2d 211, 216 (Ct. App. 2008)).

That said, the Court "has the duty to review the record and determine whether there has been an abuse of discretion amounting to an error of law." *Abel*, 446 S.C. at 463, 920 S.E.2d at 298 (quoting *Vinson v. Hartley*, 324 S.C. 389, 406, 477 S.E.2d 715, 723 (Ct. App. 1996)). "If the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial court must grant a new trial

absolute." *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 193, 638 S.E.2d 667, 670 (2006). Further, "[i]f there is a claim that an award of punitive damages violates due process, an appellate court examines the trial court's constitutional review de novo." *Sea Island Food Grp., LLC v. Yaschik Dev. Co.*, 433 S.C. 278, 289, 857 S.E.2d 902, 907 (Ct. App. 2021).

ARGUMENT

I. The trial court erred in denying Defendants' motion for JNOV on the SCUTPA claim and trebling damages thereunder.

To establish a SCUTPA claim, "the 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 public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s)." *Wright*, 372 S.C. at 23, 640 S.E.2d at 498. At trial, Defendants moved for a directed verdict on this claim both at the close of Postell's case and at the close of all the evidence. Tr. at 179:25–198:14, 317:16–331:13, 335:10–343:20. Defendants renewed their arguments again in a post-trial motion for JNOV, Defs.' Post-Trial Mot., and the trial court denied the motion, Post-Trial Order.

This was error for at least four reasons. *First*, Postell failed to establish Defendants engaged in any unfair or deceptive trade practice. The trial court itself stated the sum total of Defendants' purported violation of SCUTPA was "[Defendants'] entry into [Postell's] apartment and treatment of [his] personal property as if it had been abandoned, when, in fact, [he] had renewed his lease and paid advance rent." Post-Trial Order at 15. That is no unfair trade practice. *Second*, even if it was, no evidence supports the finding that Defendants' conduct adversely affected the public interest. *Third*, even if it did, the trial court erred in trebling damages under section 39-5-140(a) because Postell, at most, established a case of negligence and not a willful or knowing violation of SCUTPA. *Fourth*, even if the trial court did not err in finding a willful and

knowing violation, Postell is not entitled to double recovery through treble damages *and* punitive damages. For each of these reasons, the Court should reverse.

A. No evidence establishes Defendants committed an unfair trade practice.

To be sure, SCUTPA declares "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce" unlawful. S.C. Code Ann. § 39-5-20(a). But as our supreme court has stated, "[a]n unfair trade practice is a practice which is offensive to public policy or which is immoral, unethical, or oppressive," and "[a] deceptive practice is one which has a tendency to deceive." *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharms., Inc.*, 414 S.C. 33, 56, 777 S.E.2d 176, 188 (2015) (quoting *deBond v. Carlton Motorcars, Inc.*, 342 S.C. 254, 269, 537 S.E.2d 399, 407 (Ct. App. 2000)).

Postell's SCUTPA claim has been a moving target since the outset. At the end of his case in chief, Postell finally articulated what he believed to be a deceptive trade practice. He stated Defendants told him they would fix the situation and reimburse him for his lost property but never did. Tr. at 172:16–174:2. In his words, "[t]he deceptive act is saying you're going to do one thing and then doing another." *Id.* at 174:1–2. The trial court properly rejected that conduct as a deceptive trade practice at the directed verdict and post-trial stages: "Defendants are correct that the Court instructed the jury that the Defendants' failure to reach a settlement with Plaintiff over the value of his missing personal property was not an unfair trade practice." Post-Trial Order at 3; Tr. at 340:1–3, 343:7–11, 351:21–24. Postell never challenged that finding.

Instead, he pivoted to a new theory that the unfair trade practice can be found in a violation of section 27-40-730(d) of the South Carolina Landlord Tenant Act. That statute provides that when a rental agreement has ended and the tenant has removed a substantial portion of his personal property but has left personal property in his unit, a landlord is liable for disposing of the personal

property only if the property exceeded five hundred dollars and was grossly negligent. S.C. Code Ann. § 27-40-730(e)–(d).

But Postell's SCUTPA claim was never based on a violation of any statute until after he presented his case in chief. In fact, even then, it was an afterthought. Tr. at 196:12 & 22 (making the argument as "one more thing" and "if [the court was] looking for one more angle of there's a statutory requirement of over $500"). A review of the allegations in his Complaint on this cause of action reveals that statute played no role in this case until the very end. *See* Compl. at ¶¶ 25–30 (never mentioning a statutory violation generally or section 27-40-730(d) specifically). Postell is not allowed to try his case by ambush and switch theories when it suits him.

"A judgment must be in accord with the pleadings of the party in whose favor it is rendered, or it is fatally defective." *Blackburn & Co. v. Dudley*, 289 S.C. 415, 418, 338 S.E.2d 151, 153 (1985) (citing *Brockington v. Lynch*, 119 S.C. 273, 112 S.E. 94 (1922)). "This is a rule of pleading based upon the principle that a plaintiff who has pled one theory should not be allowed to recover upon another." *Id.* (citing *Hutson v. Stone*, 119 S.C. 259, 112 S.E. 39 (1922)). And a court must not "under the guise of liberal construction of the pleadings, write into the complaint allegations that are not presented." *Davis v. Monteith*, 289 S.C. 176, 182, 345 S.E.2d 724, 727 (1986).

Even so, the trial court misunderstood Postell's desire to base his SCUTPA claim on a violation of section 27-40-730(d). Despite Postell's arguments and clear belated reliance on this statute, the trial court stated, "[a]s it relates to his claim under the UTPA, the Plaintiff was not seeking to hold Defendants liable for damages under the Act." Post-Trial Order at 5. So it is unclear, then, how the trial court could deny Defendants' motion for JNOV.

Yet it did, finding evidence in the record of an unfair trade practice. According to the trial court, the "actions [of] removing Plaintiff's personal property -- as if his lease had expired and

Plaintiff had left his belongings or he had abandoned his apartment -- in the situation where Plaintiff had actually renewed his lease and paid advance rent for this same apartment" is evidence of an unfair trade practice. Post-Trial Order at 3–4. This was error. There is nothing "immoral, unethical, or oppressive," *State ex rel. Wilson*, 414 S.C. at 56, 777 S.E.2d at 188, about this conduct or a single instance of inadvertent disposal of personal property.[3]

The other evidence the trial court references in a footnote does not move the needle either. Post-Trial Order at 4 n.2. While it is true that Floyd assured Postell's mother that Postell could disregard the turnover notice because he had renewed, there is no question that Postell's name appeared on the turnover list because of simple human error. Tr. at 181:24–182:2 ("It is, and I want to emphasize this, [the renewal information] is put in by people, so they are looking at two different computer screens, comparing information, inputting it into, so it is all manual entry.").

Mere negligence is insufficient to form the basis of a SCUTPA claim. *See Clarkson v. Orkin Exterminating Co.*, 761 F.2d 189, 191 (4th Cir. 1985) ("There is no support in South Carolina law for the proposition that a service person violates the unfair trade practice statute if he performs his job poorly or overlooks something which should have attracted his attention. An explicit or implicit representation that he performed his job properly, if the fault is negligence or inattention, is simply not the kind of deceptive practice the statute was intended to reach."); *see also Simmons v. Danhauer & Assocs. LLC*, 477 Fed. Appx. 53 (4th Cir. 2012) ("Although [one defendant] may have failed to proactively prevent [another defendant's] allegedly fraudulent actions or realize that its policies created the potential for such abuse, negligence or incompetence alone is insufficient to establish an unfair or deceptive practice sufficient to support a claim under

[3] Although Defendants cited section 27-40-730(d) below, it was simply for the point that a disposal of personal property is not per se illegal. Defs.' Post-Trial Mot. Defendants do not seek refuge in the statute. *Contra* Post-Trial Order at 4–5.

SCUTPA."); *Wash. Mut. Bank v. Hiott*, No. 2006-UP-329, 2006 S.C. App. Unpub. LEXIS 357, *5 (Ct. App. Sep. 19, 2006) (applying *Clarkson*, 761 F.2d 189). So is a plain breach of contract. *Cowart v. Poore*, 337 S.C. 359, 367, 523 S.E.2d 182, 186 (Ct. App. 1999) (Connor, J., concurring). Neither of which Defendants concede.

But that is not all. "Whether an act or practice is unfair or deceptive within the meaning of the [SC]UTPA depends upon the surrounding facts and the impact of the transaction on the marketplace." *State ex rel. Wilson*, 414 S.C. at 56–57, 777 S.E.2d at 188 (citation omitted). Defendants did not inadvertently dispose of Postell's personal property and move on or pretend like it did not happen. Rather, Defendants immediately took Postell shopping for necessities, Tr. at 105:24–106:1, 112:20–25, and bought him hundreds of dollars' worth of replacements, Defs.' Ex. 6. They also worked with Postell and his mother for weeks in good faith, trying to establish the value of the personal property so they could reimburse Postell for his loss. Tr. at 259:18–261:3, 264:12–266:5, 268:23–25. Recognizing a mistake and trying to fix it is not "immoral, unethical, or oppressive." *State ex rel. Wilson*, 414 S.C. at 56, 777 S.E.2d at 188.

The trial court's citation to *Burbach v. Investors Management Corp. International*, 326 S.C. 492, 484 S.E.2d 119 (Ct. App. 1997), does not change this just because it involved a residential lease. Unfair trade practices arising from a residential lease may form the basis of a SCUTPA claim. *Id.* at 497, 484 S.E.2d at 121. That statement is not remarkable, however, and does not automatically render Postell's SCUTPA claim viable when the evidence does not support the finding of an unfair trade practice. "*Burbach* [simply] turns on the admissibility of evidence." *Reynolds v. Ryland Grp., Inc.*, 340 S.C. 331, 335, 531 S.E.2d 917, 919 (2000).

The evidence here leads to only one conclusion: Defendants did not commit an unfair trade practice through the accidental disposal of Postell's personal property.

B. The purported unfair trade practice does not adversely affect the public interest.

Even if there were evidence from which a jury could find an unfair trade practice occurred (there is not), that gets Postell only so far. Among the other elements necessary to assert a SCUTPA claim is that the "defendant's actions adversely affected the public interest." *Daisy Outdoor Advert. Co. v. Abbott*, 322 S.C. 489, 493, 473 S.E.2d 47, 49 (1996). "An impact on the public interest may be shown if the acts or practices have the potential for repetition." *Singleton v. Stokes Motors, Inc.*, 358 S.C. 369, 379, 595 S.E.2d 461, 466 (2004) (citing *Crary v. Djebelli*, 329 S.C. 385, 387, 496 S.E.2d 21, 23 (1998)). A plaintiff can show an act is capable of repetition in one 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.*

In the face of Defendants' motions for a directed verdict, Postell pointed to testimony from Young, claiming this conduct—a mere inadvertent disposal of personal property of a renewing tenant—occurred in the past at The Rowan. Tr. at 187:23–188:1. The trial court accepted this. But that was not exactly Young's testimony.

In response to questioning by Postell's counsel about prior instances, Young simply stated "correct." Tr. at 42:2–16. Young provided no specific instances of, or facts supporting, inadvertent disposal of personal property of renewing tenants occurring in the past. *See Carolina Real Est. Holdings, LLC v. Brilin Elec., LLC*, 446 S.C. 376, 388, 919 S.E.2d 918, 924 (Ct. App. 2025) ("However, there are *no specific facts* that show [the defendant] fraudulently inflated quotes for other tenants in the past or would do so in the future." (emphasis added)). In fact, when questioned further, Young testified that, when she discovered an incorrect vacancy designation on

the very same day as this turnout, she and Brown followed the correct procedure[4] and verified the occupancy status with the front desk. Tr. 90:20–92:3.

What is more, sheer similar conduct occurring in the past does not satisfy this element. Rather, Postell was required to establish that "the *same kind* of unfair act . . . occurred in the past and was likely to continue in the future without deterrence." *Turner v. Kellett*, 426 S.C. 42, 49, 824 S.E.2d 466, 469–70 (Ct. App. 2019). For instance, in *Burbach*, a case on which the trial court and Postell heavily relied, the evidence of prior occurrences was concrete. "During the trial, the [plaintiffs] presented testimony from three prior tenants of the landlords" who "testified about [the landlord's] failure to return their security deposits and its attempt to charge them for repairs." 326 S.C. at 494–95, 484 S.E.2d at 120. Those prior tenants "also testified about court actions brought by and against [the landlord] arising from these disputes and the outcome of these actions." *Id.* Based on that evidence, this Court found that "the problems experienced by the [plaintiffs] are not isolated events. At least several other tenants experienced similar problems. The other tenants not only complained but also received judgments. At least one case involved unfair trade practices. Clearly, the landlords' behavior is capable of repetition." *Id.* at 497, 484 S.E.2d at 121.

No such evidence exists here. Postell did not establish the same kind of conduct occurred in the past causing a tenant to permanently lose personal property because (1) their apartment was improperly designated as vacant on a turnover list, (2) their apartment was improperly bagged and

[4] *See* Tr. at 202:16–20 ("This is policy or this is protocol from this point forward, so you need to reach out to the office staff, you need to verify, if even after verification there's a question, you need to call a manager.").

tagged and trashed out (against the established procedure)[5], and (3) that property was then lost, misplaced, or even kept by a rouge employee.

At the very most, Postell presented questioning by his counsel about unspecified events requiring more than speculation to conclude "the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence." *Singleton*, 358 S.C. at 379, 595 S.E.2d at 466. Even Postell's counsel admitted below that the testimony was not specific and was simply "another instance of when the list was wrong and they went into another room incorrectly." Tr. at 193:13–16. Although the Court should consider whether more than one inference can be drawn from the evidence, "this rule does not authorize the submission of speculative, theoretical, and hypothetical views to the jury." *Wright*, 372 S.C. at 22, 640 S.E.2d at 498 (citing *Proctor v. Dep't of Health & Env't Control*, 368 S.C. 279, 292–93, 628 S.E.2d 496, 503 (Ct. App. 2006)).

Importantly, the evidence establishes that Campus Advantage fired the employee (Brown) who improperly turned Postell's apartment and disposed of or kept his personal property. Tr. at 294:23–25. Thus, even if Postell established prior instances of "the same kind of actions," any future repetition of this conduct is precluded. *See Turner*, 426 S.C. at 49, 824 S.E.2d at 469 (finding the fact that the defendants "fired" the employee who charged the plaintiff for auto repairs that were never performed "thereby precluding any future repetition" important to whether the practices were capable of repetition). What is more, Defendants have established policies and procedures in place to protect personal property left behind by tenants. Tr. at 194:21–195:11.; *see also* Pl.'s Ex. 1 at 14. Young and Brown did not follow those policies. And the evidence shows

[5] *See* Tr. at 201:16–22 ("So on the 25th, we went back over the plan of action from the day before and emphasized that we are not trashing the units out, we are not doing anything with any units, we are not bringing in any additional vendors. The most we are going to do today is verify occupancy through occupancy walks and we are going to complete move out inspections, [] the only two priorities for our focus on the 25th were those two things.").

that, once they discovered the issue, Defendants attempted to fix it and reimburse Postell for his missing personal property. *See supra* Section I.A. This establishes the conduct is not likely to "continue to occur absent deterrence." *Singleton*, 358 S.C. at 379, 595 S.E.2d at 466. As a result, Postell failed to establish any conduct by Defendants adversely affected the public interest.[6]

C. The trial court erred in finding a willful and knowing violation of SCUTPA and trebling damages.

Without a legitimate violation of SCUTPA attributable to Defendants, the provisions of section 39-5-140 related to treble damages are inapplicable. Regardless, even if Postell established a violation of SCUPTA, the trial court erred in awarding him treble damages.

Under SCUTPA, a trial court may treble the actual damages caused by the unfair or deceptive act only if there was a "willful or knowing violation." S.C. Code Ann. § 39-5-140(a). "For the purposes of this section, a willful violation occurs when the party committing the violation knew or should have known that [the] conduct was a violation of § 39-5-20." S.C. Code Ann. § 39-5-140(d). It is paramount that a party must present some evidence to a court to demonstrate a willful violation before the court may consider an award of treble damages under SCUTPA. *See generally Top Value Homes v. Harden*, 319 S.C. 302, 307, 460 S.E.2d 427, 430 (Ct. App. 1995) (explaining the trial court did not err in refusing to treble damages despite evidence the seller failed to disclose a prior fire in the mobile home to the purchaser, because no evidence showed the lack of disclosure was willful or knowing).

Here, no evidence justifies treble damages under section 39-5-140(a). Not only did Postell fail to identify the actual violation of SCUTPA, but he also submitted no evidence establishing

[6] For all these reasons, because Postell failed to establish a violation of SCUTPA, the Court should reverse the trial court's award of attorney's fees under SCUTPA too. *See* S.C. Code Ann. § 39-5-140(a) ("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.").

"the violation" was willful or knowing. Postell argued below that the jury found Defendants acted willfully in the jury verdict, but the verdict contains no such finding. Jury Verdict. The words "willfully" and "knowingly" do not appear anywhere on the verdict form, much less as they relate to a violation of SCUTPA. *Id.* Even so, that determination—if made at all—was well outside the jury's purview and was reserved solely for the trial court. S.C. Code Ann. § 39-5-140(a). Postell's failure to identify a willful and knowing violation of SCUTPA with legitimate evidence should have been fatal to his request for treble damages.

As our supreme court has noted, the statutory definition of willful has been construed by this Court to mean: "if, in the exercise of due diligence, a person of ordinary prudence engaged in trade or commerce could have ascertained that his conduct violates the Act, then such conduct is willful." *Haley Nursery Co. v. Forrest*, 298 S.C. 520, 525, 381 S.E.2d 906, 909 (1989) (quoting *State v. Nest Egg Soc'y Today, Inc.*, 290 S.C. 124, 128, 348 S.E.2d 381, 384 (Ct. App. 1986)). In *Haley Nursery*, the court upheld the trial court's decision declining to treble damages based on the plain language of the statute. 298 S.C. at 525, 381 S.E.2d at 909.

There, after receiving an incorrect order for trees, the defendant refused to satisfy the bill and the plaintiff filed a collection action. *Id.* The defendant counterclaimed for a violation of SCUTPA based on the delivery mistake. *Id.* The jury found for the defendant on the SCUTPA counterclaim, and the defendant moved for treble damages. *Id.* The trial court declined to treble the actual damages. *Id.* On appeal, the supreme court affirmed, finding there was no evidence the plaintiff committed a willful violation of SCUTPA because the evidence confirmed the plaintiff relied on a third-party tree supplier to provide them with the correct tree variant before delivering to the defendant. *Id.* This was standard practice in the tree supplying industry and, thus, there was no willful violation of SCUTPA. *Id.*

Here, Postell never articulated what he believed was the alleged violation until the end of his case in chief, which the trial court then rejected. Post-Trial Order at 3; Tr. at 340:1–3, 343:7–11, 351:21–24. How, then, can there be a willful and knowing violation of SCUTPA? The trial court's ruling is not clear. The trial court simply concluded that Defendants "'should have known' that by removing [Postell's] personal property after he had renewed his lease as if he had instead terminated his lease or abandoned his apartment would constitute an unfair or deceptive practice in violation of UTPA." Post-Trial Order at 15–16. The trial court does not articulate why. The only other reasoning it provided was that Defendants are in the business of renting apartments to college students. *Id.* at 15. That, however, does not explain how Defendants willfully or knowingly violated SCUTPA by incorrectly disposing of Postell's personal property. That is especially so because the evidence confirms Defendants had policies and procedures in place to protect personal property left behind by tenants (or Postell in this situation), so should not have expected the conduct to occur. Tr. at 194:21–195:11.; *see also* Pl.'s Ex. 1 at 14. There is no evidence in the record to support the trial court's finding that Defendants willfully or knowingly violated SCUTPA.

D. Postell is prohibited from receiving double recovery through a trebling of damages and punitive damages.

Finally, even if Postell had shown a willful or knowing violation of SCUTPA, Postell was not entitled to treble damages as they represent a double recovery. "The doctrine of election of remedies involves a choice between two or more different and coexisting modes of procedure and relief afforded by law for the same injury." *Save Charleston Found. v. Murray*, 286 S.C. 170, 175, 333 S.E.2d 60, 64 (Ct. App. 1985). "Its purpose is to prevent double redress for a single wrong." *Id.* at 175, 333 S.E.2d at 65. "When an identical set of facts entitles the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both; however, the plaintiff may not

recover both." *Id.* (citing *Baeza v. Robert E. Lee Chrysler, Plymouth, Dodge, Inc.*, 279 S.C. 468, 309 S.E.2d 763 (Ct. App. 1983)).

Postell's award of treble damages—not appropriate to begin with because there was no willful or knowing violation of SCUTPA—should be reversed. The jury returned a verdict that included $462,500.24 in punitive damages. Jury Verdict. Treble damages and punitive damages accomplish the same goal: to punish or deter. *See Gamble v. Stevenson*, 305 S.C. 104, 110, 406 S.E.2d 350, 354 (1991) ("In South Carolina, 'punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future.'" (citation omitted)); *see also Atkinson v. Orkin Exterminating Co.*, 361 S.C. 156, 170 n.9, 604 S.E.2d 385, 392 n.9 (2004) (citing Supreme Court case law "recit[ing] a long history of statutory sanctions concerning double, treble, or quadruple damages awarded to deter and punish" (citation omitted)). Trebling the actual damages while also allowing Postell to cover punitive damages allows double recovery for Postell.

Our supreme court has explicitly considered this situation and found a plaintiff cannot recover both punitive and treble damages. "We agree with [the] contention that [plaintiff] was not entitled to recover both punitive and treble damages. An award of punitive damages resulting from an act that may also result in liability for multiple damages is not allowed, for it would result in a double recovery for one wrongful act." *Adamson v. Marianne Fabrics, Inc.*, 301 S.C. 204, 208, 391 S.E.2d 249, 251 (1990); *see also Inman v. Imperial Chrysler-Plymouth, Inc.*, 303 S.C. 10, 14, 397 S.E.2d 774, 776 (Ct. App. 1990) (recognizing the rule in *Adamson* applies to SCUTPA claims). This is not like the situation in *Toyota of Florence v. Lunch*, 314 S.C. 257, 442 S.E.2d 61 (1994), where "the enhancement of actual damages and the award of punitive damages are allowed

by the terms of the [Regulation of Manufacturers, Distributors and Dealers] Act itself." *Id.* at 265, 442 S.E.2d at 616.

Therefore, even if treble damages were appropriate here, Postell is not entitled to both treble *and* punitive damages.

II. The trial court erred in denying Defendants' motion for JNOV as to Postell's breach of contract claim.

In his Complaint, Postell alleged a breach of contract based on the "terms of the lease." Compl. at ¶ 33. It was not until his response in opposition to Defendants' motion for summary judgment, however, that Postell raised the issue of good faith and fair dealing (in a single sentence). Pl.'s Opp. to Mot. for Summ. J. at 8. And when Defendants sought a directed verdict on the claim, Postell again raised the good faith and fair dealing argument, stating with no particularity that "there's like a 60 page lease that I'm quite confident there are numerous sections in that the jury can determine that The Rowan failed to perform on its end." Tr. at 325:3–6.

But the Complaint says nothing about the covenant of good faith and fair dealing. Rather, the allegations relating to the breach of contract cause of action specifically state the "lease agreement" and the "requirements of the landlord or owner" therein form the basis of Postell's breach of contract claim. *See* Compl. at ¶ 32; *see also* Defs.' Ex. 13. Nor does the Complaint state Postell's breach of contract claim is based on any statutory good faith and fair dealing duty. A jury verdict cannot be based on some unpled theory of recovery. *See Blackburn & Co.*, 289 S.C. at 418, 338 S.E.2d at 153.

Simply saying there must be some term Defendants breached does not suffice either. Postell cannot recover on a breach of contract claim when he, himself cannot even identify what provision of the contract Defendants breached. *See Rabon v. State Fin. Corp.*, 203 S.C. 183, 185, 26 S.E.2d 501, 502 (1943) ("[B]efore a party can recover for the breach of a contract, that he must

allege and prove by competent, relevant testimony each one of the material elements of the contract sued on."); *see also Hendricks v. Clemson Univ.*, 353 S.C. 449, 461, 578 S.E.2d 711, 717 (2003) ("Clemson admits that some aspects of the student/university relationship are indeed contractual, but argues Hendricks has not pointed to an identifiable contractual promise that Clemson failed to honor in this case. We agree.").

Like the basis of the ouster claim—on which the trial court properly granted directed verdict in Defendants' favor, Tr. at 353:6–10—the lease agreement specifically contemplates that Postell would have possession, use, and enjoyment of the apartment unit he rented (Unit 3007A). That is the very nature of an apartment lease. *Cf. B-L-S Constr. Co. v. St. Stephen Knitwear, Inc.*, 276 S.C. 612, 614, 281 S.E.2d 129, 130 (1981) ("[T]he essential elements of a binding lease agreement were said to be the grant of possession and exclusive use and enjoyment of the property, definite consideration or rent, and a certain term."). Postell did not plead and has not once argued that he lost the use and enjoyment of Unit 3007A. He couldn't because he didn't. That is why the trial court directed verdict to Defendants on Postell's ouster claim. To disallow the ouster claim but allow the breach of contract claim to go forward is inherently inconsistent.[7]

Because there is no evidence that Defendants breached any provision of the lease agreement by inadvertent disposal of personal property—and because Postell cannot proceed on a

[7] That said, the lease imposes no obligations on Defendants as to Postell's personal property. In fact, the opposite is true. Loss of personal property is expressly excluded in the lease agreement. *See* Defs.' Ex. 13. Section 14, titled Risk of Loss of Resident's Property, states, "Residents shall bear the risk of loss of any and all of Residents' personal property." *Id.* at § 14. That same section provides that "Resident are required to purchase and maintain personal liability insurance with a coverage limit of no less than $100,000.00 for the Term and any renewal periods." *Id.*

The trial court properly recognized this section is "broad." Post-Trial Order at 6. It went on, however, to conclude "[b]y implication" that "liability for loss or damages sustained by the acts or omissions of Defendants' employees is not excluded from potential liability." *Id.* at 7. Under normal circumstances, that might be the case. But that is not the implication of Section 14 here.

theory he never pled—the trial court erred in denying Defendants' motion for JNOV on the breach of contract claim.

III. The trial court erred in denying Defendants' motion for a new trial absolute because the jury's verdict—totaling over 25 times the actual economic damages—is wholly inconsistent with the evidence and is grossly excessive

A trial court "must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives." *Howard v. Roberson*, 376 S.C. 143, 154, 654 S.E.2d 877, 883 (Ct. App. 2007). "Ordinarily the only means of discovering the existence of passion and prejudice as influencing the verdict is by comparing the amount of the verdict with the evidence before the trial court." *Nelson v. Charleston & W.C.Ry. Co.*, 231 S.C. 351, 362, 98 S.E.2d 798, 802 (1957). But "[t]he size of the verdict alone may show that it must have been the result of passion or prejudice." *Id.*

The trial court properly recited the law but came to the wrong conclusion based on the record. When a damages award is so grossly disproportionate to the evidence of actual damages that it "shocks the conscience," the Court can infer the jury was affected by passion, caprice, prejudice, or other factors outside the evidence, and those factors affected not only the damage award but also the finding of liability. *Dillon v. Frazer*, 383 S.C. 59, 63, 678 S.E.2d 251, 253 (2009); *see also Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct. App. 1996) ("The trial judge must grant a new trial absolute if the amount of the verdict is grossly . . . excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives.").

Here, the only evidence of any actual damages was contained on a spreadsheet of estimated values for Postell's missing personal property. The estimated loss of personal property was only

$27,500.00. Defs.' Exhibit 15. Despite this, the jury returned a verdict of $230,000.00 in actual damages and $462,500.24 in punitive damages. Jury Verdict.

The result was a total damages award ***over 25 times*** the evidence of actual economic damages presented to the jury. And after trebling, attorney's fees, and interest, the trial court entered final judgment in Postell's favor for $931,850.71. Final J. Order. This award finds no justification in the facts and evidence presented at trial. The disparity clearly goes beyond an unduly liberal award and suggests that the jurors were motivated by improper considerations.[8]

A. The jury's award of $230,000.00 in actual damages finds no support in the record.

As explained, the only evidence of actual economic damages presented in this case was $27,500.00. *See* Defs.' Ex. 15. Broken down, that figure comprises $7,500.00 for Postell's self-built computer and $20,000.00 for other personal property. *Id.* The initial amount of damage Postell attributed to the computer was $7,500.00. This number never changed even though Postell testified he could not properly diagnose the damage until months after he provided the estimated value. Tr. at 130:2–22.

As for the remaining personal property, according to Postell and his mother, that figure was an estimate and was not reduced at all by depreciation. Tr. at 113:3–12, 114:20–25. In fact, the only reasonable inference from the evidence is that Postell and his mother decided the value of the personal property was $20,000.00 on or before August 7, 2022, and then backed into that number through the several weeks following. They acknowledged through their testimony that they told Defendants during a phone call on August 7—only two days after Postell learned that the property was missing—that they estimated the value of the personal property to be worth

[8] Considering the jury's question during deliberation, one such improper consideration may have been the amount of attorney's fees Postell incurred throughout the case, even though the trial court told the jury that attorney's fees was a legal issue they should not consider. Tr. at 443:14–245:10.

$20,000.00. *See* Tr. at 148:4–150:17; *see also* Tr. at 274:5–8. This is confirmed through Floyd's contemporaneous memorialization of that conversation in an email to Postell and his mother later that day. Defs.' Ex. 10.

Postell further testified about the process he and his mother undertook to develop the spreadsheet of personal property he ultimately provided to Defendants on August 22, 2022. Starting with the $20,000.00 estimate and the categories of personal property Postell's mother outlined in a text exchange with Postell on August 5, 2022, Pl.'s Ex. 7, Postell testified that they "Googled" the prices of various items and backed into the respective quantities shown on the spreadsheet. Tr. at 170:1–10, 171:7–21. Even though none of his items were brand new, Postell did not account for depreciation. Tr. at 113:3–12, 117:16–23. Nor did Postell omit items that Defendants had already replaced on the very day Postell learned they were missing. *Compare* Defs.' Ex. 6, *with* Defs.' Ex. 10. Thus, the $27,500.00 figure Postell came up with as the value of the missing or damaged personal property was overestimated at best.

Even so, the jury somehow returned a verdict of $230,000.00 in actual damages and $462,500.24 in punitive damages. These damages are grossly disproportionate to the evidence of actual damages in this case. Instead, they directly reflect the damages award Postell's counsel suggested to the jury during his closing argument, though the trial court instructed the jury not to consider that commentary as evidence. *See* Tr. at 425:22–426:2 ("You must not consider as evidence any statement of counsel made during the trial; statements of counsel do not constitute evidence. Rather, counsel or lawyers are articulating the position and contention of their respective clients, this rule applies to the opening statement of counsel and the closing argument.").

But that damages award finds no support in the record. For "actual damages," Postell's counsel suggested the jury "put a zero behind" the actual damages in the record—$27,500.00—

and award Postell $227,000.00. Tr. at 404:16. Postell acknowledges that $27,500.00 is the only estimate or economic damages that can be found in the record. Tr. at 420:11. Yet Postell's counsel stated in reply, "I'd submit to you that $27,500.00 is the right number of economic damages, whatever number times two, three, four, five, 10 of noneconomic damages" should then be applied. Tr. at 420:11–14. This is even though Postell presented no actual evidence of noneconomic damages during the trial at all much less evidence to justify a multiplier of ***ten times*** the economic damages. While an award of noneconomic damages does not require a precise calculation, it must be rooted in some actual evidence.

All Postell presented as to noneconomic damages was and unsubstantiated assertion of counseling without a single medical bill or other evidence being placed into evidence.[9] *See* Tr. at 118:9–19 ("Q. How did this make you feel? A. Honestly, I don't really know. I wouldn't say I'm the most emotional person in the world, but, like, it was the start of my junior year of college. It was something I was looking forward to in some sense. Q. Did this derail that? A. Yes. Q. Did you have to seek any mental health counseling? A. Yes. Q. Is that behind you now? A. Yes."). When his roommate told him that his stuff was thrown out, Postell simply said "okay." Tr. at 134:11–15. Postell did not think someone had broken into his apartment; he thought it was a misunderstanding. Tr. at 111:4–13. It was. The trial court's finding that there was "abundant evidence" about Postell's "mental suffering as a direct result of this incident" greatly overstates the actual testimony. Post-Trial Order at 9.

[9] In fact, Postell's testimony is not clear about the reason he sought "mental health counseling" to begin with. Tr. at 118:16–17.

The jury's award of actual damages was grossly excessive based on the record and had to have been impacted by improper considerations, including Postell's counsel's closing argument which suggested the jury simply multiply the economic damages by whatever number they wanted.

B. Punitive damages are not supported by the record and are grossly excessive.

So too was the jury's award of punitive damages in this case. Punitive damages are warranted *only* when the defendant's conduct is willful, wanton, or in reckless disregard of the rights of others. *See Cartee v. Lesley*, 290 S.C. 333, 337, 350 S.E.2d 388, 390 (1986).

At the outset, the jury never made a specific finding that Defendants' conduct was willful, wanton, or reckless. In fact, those words appear nowhere on the jury's verdict. Rather, directly after asking about Postell's actual damages, the verdict form asked only whether "Plaintiff proved its damages to a clear and convincing standard." Jury Verdict.

If you answered "Yes" to any of the first five questions, also answer the following question.

5. **Please state the total amount of damages sustained by Ansel Postell.**

$ 230,000

6. **If Plaintiff proved its damages to a clear and convincing standard, please state the amount of punitive damages sustained by Ansel Postell.**

$ 462,500.24

That is not the proper question in deciding whether to award punitive damages. *See Sea Island Food Grp., LLC*, 433 S.C. at 289, 857 S.E.2d at 907–08 ("In order to recover punitive damages, the plaintiff must present clear and convincing evidence that the defendant's conduct was willful, wanton, or in reckless disregard of the plaintiff's rights." (citation omitted)). The Court could and should stop its inquiry here and order a new trial absolute.

Even so, the punitive damages award is inappropriate. In reviewing a punitive damages award, a court must consider "1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 585, 686 S.E.2d 176, 184 (2009) (citing *BMW of N. Am. v. Gore*, 517 U.S. 559, 575 (1996)). Our supreme court articulated a similar eight-part test in *Gamble*.[10] While that test "remains relevant to the post-judgment due process analysis," it does "only insofar as it adds substance to the *Gore* guideposts." *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185.

Here, the trial court considered both the *Gore* factors and the *Gamble* factors and found the punitive damages award justified and not excessive. Essentially, the trial court recited the same facts it did in considering the other issues in Defendants' post-trial motion. In sum, the trial court recounted that Postell's unit incorrectly appeared as vacating on the turn list when he renewed and paid six months' rent in advance; Defendants are in the business of renting apartments to college students and there are over 1,000 units at The Rowan; Campus Advantage manages other properties throughout the country; and Defendants tried to verify the value Postell's lost property before reimbursing him for the loss. Post-Trial Order at 9–13. These facts do not justify an award of punitive damages in this case, much less a punitive damages award of $462,500.24.

[10] The eight *Gamble* factors are: "(1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) as noted in *Haslip*, "other factors" deemed appropriate." *Gamble*, 305 S.C. at 111–12, 406 S.E.2d at 354 (citing *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20 (1991)).

Our supreme court recently confirmed that "[r]eprehensibility is 'perhaps the most important indicium of the reasonableness of a punitive damages award.'" *Green v. McGee*, 446 S.C. 343, 353, 919 S.E.2d 903, 908 (2025) (quoting *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185). Factors to consider when determining reprehensibility include whether

> (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident.

Mitchell, 385 S.C. at 587, 686 S.E.2d at 185 (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003)).

Here, Postell suffered approximately $27,500.00 in actual economic damages but no physical harm. "This would typically weigh against the reprehensibility of [Defendants'] conduct. *Id.* at 589, 686 S.E.2d at 186. Postell presented no evidence that Defendants' conduct showed a reckless disregard for his (or others') health and safety. While Postell was a college student at the time, he presented no evidence of his financial status. In any event, Defendants immediately took action to replace his missing items and intended to reimburse him for the items once they could verify the value with some confidence.

Although the trial court stated there was evidence "that other tenants' personal property had been improperly removed on previous occasions," Post-Trial Order at 11, that is not quite Young's testimony. *See supra* Section I.B. Even if it were, as it relates to Postell, his unit appearing incorrectly on the turn list was an isolated event. Finally, there was no intentional malice, trickery, or deceit here. Defendants' conduct was no more reprehensible than any other mistake or accident. *Contra Sea Island Food Grp., LLC*, 433 S.C. at 290, 857 S.E.2d at 908 ("[The

defendant's] actions in terminating the master lease were no mere accident."). These factors weigh against an award of punitive damages.

Turning to the ratio between punitive damages and actual damages, the Court "may consider: the likelihood that that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 53, 691 S.E.2d 135, 151 (2010) (citing *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185). "Nevertheless, a court may not rely upon these considerations to justify an otherwise excessive punitive damages award." *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185.

Defendants acknowledge they are in the business of renting housing to students and regularly (mostly, annually) conducting large-scale turnouts. That, however, does not mean that a punitive damages award would deter the conduct that occurred here by simple mistake. Floyd testified there is not one automated system that can be used to monitor, store, and reproduce the occupancy status for all the units at The Rowan (or at any other large housing complex). Tr. at 181:24–182:2. Humans must enter the information. *Id.* Contrary to the trial court's suggestion otherwise, Post-Trial Order at 11, there are already policies and procedures in place that serve as "checks and balances" on the turnout process and to prevent the loss of personal property, Tr. at 194:21–195:11.; *see also* Pl.'s Ex. 1 at 14. Punitive damages do not further those policies.

Even if they did, the punitive damages award here has no reasonable relation to the actual damages Postell incurred: loss of approximately $27,500.00 in personal property. The jury's punitive damages award—$462,500.24—is 16.81 times that actual property loss. There is no reason to foresee that inadvertent disposal of personal property would cause over $200,000.00 in mental suffering by the trial court's analysis. *See* Post-Trial Order at 11. What is more, it clearly

is based on Postell's counsel's closing argument, which suggested to the jury they should use the monthly rental fee ($635) times the number of beds at The Rowan (1002) to calculate the punitive damages, Tr. at 403:8–23, though no one has ever suggested Defendants deprived Postell of use or occupancy of his unit.

The trial court's reasoning that Defendants have the ability to pay is similarly based on this notion that The Rowan has over 1000 beds generating rent and Campus Advantage manages other student housing complexes. Post-Trial Order at 11–12. But an excessive punitive damages award is not justified just because Defendants may be able to pay the award. *See Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185 ("While the ability to pay remains relevant to the post-judgment due process review, a punitive damages award should never be based solely on a percentage of the defendant's net worth."). Especially when Postell introduced no evidence of ability to pay into the record.

Finally, the trial court found it could look to "comparable cases" and considered *Burbach* comparable to the punitive damages award in this case. This was error.

For one, case law suggests that the court should look to whether there are civil penalties or fines "authorized or imposed" by statute, not merely comparable punitive damages awards in other cases. *See James*, 371 S.C. at 197, 638 S.E.2d at 672 (comparing the various administrative penalties under statute that the director of the Department of Insurance may impose for each violation of the insurance laws to the punitive damages award); *Sea Island Food Grp., LLC*, 433 S.C. at 292, 857 S.E.2d at 909 ("[T]he parties agree there are no authorized civil penalties applicable in this case.").

That is because "a reviewing court engaged in determining whether an award of punitive damages is excessive should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue." *Gore*, 517 U.S. at 583 (citation and internal

quotation marks omitted). Here, no statutes impose civil penalties. *Cf. Collins Entm't Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 142, 584 S.E.2d 120, 129 (Ct. App. 2003) ("In the present case, however, we were not able to locate any 'legislative judgments' imposing civil or criminal penalties for tortious interference with a contract, and counsel has not directed our attention to any such statute. In our view, the absence of statutory sanctions for the specific misconduct complained of here poses a dilemma not unlike that in cases in which the reviewing court recognized that the statutory penalty was set at 'such a low level, there is little basis for comparing it with any meaningful punitive damages award.'" (citation omitted)); *Duncan v. Ford Motor Co.*, 385 S.C. 119, 147, 682 S.E.2d 877, 891 (Ct. App. 2009) ("[O]ur appellate courts have faced similar problems when attempting to compare the punitive damages award with possible civil fines that could be imposed against the defendant for similar misconduct."), *overruled in part on other grounds by State v. Wallace*, 440 S.C. 537, 542 n.3, 892 S.E.2d 310, 312 n.3 (2023).

For another, the only similarity between *Burbach* and this case is that it involves a residential lease. In that case, the plaintiff had constant problems with the house that the landlords never resolved and when they vacated the premises, the landlords refused to return that deposit for pretextual reasons (as they did with many other tenants). 326 S.C. at 495, 484 S.E.2d at 120. No such circumstances exist here. Because "[t]here are no directly comparable civil penalties or cases[,] . . . this factor is neutral regarding the constitutionality of the punitive damages award." *Abel*, 446 S.C. at 474 n.10, 920 S.E.2d at 304 n.10.

Put simply, the punitive damages award in this case—$462,500.24—is so grossly excessive to the evidence of actual damages—$27,500.00—that it shocks the conscience and does not survive review under *Gore*, *Mitchell*, and *Gamble*. For the reasons above, the trial court erred in denying Defendants' motion for a new trial absolute.

C. The evidence requires a new trial under the thirteenth juror doctrine.

Under the "thirteenth juror" doctrine, a trial court may grant a new trial absolute when it finds the evidence does not justify the verdict. *S.C. Highway Dep't v. Townsend*, 265 S.C. 253, 285, 217 S.E.2d 778, 781 (1975). This ruling is also known as granting a new trial upon the facts. *E.g.*, *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990). "Similarly, the judge may grant a new trial if the verdict is inconsistent and reflects the jury's confusion." *Vinson*, 324 S.C. at 404, 477 S.E.2d at 722.

Here, the trial court erred in denying Defendants' motion for a new trial absolute under the thirteenth juror doctrine because the evidence presented at trial does not justify the verdict. As explained above, the evidence does not support a SCUTPA or breach of contract claim and does not justify the actual and punitive damages award rendered by the jury. It is clear from the amount of the jury's verdict that the award of $230,000.00 in actual damages and $462,500.24 in punitive damages is not based on any evidence introduced by Postell at trial related to his lost or damaged personal property or vague references to mental health counseling. Instead, it was based entirely on the passion, prejudice, and arguments of counsel.

The Court should reverse because the verdict (and the trial court's decision not to invoke the thirteenth juror doctrine) is "wholly unsupported by the evidence." *Folkens*, 300 S.C. at 254–55, 387 S.E.2d at 267.

IV. Alternatively, the trial court abused its discretion in denying Defendants' motion for a new trial nisi remittitur.

At the very least, for all the reasons above, the trial court should have granted Defendants' alternative motion for a new trial *nisi remittitur* because the verdict is excessive. *See James*, 371 S.C. at 193, 638 S.E.2d at 670; *see also Jolly v. Fisher Controls Int'l, LLC*, 443 S.C. 511, 523, 905 S.E.2d 380, 387 (2024) ("It is only when the trial court deems the verdict inadequate or

excessive—but not grossly so—that the trial court has the authority to grant a new trial *nisi*." (citation omitted)).

In denying Defendants' motion for a new trial *nisi remittitur*, the trial court conducted no analysis showing it exercised its discretion. *See Morris v. BB&T Corp.*, 438 S.C. 582, 587, 885 S.E.2d 394, 397 (2023) ("The exercise of discretion is not to simply make a decision. [It] requires first that the trial court recognize it has the responsibility of discretion . . . [and] then to follow a thought process that begins with the trial court's clear understanding of the applicable law, continues with the court's sound analysis of the situation before it in light of the law, and ends with the trial court's ruling that follows the law and is supported by the facts and circumstances." (internal citations omitted)).

The Court should reverse and reduce the verdict accordingly.

CONCLUSION

For the reasons above, the Court should reverse the trial court's denial of Campus Advantage and The Rowan's directed verdict motions and post-trial motions and should vacate or reverse the jury's verdict and judgment in this matter. At the very least the Court should reverse the trial court's denial of Defendants' motion for a new trial *nisi remittitur* and reduce the verdict.

(Signature Page Follows)

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