THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE RICHLAND COUNTY
Court Of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge
Alison Renee Lee, Circuit Court Judge

APPELLATE CASE NO.: 2014-001799

Coastal Pi, LLC d/b/a Primarily Pi and James Bigby. . . . . Respondents,

v.

Danville Business Advisors, LLC and Marion D. Turbeville . . . . . .Defendants,

Of Whom Marion D. Turbeville is. . . . . Appellant.

BRIEF OF RESPONDENTS

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II. DID THE TRIAL COURT ERR WHEN IT AWARDED THE RESPONDENTS ATTORNEYS' FEES, COSTS AND TREBLE DAMAGES?

STATEMENT OF THE CASE[1]

In this appeal from the Circuit Court, Appellant Marion D. Turbeville ("Appellant" or "Turbeville"), seeks reversal of an order denying his motion to dismiss and of an order awarding attorneys' fees and treble damages under the South Carolina Unfair Trade Practices Act ("UTPA"), S.C. Code §§ 39-5-10 to 560 (1985 & Supp. 2014).

This case arises from a project to upfit a portion of a commercial building in West Columbia, South Carolina to be used as a pizza restaurant (hereinafter, "the Project"). (R. pp. 28-32.) Respondents Coastal Pi, LLC d/b/a Primarily Pi and James Bigby (collectively, "Respondents") commenced this action on June 27, 2011. (R. p. 28.) In their original complaint, the Respondents demanded a jury trial and asserted claims against the contractor on the Project, C.G.I. Development, Inc. ("Contractor"), for breach of contract, breach of warranties, equitable indemnity and negligence. (R. pp. 30-32.)

On May 12, 2012, after litigating the case for one year against the Contractor, the Respondents amended their complaint to add claims against the Appellant and his company, Danville Business Advisors, LLC ("Danville").[2] (R. pp. 37-47.) The claims

[1] The Respondents offer this Statement of the Case and Facts in lieu of Appellant's Statement of the Case and Facts.

[2] The Amended Complaint also included claims against other entities not parties to this appeal.

against the Appellant included negligence, equitable indemnity and breach of fiduciary duty. (R. pp. 44-45.)

On May 22, 2012, Appellant answered the amended complaint. (R. pp. 48-54.)

In November 2012, the parties agreed by stipulation to remove the case from the trial roster pursuant to Rule 40(j), SCRCP. (R. pp. 2-6.) On August 28, 2013, after conducting a hearing on Respondents' motion to restore the case and motion to amend their complaint, the Circuit Court issued two orders restoring the case to the trial roster and granting the Respondents leave to file a second amended complaint. (R. pp. 7-8.)

After receiving the orders, Respondents filed their second amended complaint, in which they asserted claims against Turbeville for equitable indemnity, negligence, breach of fiduciary duty, violation of the UTPA, constructive fraud, fraud and negligent misrepresentation.[3] (R. pp. 59-77.) Again, the Respondents demanded a jury trial. Id. at 76.

Turbeville promptly answered, demanded a jury trial, denied the Respondents' allegations and asserted numerous affirmative defenses, including Rule 12(b)(6), SCRCP. (R. pp. 79-91.)

Prior to trial, the Respondents settled with all parties except Danville and Turbeville.

On February 27, 2014, Turbeville moved to dismiss the claims against him individually. (R. pp. 101-102.) After a hearing on the motion held April 23, 2014, Judge G. Thomas Cooper, Jr. denied the motion to dismiss. (R. pp. 9-13.)

The parties tried the case before a jury on May 27, 28 and 29, 2014, with Judge Alison Renee Lee presiding. (R. p. 236.) At the close of the Plaintiffs' case, Turbeville

[3] The Second Amended Complaint also included claims against other entities not parties to this appeal.

moved for directed verdict on the issue of his individual liability. (R. p. 318, line 13 – p. 319, line 5.) The Court did not decide the motion at that time. (R. p. 319, line 25 – p. 320, line 4.) The Respondents also dismissed their claims against Turbeville for equitable indemnity, constructive fraud, fraud and negligent misrepresentation. (R. p. 316, line 16 – p. 317, line 12.)

At the close of the evidence, Turbeville renewed his motion for directed verdict. (R. p. 334, line 8 – p. 339, line 16.) Judge Lee granted Turbeville a directed verdict on the negligence claim based on the economic loss rule, but she denied the motion as to his individual liability under the UTPA and sent the case to the jury. (R. p. 332, lines 1-11.)

The jury returned a verdict against Turbeville on the remaining claims (breach of fiduciary duty and violation of the UTPA) and awarded damages of $39,200. (R. p. 334, line 8 – p. 339, line 16; R. p. 21.) Due to a post-trial motion for the Respondents to elect their remedy, the trial court withheld entry of judgment on the jury verdict. (R. p. 19.)

The parties resolved the election of remedies issue by consent order, and Respondents moved pursuant to the UTPA for reimbursement of $110,020.08 in attorney's fees and costs, as well as treble damages. (R. pp. 14-15; R. pp. 106-115.) The trial court granted Respondents' motion and awarded $84,907.85 in attorneys' fees and costs, as well as treble damages. (R. pp. 16-18.) Accordingly, the trial court entered judgment against Turbeville in the amount of $202,507.85. Id.

On August 21, 2014, Turbeville served his notice of appeal.

FACTS

Turbeville was one of two owners of Danville Business Advisors, LLC, a Columbia-based business that was a "boutique commercial real estate financing

company." (R. p. 238, lines 13–16.) Prior to the Primarily Pi Project, Turbeville had worked with Mr. Bigby on prior restaurant jobs. (R. p. 238, lines 17–20.) On the Primarily Pi Project, the Respondents hired Danville to be "involved in every step of the way." (R. p. 239, lines 4–19.) In exchange, the Respondents agreed to pay $1,500 per month. Id. In all, the Respondents paid Danville $24,000 for its work on the Project. (R. p. 242, line 14 – p. 246, line 3.) Unbeknownst to the Respondents, Danville also received an undisclosed leasing commission in the amount of $23,067.58 and a secret finder's fee in the amount of $16,500. Id. Therefore, although Turbeville led Bigby to believe the only money Danville received from the Project was the $1,500 per month (for a total of $24,000) from the Respondents, in fact Danville received more than twice that amount at the Respondents' expense. It was Turbeville's personal practice not to disclose the leasing commissions and finder's fees unless the client asked. (R. p. 245, line 24 – p. 246, line 25.)

On the Primarily Pi Project, Turbeville instructed the Contractor to increase its quote by $16,500 to account for the finder's fee, and the Contractor complied. (R. p. 256, line 20 – p. 257, line 3; R. p. 261, line 18 – p. 262, line 6; R. pp. 146-150.) This was Turbeville's and Danville's standard practice, and it cost the Respondents and other Danville clients more money than they otherwise would have spent. (R. p. 247, line 1 – p. 248; R. p. 256, line 20 – p. 257, line 3; R. p. 261, line 18 – p. 262, line 6; R. p. 329, line 16 – p. 330, line 12; R. pp. 127-134; R. pp. 146-150.)

When the restaurant opened, the Respondents experienced serious problems, including a strong sewer smell and excessive heat. (R. p. 273, line 5 – p. 274, line 9; R. p. 277, lines 13 to 21; R. p. 279, line 1 – p. 280, line 1.) Although the Respondents tried,

they could never overcome the problems they faced on the Project and ultimately had to shutter the business. (R. p. 82, lines 15 to 17.)

After filing this lawsuit, the Respondents discovered that Turbeville had personally negotiated for $39,567.58 in additional payments from the Project at their expense. Furthermore, the Respondents discovered that the sewer smell and excessive heat were the direct and foreseeable result of Turbeville's and Danville's failure to properly manage the Project. With Turbeville's approval, the Contractor installed cheaper rooftop HVAC units than the units the project engineer specified. (R. p. 263, lines 22 to 24; R. p. 264, line 14 – p. 267, line 17.) The project engineer informed Turbeville in August of 2009 that the cheaper units were the cause of the excessive heat problem, but Turbeville kept that information from Mr. Bigby. (R. p. 274, lines 14 to 20; R. p. page 279, lines 1 to 17; R. pp. 151-52.)

When the Respondents filed suit in 2011, they first sued the Contractor, alleging construction defect claims. After they discovered Turbeville's and Danville's deceptive business practice of negotiating for secret commissions, however, the Respondents amended their pleading to assert claims against Danville and against Turbeville individually. In the Second Amended Complaint, the Respondents alleged, among other claims,

> 90. Turbeville's practice of secretly negotiating for kickbacks to be paid to Danville from contractors without disclosing those payments to his clients is an unfair method of competition and an unfair or deceptive act or practice in the conduct of a trade or commerce, as defined by law.
>
> 91. Danville's practice of secretly collecting kickbacks from contractors without disclosing those payments to its clients is an unfair method of competition and an unfair or deceptive act or practice in the conduct of a trade or commerce, as defined by law.

> 92. These actions constitute a violation of the South Carolina Unfair Trade Practices Act S.C. Code Ann. § 39-5-10 *et seq.* (the "Act").
>
> 93. Turbeville's and Danville's unfair and deceptive practices affect the public interest and have the potential for repetition, if it has not already been repeated.
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> * * *
>
> 95. Additionally, Turbeville's and Danville's practice of secretly negotiating for kickbacks that increase the contract prices have, upon information and belief, already been repeated, and will likely continue to occur absent deterrence because the parties who gain from the arrangement keep it secret from owners.
>
> 96. Turbeville, individually and on behalf of Danville, used and employed the unfair or deceptive methods, acts, and practices willfully and knowing they violated the Act.

(R. pp. 70-71.)

> At trial, Judge Lee charged the jury,
>
> In order to hold Marion Turbeville personally liable under these claims, the Plaintiff must establish by the greater weight or the preponderance of the evidence that Mr. Turbeville personally committed, participated in, directed or authorized the commission of acts in violation of those fiduciary duties or in violation of the unfair trade practices act.

(R. p. 333, lines 10 to 16.) The jury determined that both Danville and Turbeville violated the UTPA. (R. pp. 21-23.) Against Danville, the jury awarded damages of $521,000. (R. pp. 22-23.) With respect to Turbeville individually, however, the jury did not impose the full weight of the Respondents' damages. Rather, the jury awarded actual damages of $39,200, slightly less than the sum of the leasing commission and the finder's fee Turbeville negotiated. (R. p. 21.)

On June 4, 2014, the Respondents moved for an award of attorneys' fees and treble damages under the UTPA. (R. pp. 106 and 119.) Respondents submitted a memorandum and an affidavit of attorneys' fees and costs in support of their request for

reimbursement for $110,020.08 in fees and costs. (R. pp. 107-115.) In response, Turbeville argued he should not have to pay attorney's fees and costs incurred in prosecuting the claims against the other defendants, the Contractor and FRS, Inc. (R. pp. 120-125.) He also requested that the trial court require an itemization of fees and costs. Id. The trial court obliged and directed the Respondents to submit an itemization of fees and costs beginning with the date Turbeville was added to the lawsuit. (R. p. 340.) On July 25, 2014, the Respondents complied with the trial court's request by submitting fourteen pages of itemized costs and billing records supporting their motion. (E-mail from Bruner to Court, July 25, 2014 at 3:24 PM, App. pp. 2-17.) After considering the arguments and submissions of counsel, the trial court granted the Respondents' motion but reduced the award of attorneys' fees and costs to $84,907.85, roughly 77% of the fees and costs requested. (R. pp. 16-18.) In addition, the trial court found substantial evidence in the record that proved Turbeville knew or should have know his practice of negotiating for secret commissions at his clients' expense violated the UTPA. As a result, the trial court trebled the damage award against Turbeville and entered judgment in the amount of $202,507.85. Id.

STANDARD OF REVIEW

An appellate court applies the same standard as the trial court when reviewing a decision to grant or deny a motion to dismiss an action pursuant to Rule 12(b)(6), SCRCP. Fabian v. Lindsay, 410 S.C. 475, 481-82, 765 S.E.2d 132, 136 (2014), reh'g denied (Dec. 10, 2014). The Court is free to decide questions of law with no particular deference to the trial court. Id.; Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009) (citing Doe v. Marion, 373 S.C. 390, 395, 645

S.E.2d 245, 247 (2007)). "In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." Doe, 373 S.C. at 395, 645 S.E.2d at 247-48 (citing Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006)). "If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper." Doe at 395, 645 S.E.2d at 247. "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." Id. (citation omitted). "The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. Id.

"In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law, and a factual finding by the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the jury's findings." Wright v. Craft, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006) (citing Erickson v. Jones Street Publishers, L.L.C., 368 S.C. 444, 464, 629 S.E.2d 653, 663-64 (2006); R & G. Const. Inc., v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 431, 540 S.E.2d 113, 117 (Ct. App. 2000) cert. dismissed (July 22, 2002) rehearing denied (Aug 21, 2002); and Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976)). Findings of fact the trial judge makes will not be disturbed on appeal unless "found to be without evidence which reasonably supports the judge's findings." Townes Assocs., 266 S.C. at 86, 221 S.E.2d at 775. The trial judge's findings are equivalent to a jury's findings in a law action. Id.

"The decision to award or deny attorneys' fees under a state statute will not be disturbed on appeal absent an abuse of discretion." S. Carolina Dep't of Transp. v. Revels, 411 S.C. 1, 8, 766 S.E.2d 700, 703-04 (2014) (quoting Kiriakides v. Sch. Dist. of Greenville Cnty., 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009). "Similarly, the specific amount of attorneys' fees awarded pursuant to a statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." Revels, 411 S.C. at 8, 766 S.E.2d at 703-04. "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." Id.

ARGUMENT

Turbeville raises two issues on appeal. First, he argues the Circuit Court erred by denying his motion to dismiss because he was shielded from individual liability. Second, he argues the trial court erred in granting the Respondents' motion for attorneys' fees and treble damages under the South Carolina Unfair Trade Practices Act ("UTPA"), S.C. Code §§ 39-5-10 to 560 (1985 & Supp. 2014).

Contrary to Turbeville's arguments, it is well-established that with few exceptions an individual is liable for unfair trade practice he uses or employs, including unfair trade practices he commits, participates in, directs or authorizes when he is acting on behalf of a business. As discussed in more detail below, the General Assembly has expressed no intention of shielding individuals from liability for their unfair trade practices when they are acting on behalf of an LLC. Therefore, Turbeville's argument that he is immune from suit for his unlawful actions has no merit.

With respect to the trial court's order granting Respondents' motion for attorney's fees and treble damages, the record in this case shows no sign that the fee award was

controlled by an error of law or based on unsupported factual conclusions, nor is there any indication that the trial court's finding that Turbeville willfully violated the UTPA was without evidence reasonably supporting Judge Lee's findings. Accordingly, Turbeville can show no error upon which to reverse the trial court's order.

For these reasons, as well as any other grounds appearing in the record pursuant to Rule 220(c), SCACR, the lower court committed no reversible error, and this Court should affirm.

I. AN INDIVIDUAL MEMBER OF A SOUTH CAROLINA LIMITED LIABILITY COMPANY IS LIABLE FOR UNFAIR TRADE PRACTICES HE PERSONALLY COMMITS, PARTICIPATES IN, DIRECTS OR AUTHORIZES.

Turbeville first argues the Circuit Court erred in denying his motion to dismiss because the Court erroneously relied on 16 Jade Street, LLC v. R. Design Constr. Co., LLC, 398 S.C. 338, 728 S.E.2d 448 (2012) ("Jade Street I"), rather than on the clear and unambiguous language of S.C. Code Ann. § 33-44-303 (2006).

As an initial matter, it must be noted that Turbeville does not argue Judge Cooper erred in holding that an individual can be held liable under the UTPA for unfair trade practices he personally commits, participates in, authorizes or directs. (See R. pp. 12-13 (quoting BPS, Inc. v. Worthy, 362 S.C. 319, 328, 608 S.E.2d 155, 160 (Ct. App. 2005) (emphasis in original)).) Judge Cooper's Order was based not only on the Court's interpretation of Section 33-44-303 but also on the UTPA as interpreted by Worthy. Appellant's failure to appeal that basis for denying the motion to dismiss is fatal to his appeal under the two issue rule. See Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) (explaining the two issue rule).

Second, Turbeville has not challenged the trial court's denial of his motions for directed verdict and for judgment notwithstanding the verdict.[4] Therefore, Turbeville has waived any right to challenge those decisions; the trial court's holdings denying those motions are the law of the case. See Rule 208(b)(1)(B), SCACR (requiring an appellant's initial brief to contain "[a] statement of each of the issues presented for review".); Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (explaining that an unappealed ruling, right or wrong, is the law of the case); see also State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("No point will be considered which is not set forth in the statement of issues on appeal."); State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001); Wright, 372 S.C. at 21, 640 S.E.2d at 497; Barnes v. Cohen Dry Wall, Inc., 357 S.C. 280, 287, 592 S.E.2d 311, 314, n. 11 (Ct. App. 2003) (declining to address issues that were not set forth in appellant's statement of issues on appeal).

Third, even if this Court reaches the merits of the first issue Turbeville raises on appeal, the Appellant's argument is based on a strained interpretation of the South Carolina Uniform Limited Liability Company Act of 1996 ("LLC Act"), S.C. Code Ann. §§ 33-44-101 to 1208 (2006), which frustrates the purpose of the UTPA. Appellant argues the LLC Act, as adopted in South Carolina, shielded him from liability for unfair trade practices he personally used and employed on the Primarily Pi Project and other projects; he contends liability for that unlawful conduct lay solely with the company, Danville. It is well-settled in South Carolina that an officer or director of a corporation is liable for unfair trade practices he commits, participates in, directs or authorizes, Plowman v. Bagnal, 316 S.C. 283, 286, 450 S.E.2d 36, 38 (1994), adhered to on reh'g

[4] Turbeville also has not challenged the jury charge the trial court gave as to his individual liability.

(Oct. 19, 1994); Worthy, 362 S.C. at 328, 608 S.E.2d at 160. Whether that rule applies equally to an individual member of a limited liability company who participated in and authorized the UTPA violations appears to be a novel issue in this State.

"All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." Mull v. Ridgeland Realty, LLC, 387 S.C. 479, 486, 693 S.E.2d 27, 31 (Ct. App. 2010) (quoting Broadhurst v. City of Myrtle Beach Election Comm'n, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000)). "Courts should give words 'their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.'" Mull at 486 (quoting Sloan v. S.C. Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006)). "In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose." Mull at 486 (citing Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992)). "Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law." Mull at 486 (quoting Bennett v. Sullivan's Island Bd. of Adjustment, 313 S.C. 455, 458, 438 S.E.2d 273, 274 (Ct. App. 1993)). "Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the Legislature or would defeat the plain legislative intention." Mull at 486 (citing Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000)); see also Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 440 S.E.2d 364 (1994). "Specific statutes are not to be considered repealed by a later general statute unless there is a direct reference to the earlier statute or

the intent of the legislature to do so is explicitly implied." Denman v. City of Columbia, 387 S.C. 131, 138-39, 691 S.E.2d 465, 468-69 (2010) (citing Atlas Food Systems and Serv., Inc. v. Crane National Vendors Div. of Unidynamics Corp., 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995); City of Rock Hill v. S.C. Dept. of Health and Envtl. Control, 302 S.C. 161, 167, 394 S.E.2d 327, 331 (1990); Sharpe v. S.C. Dept. of Mental Health, 281 S.C. 242, 245, 315 S.E.2d 112, 113 (1984)). "Repeal by implication is disfavored, and is found only when two statutes are incapable of any reasonable reconcilement." Denman, 387 S.C. at 139, 691 S.E.2d at 469 (internal quotations omitted).

The UTPA provides, "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." S.C. Code Ann. § 39-5-20(a) (1985). The UTPA defines "trade or commerce" as "the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State." S.C. Code Ann. § 39-5-10(b) (1985). In addition, the UTPA confers a private cause of action on "[a]ny 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 § 39-5-20[.]" S.C. Code Ann. § 39-5-140(a) (1985). The South Carolina Supreme Court has recognized, "The plain language of section 39–5–140 provides that **any** person is liable for damages resulting from their use or employment of unfair trade practices." Plowman, 316 S.C. at 286, 450 S.E.2d at 37 (bold emphasis added, underscored emphasis in original).

After construing the clear and unambiguous terms of the statute, the Plowman Court declined to impose liability on directors and officers of corporations without regard to whether they "used or employed" an unfair trade practice. Plowman, 316 S.C. at 286, 450 S.E.2d at 37-38. Rather, the Court expressly held "that in private actions under the UTPA, directors and officers are not liable for the corporation's unfair trade practices unless they personally commit, participate in, direct, or authorize the commission of a violation of the UTPA." Id. at 286, 450 S.E.2d at 38 (emphasis in original). That holding not only furthered the UTPA's purpose of holding accountable all people who used or employed unfair trade practices but also was consistent with the well-settled rule "that corporate officers and directors are not liable for the tortious conduct of the corporation unless they commit, participate in, direct, or authorize the commission of a tort." Id. (citing Hunt v. Rabon, 275 S.C. 475, 272 S.E.2d 643 (1980)).

In 1996, the General Assembly enacted the LLC Act. The specific portion of that Act on which Appellant relies is Section 33-44-303(a) (2006), which provides,

> (a) Except as otherwise provided in subsection (c), the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company **solely by reason of being or acting as a member or manager**.
>
> (b) The failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on the members or managers for liabilities of the company.
>
> (c) All or specified members of a limited liability company are liable in their capacity as members for all or specified debts, obligations, or liabilities of the company if:
>
> (1) a provision to that effect is contained in the articles of organization; and

(2) a member so liable has consented in writing to the adoption of the provision or to be bound by the provision.

S.C. Code Ann. § 33-44-303 (emphasis added). The comment to the Uniform Act, which the General Assembly adopted, explains in pertinent part,

> A member or manager, as an agent of the company, is not liable for the debts, obligations, and liabilities of the company simply because of the agency. **A member or manager is responsible for acts or omissions to the extent those acts or omissions would be actionable in contract or tort against the member or manager if that person were acting in an individual capacity.**

Id. Thus, the comment elucidates the Legislature's intent that a member not be held liable solely by virtue of his status as a member; rather, liability must rest on something more, such as a member's commission, participation in, direction of or authorization of the commission of a violation of the UTPA.

Contrary to Appellant's argument, Judge Cooper did, in fact, construe the plain language of Section 33-44-303(a) when deciding Turbeville's motion to dismiss. Pursuant to the standard in Rule 12, SCRCP, Judge Cooper accepted all of the allegations in the Second Amended Complaint as true. In that pleading, the Respondents alleged, inter alia,

> 90. Turbeville's practice of secretly negotiating for kickbacks to be paid to Danville from contractors without disclosing those payments to his clients is an unfair method of competition and an unfair or deceptive act or practice in the conduct of a trade or commerce, as defined by law.
>
> 91. Danville's practice of secretly collecting kickbacks from contractors without disclosing those payments to its clients is an unfair method of competition and an unfair or deceptive act or practice in the conduct of a trade or commerce, as defined by law.
>
> 92. These actions constitute a violation of the South Carolina Unfair Trade Practices Act S.C. Code Ann. § 39-5-10 *et seq.* (the "Act").

> 93. Turbeville's and Danville's unfair and deceptive practices affect the public interest and have the potential for repetition, if it has not already been repeated.
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> * * *
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> 95. Additionally, Turbeville's and Danville's practice of secretly negotiating for kickbacks that increase the contract prices have, upon information and belief, already been repeated, and will likely continue to occur absent deterrence because the parties who gain from the arrangement keep it secret from owners.
>
> 96. Turbeville, individually and on behalf of Danville, used and employed the unfair or deceptive methods, acts, and practices willfully and knowing they violated the Act.

(R. pp. 70-71.) Thus, the Respondents clearly alleged that Turbeville personally used and employed unfair or deceptive acts that violated the UTPA.

In support of his holding that Turbeville was not shielded from individual liability under the UTPA, Judge Cooper relied not only on the plain language of Section 33-44-303(a) and on authority gathered in Jade Street I, he also relied on this Court's holding that for claims under the UTPA, "a cause of action alleged by [Respondents] in the present case, 'directors and officers are not liable for the corporation's unfair trade practices *unless* they personally commit, participate in, direct, or authorize the commission of a violation of the UTPA.'" (R. pp. 12-13 (quoting Worthy, 362 S.C. at 328, 608 S.E.2d at 160 (emphasis in original)).) Accord, Tillman v. Wheaton–Haven Recreation Association, Inc., 517 F.2d 1141, 1144 (4th Cir. 1975); Hunt, 275 S.C. at 477, 272 S.E.2d at 644 ("To incur liability he must ordinarily be shown to have in some way participated in or directed the tortious act."); Plantation A.D., LLC v. Gerald Builders of Conway, Inc., 386 S.C. 198, 208-09, 687 S.E.2d 714, 720 (Ct. App. 2009) (reversing summary judgment granted to individual based upon Worthy.). See also Jones, 387 S.C. at 346, 692 S.E.2d at 903 (explaining the two issue rule).

This Court's analysis in Worthy, is instructive:

> Nothing in the law shields Worthy from direct liability in tort for his own actions. See Rowe v. Hyatt, 321 S.C. 366, 369, 468 S.E.2d 649, 650 (1996) ("An officer, director, or controlling person in a corporation is not, merely as a result of his or her status as such, personally liable for the torts of the corporation. To incur liability, the officer, director, or controlling person must ordinarily be shown to have in some way participated in or directed the tortious act."). Worthy is personally liable for any tortious acts he participated in or directed.
>
> Additionally, Worthy is liable for unfair trade practices that he personally committed. "[I]n private actions under the UTPA, directors and officers are not liable for the corporation's unfair trade practices *unless* they personally commit, participate in, direct, or authorize the commission of a violation of the UTPA." Plowman v. Bagnal, 316 S.C. 283, 286, 450 S.E.2d 36, 38 (1994) (emphasis added); see also Donsco, Inc. v. Casper Corp., 587 F.2d 602 (3rd. Cir.1978) (finding that corporate officer is individually liable for unfair competition in which he participates); Moy v. Schreiber Deed Sec. Co., 370 Pa.Super. 97, 535 A.2d 1168 (1988) (stating that corporate president could be held individually liable under the participation theory for acts of unfair competition which he personally committed); Great Am. Homebuilders, Inc. v. Gerhart, 708 S.W.2d 8 (Tex. App. 1986) (determining that corporate officer who knowingly participates in deceptive trade practice may be held individually liable).

Worthy, 362 S.C. at 328-29, 608 S.E.2d at 160-61.

Judge Cooper's holding was also consistent with the interpretation the Federal Trade Commission and Federal Courts have given to 15 U.S.C. § 45(a)(1), see S.C. Code Ann. § 39-5-20(b) (providing that courts are to be guided by interpretations given by the FTC and by Federal Courts to the analogous federal statute); F.T.C. v. Ross, 897 F. Supp. 2d 369, 374 (D. Md. 2012) aff'd, 743 F.3d 886 (4th Cir. 2014) (holding individual member of LLC liable), as well as the rule a majority of jurisdictions follow. See, e.g., Hoang v. Arbess, 80 P.3d 863, 867 (Colo. App. 2003) (stating parties did not dispute that corporate liability principles apply to LLCs); Ventres v. Goodspeed Airport, LLC, 275 Conn. 105, 145, 881 A.2d 937, 963-64 (2005) (holding that Connecticut's LLC statute "merely codifies" established liability principles of corporate law); Allen v. Dackman,

413 Md. 132, 152, 991 A.2d 1216, 1228-29 (2010) (applying general liability rule from corporations to LLCs); d'Elia v. Rice Dev., Inc., 147 P.3d 515, 525 (Utah Ct. App. 2006) ("We are persuaded by those authorities that hold that both limited liability members and corporate officers should be treated in a similar manner when they are engaged in tortious conduct."). Just as one cannot "buy immunity from suits for [his] torts by being a member of a business corporation," one cannot buy immunity by being a member of a limited liability company. Hoagland ex rel. Midwest Transit, Inc. v. Sandberg, Phoenix, & von Gontard, P.C., 385 F.3d 737, 744 (7th Cir. 2004) (Posner, J.)

Without acknowledging any portion of the UTPA, Appellant argues that the plain language of Section 33-44-303(a) shields him from liability in his individual capacity for actions taken in furtherance of the company's business. That argument overlooks the fact that the actions Turbeville took, as alleged and as determined by the jury, were unlawful and in clear violation of statutory law. Turbeville seeks immunity not from suits for common law torts like negligence but rather from suits for willfully and intentionally violating a statutory prohibition against unfair and deceptive business practices. While he may be correct that his actions were in furtherance of Danville's business, the actions he took furthered an unlawful and deceptive business practice that the General Assembly clearly prohibited. To accept Turbeville's argument that, as a matter of law, the LLC Act shields him from liability under these circumstances would create a double standard under the UTPA: one for individuals who violate the UTPA while claiming to further an LLC's business and one for everyone else. Nothing in the LLC Act or the UTPA evidences any intent to create two classes of individuals or to shroud one class of individuals in immunity for unfair trade practices used or employed to further unlawful

actions of an LLC. To the contrary, the plain language of the UTPA demonstrates the General Assembly's intent that it apply to all persons who use or employ unfair trade practices. S.C. Code Ann. § 39-5-140(a). The General Assembly promulgated exceptions to the UTPA, and at no time has the list of exceptions included actions taken by individuals on behalf of a limited liability company. S.C. Code Ann. § 39-5-40 (1985 & Supp. 2014); see Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) (recognizing "[t]he canon of construction "*expressio unius est exclusio alterius*" or "*inclusio unius est exclusio alterius*" holds that "to express or include one thing implies the exclusion of another, or of the alternative."). Therefore, to adopt Appellant's forced interpretation of Section 33-44-303(a) would lead to a result so plainly absurd that the General Assembly could not have intended it and would defeat the plain legislative intention of the UTPA.

Turbeville also cites to two bills, one in the House of Representatives and one in the Senate, in support of his argument. However, both of those bills are dead. House Bill 5150 received only two readings in the Senate and, consequently, was never presented for the Governor to sign into law. See S.C. Const. Art. III, § 18 and Art. IV, § 21. Senate Bill 1416 died in subcommittee. Today, two legislative sessions removed, no lawmaker has reintroduced either bill, a fact that not only undermines Turbeville's argument.

For these reasons, Judge Cooper committed no error when he denied Turbeville's motion to dismiss, and his order should be affirmed.

II. THE TRIAL COURT COMMITTED NO ERROR WHEN IT AWARDED THE RESPONDENTS ATTORNEYS' FEES, COSTS AND TREBLE DAMAGES.

Turbeville also argues the trial court erred when it awarded treble damages, attorneys' fee and costs under the UTPA. The record, however, fully supports Judge

Lee's findings.

"The purpose of the UTPA is to discourage unfair methods of competition and unfair or deceptive acts in the conduct of any trade or commerce." Taylor v. Medenica, 331 S.C. 575, 579, 503 S.E.2d 458, 460 (1998). In furtherance of its purpose, the UTPA allows a party harmed by the use or employment of unfair trade practices to bring a private cause action for damages. S.C. Code Ann. § 39-5-140(a). If the aggrieved party prevails, then he is entitled to collect reasonable attorney's fees and costs of the action. Id. If he also proves the defendant willfully or knowingly violated the UTPA, then the Court must award treble damages. Id.

In this case, the jury returned verdicts against both Danville and Turbeville for having violated the UTPA. Notably, while the verdict against Danville was for $521,000, the verdict against Turbeville was for only $39,200, or slightly less than the sum of the leasing commission and the "finder's fee" Turbeville negotiated. Turbeville has not appealed the trial court's denial of his motion for directed verdict or the denial of his motion for judgment notwithstanding the verdict, nor does Turbeville take issue with the jury charge on his individual liability. Rather, Turbeville contends that there was no evidence at trial that his violation was willful or knowing and that the award of attorneys' fees was improper because the trial court included fees and costs related to claims against other defendants and because the Respondents failed to present an itemization of fees and costs.

A. THE TRIAL COURT'S AWARD OF ATTORNEYS FEES AND COSTS IN THE AMOUNT OF $84,907.85 WAS PROPER

By statute the trial court had no discretion to deny Respondents attorneys' fees and costs, regardless of whether the violation was a willful or knowing violation of the

UTPA. The trial court did, however, have discretion to determine what constituted reasonable attorneys' fees and costs.

In support of their motion for treble damages and attorneys' fees and costs, the Respondents submitted a memorandum and an Affidavit of Attorneys' Fees and Costs dated June 6, 2014, requesting reimbursement for $110,020.08 in fees and costs. On June 20, 2014, Turbeville submitted a written memorandum in opposition to Respondents' motion in which he argued (i) it would be inappropriate for him to be charged attorneys' fees and costs incurred for claims against other defendants and (ii) that the Affidavit of Attorneys' Fees and Costs made it "impossible to ascertain amount of time spent on each task that the Plaintiffs' are seeking to be reimbursed for at this point." (R. p. 124.)

In response to Turbeville's concerns, the trial court asked that the Respondents submit an itemization of attorneys' fees and costs "beginning with the day that Turbeville was added to the lawsuit." (R. p. 340.) On July 25, 2014, the Respondents complied with the trial court's request by submitting fourteen pages of itemized costs and billing records. (E-mail from Bruner to Court, July 25, 2014 at 3:24 PM, App. pp. 2-17.) Turbeville's counsel made no further objection.

In its order awarding attorneys' fees and costs, the trial court properly considered the request in light of the factors set forth in Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997). Furthermore, the court reasoned,

> The amount of attorneys' fees and costs submitted by Plaintiffs included costs and fees attributable to other defendants not relating to the issues asserted against Marion Turbeville. **Therefore, those costs and fees are not included in the amount awarded to Plaintiffs arising out of the unfair trade practices act claims against Turbeville.**

(R. p. 17.) (emphasis added). The court then found Respondents entitled to attorneys' fees and costs of $84,907.85, roughly 77% of the fees and costs requested.

Therefore, contrary to Turbeville's arguments on appeal, the trial court accommodated his objections, required the Respondents to submit an itemization of fees and costs, and awarded only those fees and costs incurred in connection with the issues related to the claims against Turbeville. See Am. Fed. Bank, FSB v. No. One Main Joint Venture, 321 S.C. 169, 175, 467 S.E.2d 439, 443 (1996) (holding that attorney's fees could be awarded for defending counterclaims where the counterclaims were intertwined with the issue of the bank's ability to proceed on a note); Hardaway Concrete Co. v. Hall Contracting Corp., 374 S.C. 216, 231, 647 S.E.2d 488, 495-96 (Ct. App. 2007); Charleston Lumber Co. v. Miller Housing Corp., 318 S.C. 471, 483, 458 S.E.2d 431, 438–39 (Ct. App. 1995).

Accordingly, the trial court committed no abuse of discretion when it awarded Respondents attorneys' fees and costs in the amount of $84,907.63.

B. THE TRIAL COURT COMMITTED NO ERROR WHEN IT FOUND TURBEVILLE WILLFULLY VIOLATED THE UTPA.

Turbeville also argues the trial court erred when it found his violation of the UTPA was willful and knowing. However, the record—and Mr. Turbeville's own testimony—clearly supports the trial court's finding.

Pursuant to the UTPA, "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 Section 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." S.C. Code Ann. § 39-5-140(a) (emphasis added).

In its order awarding treble damages, the trial court held,

> The facts and circumstances of this case warrant an award of treble damages under the UTPA. Such an award is appropriate when a defendant engages in conduct that he knew or should have known violated the UTPA. S.C. Code Ann. § 39-5-140(a), (d). "The statutory definition of willful has been construed by our Court of Appeals 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., Inc. v. Forrest, 298 S.C. 520, 525, 381 S.E.2d 906, 909 (1989) (quoting State v. Nest Egg Soc. Today, Inc., 290 S.C. 124, 348 S.E.2d 381 (Ct. App. 1986)).
>
> In this case, this Court finds no evidence in the record that the Defendants' practice of negotiating for commissions at their clients' expense without disclosing those payments to the clients is a common, accepted practice. Although Mr. Turbeville continued to claim that the secret commissions were part of Danville's business model, he could not name one other business that engages in the same practice or employs the same business model. At no time did the Defendant present any evidence that it is common practice to negotiate and collect these payments without telling their clients. Nor did the Defendant present any testimony that the Plaintiffs or any of their other clients knew about the secret finder's fees and commissions.
>
> Mr. Turbeville testified unapologetically that he would negotiate for commissions and finder's fees—in addition what his clients paid him—that these payments increased the cost to his clients and that Mr. Turbeville would disclose those payments to clients only if they asked. Mr. Turbeville's testimony at trial simply proved Danville had a practice of negotiating for and concealing commissions that had a direct and adverse impact on their clients. Any person of ordinary prudence engaged in trade or commerce could have ascertained that such a deceptive and unfair business model violated the UTPA. See Haley Nursery, 298 S.C. at 525, 381 S.E.2d at 909. Mr. Turbeville's testimony also proved without question that he personally participated in, directed or authorized that Danville's unfair and deceptive practice. See BPS, Inc. v. Worthy, 362 S.C. 319, 328-29, 608 S.E.2d 155, 160-61 (Ct. App. 2005). I therefore find Mr. Turbeville knew or should have known his wrongful conduct violated the UTPA. As a result, this Court finds it proper to grant the Plaintiffs' motion and award Plaintiffs damages in the amount of $117,600, or three times the actual damages the jury awarded.

(R. pp. 17-18.)

All of the trial court's findings are well-supported by the record. (R. p. 47, lines 1 to 22; R. p. 245, lines 9 to 13; R. p. 245, line 24 – p. 247, line 7; R. p. 256, line 20 – p.

257, line 3; R. p. 261, line 23 – p. 263, line 5; R. p. 290, line 6 – p. 292, line 11; R. p. 322, line 25 – p. 323, line 23; R. p. 324, line 18 – p. 325, line 7; R. p. 148.) Testimony from Mr. Turbeville himself established that he participated in Danville's practice of negotiating for secret finder's fees, that Danville would demand that contractors add the finder's fee to their bids (thereby increasing the total price of the clients' contracts), and that the finder's fees were not disclosed to clients unless they asked. Id. And although he claimed the practice was standard, Turbeville was unable to name one other business that also negotiated for secret finder's fees at the expense of its clients. (R. p. 291, line 18 – p. 292, line 11.)

Appellant argues his conduct was not willful because Bigby should have known about the leasing commission. However, Appellant admitted at trial that he never disclosed the leasing commission to Bigby (R. p. 243, lines 14 to 16), and Bigby testified that had he known about the leasing commission, he would not have paid Danville $24,000 on the Project. (R. p. 301, line 21 – p. 302, line 5.) Further undermining Turbeville's argument is testimony from Ben Kelly, another witness who was a licensed real estate agent, that it was not his practice to hide commissions from his clients the way Danville and Turbeville did. (R. p. 328, lines 15-19.)

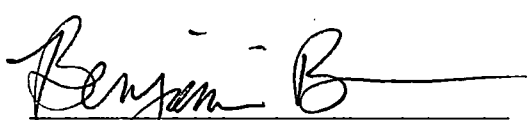
Based upon this evidence, it strains logic for Turbeville to claim that in the exercise of due diligence he could not have ascertained that this conduct constituted an unfair or deceptive act that violated the UTPA. See Haley Nursery, 298 S.C. at 525, 381 S.E.2d at 909. Moreover, at no time did Appellant offer any excuse or plausible explanation for the substantial evidence in the record that Turbeville personally instructed the General Contractor to increase its bid by $16,500 so Danville could receive a

kickback. Instead, Turbeville simply claimed the practice was Danville's business model. (R. p. 290, line 21 – p. 292, line 11.)

Therefore, the trial court's Order awarding treble damages and attorneys' fees was well-reasoned, well-supported by the evidence at trial and should be affirmed.

CONCLUSION

For the reasons set forth above, as well as any other grounds the Court finds in the record pursuant to Rule 220(c), SCACR, the record in this case demonstrates that the Circuit Court committed no error when it denied Turbeville's motion to dismiss, nor can Appellant demonstrate that the trial court erred when it granted Respondents' motion for attorneys' fees and treble damages. Consequently, this Court should affirm both orders.



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June 23, 2015

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JUN 23 2015
SC Court of Appeals

APPEAL FROM THE RICHLAND COUNTY
Court Of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge
Alison Renee Lee, Circuit Court Judge

APPELLATE CASE NO.: 2014-001799

Coastal Pi, LLC d/b/a Primarily Pi and James Bigby. . . . . Respondents,

v.

Danville Business Advisors, LLC and Marion D. Turbeville . . . . . .Defendants,

Of Whom Marion D. Turbeville is. . . . . Appellant.

CERTIFICATION

The undersigned certifies that Respondents' Final Brief, served June 23, 2015, complies with Rule 211(b), SCACR.

June 23, 2015

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PROOF OF SERVICE

I, Benjamin C. Bruner, certify that I served a copy of the attached *Brief of Respondents* by U.S. Mail First Class, postage paid, on Thomas F. Dougall, Esquire and Robert M. Peele, III, Esquire at 1700 Woodcreek Farms Road, Suite 100, Elgin, South Carolina 29045 and on Robert G. Rikard, Esquire at 1329 Blanding Street, Columbia, South Carolina 29201 this 22nd day of June, 2015.

June 23, 2015

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June 23, 2015

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: ***Coastal Pi, LLC, et al. v. Danville Business Advisors, LLC, et al.***
Appellate Case No.: 2014-001799
BPWM File No.: 9-2182.100

Dear Ms. Kitchings:

Please find enclosed for filing the original and fifteen copies of each the Respondent's Brief and the Appendix in the above referenced-matter. Please file the original and return a filed copy of each to me via our courier.

By copy of this letter, I am serving the same on all counsel of record.

With my highest regards, I am

Sincerely,

Benjamin C. Bruner

BCB/gh
Enclosures

cc: Robert M. Peele, III, Esquire (w/ enclosures)
Thomas F. Dougall, Esquire (w/ enclosures)
Robert G. Rikard, Esquire (w/ enclosures)
Charles E. Ursy, Esquire (w/ enclosures)
Mr. James Bigby (w/ enclosures)