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NO. COA 13-207  
NORTH CAROLINA COURT OF APPEALS

Filed: 3 September 2013

WEBER, HODGES & GODWIN COMMERCIAL  
REAL ESTATE SERVICES, LLC,  
Plaintiff,

v.

Watauga County  
No. 11 CVS 610

ELIZABETH JOANNE HARTLEY and  
J. RANDALL DIXON,  
Defendants.

Appeal by plaintiff from order entered 4 September 2012 by Judge Laura Bridges in Watauga County Superior Court. Heard in the Court of Appeals 4 June 2013.

*Martin & Gifford, PLLC, by William H. Gifford, Jr., for plaintiff-appellant.*

*Tuggle Duggins, P.A., by J. Nathan Duggins III, Michael S. Fox, and Emma C. Merritt Baggett, for defendant-appellees.*

HUNTER JR., Robert N., Judge.

Weber, Hodges & Godwin Commercial Real Estate Services, LLC ("Weber LLC") appeals from a trial court order granting summary judgment in favor of defendant J. Randall Dixon. On appeal, Weber LLC argues the trial court erred in granting summary judgment because there were genuine issues of fact supporting

each element of an unfair or deceptive trade practices claim. Upon review, we affirm.

### **I. Facts & Procedural History**

From 2001 to 2012, Elizabeth Hartley lived in Boone. She also owned a 3.528 acre tract of real estate (the "Property") at 140 High School Drive in Boone. Daniel Godwin is the president of DEG Ventures, Inc., the company that owns Weber LLC. In 2009, Hartley wanted to sell the Property and approached Godwin to be her real estate agent. On 22 October 2009, Hartley and Weber LLC signed and executed an Exclusive Right to Sell Listing Agreement (the "Listing Agreement") for the Property. Hartley worked primarily with Godwin. The Listing Agreement had a one-year term and stated Weber LLC would receive a 10% commission upon sale of the Property.

Godwin subsequently placed a "for sale" sign on the Property identifying Godwin as the listing agent. Although the Property did not sell during the initial one-year term, Hartley and Weber LLC renewed the Listing Agreement until 26 October 2011.

Dixon is a real estate developer. He has held a real estate broker's license since 1993. From 1993 until December 2011, Dixon was a dues-paying member of the Greensboro Regional

Realtors Association ("GRRRA"). The GRRRA is a voluntary organization whose members are all bound by the National Association of Realtors Code of Ethics (the "Code"). The GRRRA professional standards committee enforces the Code. The most severe penalty for Code violations is expulsion from the GRRRA. The North Carolina Real Estate Commission ("NCREC"), the governing state agency for realtors, has not adopted the Code. Instead, it only enforces applicable state statutes and regulations. Dixon has never listed any real property and does not hold himself out as a "real estate agent" or "realtor" to the public.

Dixon's mother, Shirley Dixon ("Shirley"), is Hartley's neighbor. After listing the Property with Weber LLC, Hartley told Shirley that she was having financial problems. Specifically, Hartley faced potential foreclosure on both her personal home and the Property. Shirley told Dixon about Hartley's situation. In fall 2009, prior to the end of the Listing Agreement's first one-year term, Dixon called Hartley about the Property. Although Dixon did not offer to be Hartley's realtor, he discussed developing the Property with Hartley. During the conversation, Hartley told Dixon about her Listing Agreement with Weber LLC.

Throughout 2010 and early 2011, Hartley and Dixon continued to discuss developing the Property. Hartley told Dixon about the Listing Agreement's renewal. Dixon also drove by the Property several times and saw the "for sale" sign stating Weber LLC was the listing agent. During his conversations with Hartley, Dixon repeatedly explained he did not want to buy the Property or act as Hartley's realtor. At no time during this period did Dixon and Godwin have any contact.

By June 2010, Dixon had corresponded with the Town of Boone about developing the Property. Dixon met with Boone town officials at least three times to discuss development plans.

In early February 2011, Dixon gave Hartley a written letter of intent about the Property's proposed development. Dixon suggested Hartley have an accountant or attorney review the letter. In early March 2011, Dixon and several investors formed Mountaineer Crossing, LLC ("Mountaineer Crossing"). Mountaineer Crossing's sole purpose was to develop the Property. Dixon had an ownership interest in Mountaineer Crossing.

On 4 March 2011, Godwin delivered a nonbinding letter of intent to Hartley from Goodwill Industries of Northwest North Carolina, Inc. ("Goodwill"). In the letter, Goodwill offered to purchase the Property for \$1,600,000. The letter did not

mention anything about the potential foreclosure. Hartley signed the letter to indicate she received the offer.

Later that evening, Dixon met with Hartley to give her Mountaineer Crossing's Operating Agreement (the "Operating Agreement"). Hartley signed the Operating Agreement that night. The Operating Agreement valued the Property at \$1,700,000. Under the Operating Agreement, Hartley would transfer the Property to Mountaineer Crossing, subject to her bank's claims, in exchange for a 40% ownership interest in Mountaineer Crossing. The Operating Agreement explained that Mountaineer Crossing would retire the bank's obligations and make \$8,500 monthly payments to Hartley until it obtained water, sewer, and utility entitlements. The Operating Agreement also stated that when Mountaineer Crossing obtained its construction permit: (i) Hartley would receive \$350,000; and (ii) Hartley's ownership interest in Mountaineer Crossing would decrease to 10%. After she signed the Operating Agreement, Hartley showed Dixon the letter of intent from Goodwill.

Later in March 2011, Hartley received a letter from her bank informing her that it had commenced foreclosure proceedings on the Property and her home. The letter stated Hartley could cure her loan default by paying the bank approximately \$240,000

by 24 March 2011. On 14 March 2011, Godwin gave Hartley a formal offer letter from Goodwill to purchase the Property for \$1,600,000. Hartley did not sign this offer. On 23 March 2011, Hartley executed a General Warranty Deed conveying the Property to Mountaineer Crossing.

Godwin demanded Hartley pay a 10% commission for the Mountaineer Crossing deal (\$170,000). However, Hartley did not pay Weber LLC any commission for this transaction. On 6 September 2011, Weber LLC filed a complaint in Watauga County Superior Court alleging: (i) breach of contract against Hartley; (ii) tortious interference with contract against Dixon; and (iii) unfair or deceptive trade practices against Dixon. On 17 July 2012, Weber LLC submitted an amended complaint without the tortious interference with contract claim. On 8 August 2012, Weber LLC filed a notice of voluntary dismissal with prejudice for all its claims against Hartley.

Throughout 2012, Hartley, Dixon and George Bell gave depositions. Bell is a licensed North Carolina realtor and a member of the GRRRA and Winston-Salem Regional Association of Realtors. Bell has been approved by the GRRRA to teach classes on the Code in North Carolina since 2001. At deposition, Bell

testified as an expert witness on the Code. Also, in an affidavit Bell stated:

Based on my knowledge of the REALTOR Code of Ethics, and my experience, both as an ethics educator and a member of multiple Professional Standards Committees, and based on my review of the sworn testimony of Joanne Hartley and Randy Dixon, it is my opinion that Randy Dixon's conduct between January 1, 2010 and April 30, 2011 was unethical in that it violated Article 16<sup>1</sup> of the REALTOR Code of Ethics. Specifically, by failing to contact Daniel Godwin . . . after learning that Joanne Hartley's property was listed for sale [by Mr. Godwin]; . . . and by thereafter presenting the Operating Agreement of Mountaineer Crossing, LLC to Ms. Hartley instead of Mr. Godwin, Mr. Dixon engaged in practices and took actions that were inconsistent with the exclusive brokerage relationship agreement that [Mr. Godwin] had with Ms. Hartley.

On 20 July 2012, Dixon filed a motion for summary judgment. Dixon argued that Weber LLC failed to prove: (i) Dixon committed an unfair or deceptive act or practice; and (ii) any alleged act by Dixon proximately caused injury to Weber LLC. On 4 September 2012, the trial court entered an order granting Dixon's motion. On 26 September 2012, Weber LLC filed timely notice of appeal.

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<sup>1</sup> Article 16 of the Code states:

REALTORS® shall not engage in any practice or take any action inconsistent with exclusive representation or exclusive brokerage relationship agreements that other REALTORS® have with clients.

## II. Jurisdiction & Standard of Review

This Court has jurisdiction to hear the instant case pursuant to N.C. Gen. Stat. § 7A-27(b) (2011).

This Court's "standard of review of an appeal from summary judgment is *de novo*." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008)). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (quotation marks and citation omitted).

On *de novo* review of a trial court order granting summary judgment, we must determine whether "the trial court properly concluded that the moving party showed, through pleadings and affidavits, that there was no genuine issue of material fact and that the moving party was entitled to judgment as a matter of law." *Daniel v. Wray*, 158 N.C. App. 161, 168, 580 S.E.2d 711, 716 (2003). We must "view all evidence in the light most favorable to the non-movant and draw all reasonable inferences in his favor." *Campbell v. Anderson*, 156 N.C. App. 371, 374, 576 S.E.2d 726, 729 (2003).



### III. Analysis

On appeal, Weber LLC argues the trial court erred by granting Defendant's motion for summary judgment because it produced sufficient evidence to support each element of its unfair or deceptive trade practices claim. Upon review, we affirm.

North Carolina's Unfair and Deceptive Trade Practices Act (the "UDTPA") makes unlawful "unfair or deceptive acts or practices in or affecting commerce." N.C. Gen. Stat. § 75-1.1(a). "The elements for a claim for unfair and deceptive trade practices are (1) defendants committed an unfair or deceptive act or practice, (2) in or affecting commerce and (3) plaintiff was injured as a result." *Phelps-Dickson Builders, L.L.C. v. Amerimann Partners*, 172 N.C. App. 427, 439, 617 S.E.2d 664, 671 (2005). To successfully seek summary judgment, defendants "bear[] the burden of establishing the lack of any triable issue" for at least one of these elements. *Schmidt v. Breeden*, 134 N.C. App. 248, 251, 517 S.E.2d 171, 174 (1999).

In North Carolina, UDTPA claims offer relief against: (i) unfair acts; and (ii) deceptive acts. See *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980) ("While an act or practice which is unfair may also be

deceptive, or vice versa, it need not be so for there to be a violation of the Act.") *rev'd on other grounds, Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988). Generally, "[a] practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Id.* "[U]nfairness . . . [is] gauged by consideration of the effect of the practice on the marketplace." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981). "Moreover, [s]ome type of *egregious* or *aggravating* circumstances must be alleged and proved before the [Act's] provisions may [take effect]." *Dalton v. Camp*, 353 N.C. 647, 657, 548 S.E.2d 704, 711 (2001) (citation and quotation marks omitted) (alteration in original).

Violations of regulatory statutes can constitute *per se* unfair acts when "the regulatory statute *specifically* defines and proscribes conduct which is unfair or deceptive within the meaning of [the UDTPA]." *Noble v. Hooters of Greenville, LLC*, 199 N.C. App. 163, 170, 681 S.E.2d 448, 454 (2009); *see also e.g., Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 98-99, 331 S.E.2d 677, 682 (1985) ("[T]he trial court correctly concluded as a matter of law that the jury's finding that the

defendant violated the provisions of either or both N.C.G.S. §§ 95-47.6(2) and (9) constituted unfair and deceptive acts or practices in violation of N.C.G.S. § 75-1.1."); see also *Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 71, 529 S.E.2d 676, 683 (2000) ("[S]uch conduct that violates subsection (f) of N.C.G.S. § 58-63-15(11) constitutes a violation of N.C.G.S. § 75-1.1, as a matter of law."). However, our review of relevant jurisprudence does not reveal any precedent indicating that violating the rules of private voluntary membership organizations constitutes a *per se* unfair act.

In the present case, Weber LLC argues Dixon's alleged violation of Article 16 of the Code constitutes an unfair act. We disagree.

First, Weber LLC argues a violation of the Code constitutes a *per se* unfair act. However, North Carolina precedent does not support this argument. Here, Weber LLC alleged facts indicating Dixon: (i) was a member of the GRRRA in 2010 and 2011; and (ii) violated the Code during that time. Specifically, Weber LLC argues Dixon violated Article 16 of the code by (i) visiting the Property without contacting Godwin; (ii) negotiating a purchase agreement with Hartley without notifying Godwin; (iii) presenting the Letter of Intent to Hartley instead of Godwin;

and (iv) presenting the Operating Agreement to Hartley instead of Godwin. Notably, Weber LLC does not allege Dixon violated any statute or regulation enforced by the NCREC; instead, Weber LLC solely bases its UDTPA claim on Dixon's alleged violation of the Code.

Our review of relevant case law reveals no precedent indicating violations of the rules of private voluntary membership organizations like the GRRRA constitute *per se* unfair acts. Furthermore, we note that: (i) membership in the GRRRA is not required to hold a realtor's license in North Carolina; (ii) the NCREC has not adopted the Code; and (iii) the Code states its rules are not enforceable by law. In sum, the Code is not a statute or administrative regulation, but rather a set of rules governing voluntary members of a private organization. Consequently, Code violations are not *per se* unfair acts. See *Noble*, 199 N.C. App. at 170, 681 S.E.2d at 454.

Having determined that any alleged Code violation is not a *per se* unfair act, we now analyze whether the evidence produced by Weber LLC creates a genuine issue of fact as to whether Defendant committed an unfair act based on the circumstances. For the reasons discussed below, we conclude the facts about Dixon's conduct do not create an issue as to whether he

committed an unfair trade practice because Dixon never held himself out as a realtor.

Here, Weber LLC relies on three cases to argue Dixon's conduct was an unfair act based on the factual circumstances. First, it cites *Johnson v. Beverly-Hanks & Assoc., Inc.*, 328 N.C. 202, 400 S.E.2d 38 (1991). In *Johnson*, the plaintiffs discovered defects in their newly-purchased home shortly after closing. *Id.* at 204-06, 400 S.E.2d at 39-40. The plaintiffs filed UDTPA and fraud claims against: (i) the real estate agents involved; (ii) the sellers; and (iii) the builder. *Id.* at 206, 400 S.E.2d at 40. There, our Supreme Court reversed the trial court's grant of summary judgment in favor of one of the realtors for the UDTPA claim. *Id.* at 212, 400 S.E.2d at 44.

Next, Weber LLC cites *Davis v. Sellers*, 115 N.C. App. 1, 443 S.E.2d 879 (1994). In *Davis*, the plaintiff filed UDTPA and fraud claims against the sellers of a home for failure to disclose drainage problems affecting the home's structure. *Id.* at 6, 443 S.E.2d at 880-81. There, the trial court granted directed verdict and denied a subsequent motion for relief on the UDTPA claim in favor of the sellers because they were exempt as private homeowners. *Id.* at 7, 443 S.E.2d at 883. However, we reversed because one of the sellers had a real estate

broker's license and received a referral fee for the sale; thus, the private homeowners exemption did not apply. *Id.* at 8, 443 S.E.2d at 883-84.

The present case is distinguishable from *Johnson* and *Davis*. In both *Johnson* and *Davis*, the plaintiffs alleged unfair acts because the defendants held themselves out as realtors, but failed to abide by relevant professional standards for realtors. See *Johnson*, 328 N.C. at 206, 400 S.E.2d at 40; *Davis*, 115 N.C. App. at 8, 443 S.E.2d at 883-84.

Here, on the other hand, Dixon never presented himself as a realtor. Although Dixon has held a real estate broker's license since 1993, he has never listed any real property and does not hold himself out as a "real estate agent" or "realtor" to the public. Furthermore, Dixon never offered to be Hartley's realtor, and in fact repeatedly emphasized that he did not want to personally buy the Property or act as a realtor. Dixon solely discussed the proposed development project with Hartley, and did not offer any other real estate deals. In sum, Dixon only acted as a real estate developer, not a realtor. Thus, *Davis* and *Johnson* are inapplicable here. Since Dixon did not present himself as a realtor, his alleged violation of the Code does not constitute an unfair act.

Lastly, Weber LLC cites *Jacobs v. Physicians Weight Loss Ctr. of Am., Inc.*, 173 N.C. App. 663, 620 S.E.2d 232 (2005). In *Jacobs*, the plaintiffs contracted with defendant to purchase a weight-loss plan. *Id.* at 665, 620 S.E.2d at 235. The plaintiffs later realized they could purchase the weight loss drugs for a lower price at local pharmacies, but the defendant's staff doctors refused to grant prescriptions for this purpose. *Id.* at 665-66, 620 S.E.2d at 235. In *Jacobs*, although this Court reversed the trial court's summary judgment order on other grounds, we explicitly agreed with the trial court's statement that:

The withholding of prescriptions by [defendant] amounted to unethical conduct and contravened public policy, thus overriding the freedom of contract argument. . . . The problem with the customer contract and the policy of withholding prescriptions taken together is that such practices mandated a physician practice—the refusal to provide a prescription—that violated medical ethics. The withholding of prescriptions, therefore, is unethical conduct and satisfies the fairness prong, as [defendant] encouraged physicians to treat their patients in a manner that amounted to an unfair practice.

*Id.* at 671, 620 S.E.2d at 238 (alteration in original).

Weber LLC analogizes *Jacobs* to the instant case by contending that if a doctor's medical ethics violation can

constitute an unfair trade practice, an alleged realtor ethics violation should also be considered an unfair act. However, unlike the present case, the trial court in *Jacobs* relied on a prior North Carolina Medical Board order determining the defendant's conduct to be unethical.<sup>2</sup> There, the trial court described how:

[t]he actions of PWLC that prevented patients from obtaining requested prescriptions are unethical and contravene public policy. *The Medical Board clearly demonstrated in the Consent Order that a physician violates an ethical duty by not providing a patient his prescription to use at the pharmacy of his choice.*

*Jacobs v. Physicians Weight Loss Ctr. of Am., Inc.*, 00 CVS 7910, 2003 NCBC LEXIS 11, at \*P21 (N.C. Bus. Ct. 5 Nov. 2003) (emphasis added). Here, on the other hand, the governing state agency for realtors (the NCREC) has not previously found Dixon's conduct to be unethical. Moreover, unlike the doctors in *Jacobs*, Dixon does not hold himself out as a member of the profession at issue.

Consequently, there is no genuine issue of material fact as to whether Dixon's conduct constitutes an unfair act. Thus, the trial court did not err in granting summary judgment. Since we

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<sup>2</sup> The North Carolina Medical Board is the state agency created by our General Assembly to regulate the practice of medicine.



determine the trial court did not err in granting summary judgment based on the first element of a UDTPA claim, we decline to address Plaintiff's other arguments.

**IV. Conclusion**

For the forgoing reasons, we

AFFIRM.

Chief Judge MARTIN and Judge ELMORE concur.

Report per Rule 30(e).