IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1199

Filed: 17 December 2019

Mecklenburg County, No. 16 CVS 14204

JOHN W. DUFF and wife, OLGA C. DUFF, and JOSE M. CALDERON and wife, JULIANA O. CALDERON, Plaintiffs,

v.

THE SANCTUARY AT LAKE WYLIE PROPERTY OWNERS ASSOCIATION, INC., a North Carolina Nonprofit Corporation, Defendant.

Appeal by defendant from orders entered 18 December 2017 and 23 February 2018 and cross-appeal by plaintiffs from order entered 23 February 2018 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 May 2019.

Cranfill Sumner & Hartzog LLP, by Carl Newman, Patrick H. Flanagan, and Meredith A. Fitzgibbon, for defendant-appellant/cross-appellee.

Scarbrough & Scarbrough, PLLC, by Madeline J. Trilling, for plaintiffs-appellees/cross-appellants.

BRYANT, Judge.

Where defendant's exercise of authority in reviewing and denying plaintiffs' proposed building plans was not reasonable and not made in good faith, the trial court did not err in submitting plaintiffs' claim of fraud to the jury or in entering declaratory judgment approving plaintiffs' proposed building plans. Where plaintiffs did not demonstrate that defendant's conduct satisfied the "in or affecting commerce" element, the trial court did not err in granting defendant's

directed verdict motion as to plaintiff's unfair and deceptive trade practices claim. Where the evidence was contrary to the jury's finding of $1,700 in damages, the trial court did not err in vacating and reducing plaintiffs' jury award for the fraud claim.

Substantive History

Plaintiffs John Duff and Olga Duff ("the Duffs") purchased an undeveloped lot in a Mecklenburg County residential community known as the Sanctuary at Lake Wylie ("the Sanctuary") in 2005. Their parents, plaintiffs Jose Calderon and Juliana Calderon ("the Calderons"), purchased the lot adjoining the Duffs' property. We refer to all of the above, whose properties are at issue, collectively as "plaintiffs."

Plaintiffs, as owners of their respective lots, automatically became members of defendant, The Sanctuary at Lake Wylie Property Owners Association, Inc. (hereinafter "defendant POA"). All properties at the Sanctuary were subject to a "Declaration of Covenants, Conditions and Restrictions for the Sanctuary" (hereinafter the "Declaration"). The Declaration was recorded in the Office of the Mecklenburg County Register of Deeds in September 2004.

The language of the Declaration provided for defendant POA to create design guidelines of "the procedures for submission, review and approval of plans and specifications to the Architectural Control Committee [('ACC')] and the fees to be imposed by the [ACC]." It also outlined the duties of the ACC to oversee and evaluate "development and enforcement of architectural control standards and restrictions" pursuant to the design guidelines. Per the Declaration, all proposed

building plans must first be approved by the ACC. Additionally, all residents must submit a fully signed contract with a "Guild Builder," who has satisfied "certain criteria and requirements established by the [ACC] and [defendant POA]," "as a condition to the commencement of construction."[1] The ACC was to provide a list of approved Guild Builders to the residents.

On or about 7 January 2016, plaintiffs entered into a construction contract with True Homes,[2] an approved Guild Builder, to build their homes on their respective lots, and each paid the required $5,000 deposit. True Homes had previously been approved for two construction projects at the Sanctuary. As such, plaintiffs chose building plans consistent with homes already built in the Sanctuary community.

On 4 March 2016, True Homes submitted the first set of preliminary plans to the ACC. The ACC denied the plans stating that the "plans do not meet the requirements of [the design guidelines] for architectural detail and materials." The plans were revised and resubmitted as the second set of preliminary plans to the ACC on 24 March 2016. The ACC denied those plans stating, "the changes you propose do little to separate this home from hundreds of similar homes[.] . . . There is nothing that says 'custom' or 'luxury' about the plans you submitted[.]"

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[1] Defendant POA's Board of Directors, the ACC, and the Guild Builder list were solely managed by Crescent until December 2007 when Crescent transferred control of the Board to defendant POA. In 2015, Crescent agreed to transfer control of the ACC to defendant POA. The transfer in control allowed defendant POA the authority to appoint ACC members, review and approve all submissions of plans, collect and distribute payment of applicable fees, revise the design guidelines in its discretion, and manage the list of acceptable Guild Builders.

[2] Plaintiffs entered into their respective contracts within days of the transfer of control over the ACC.

On 8 April 2016, the ACC chairman, Ron Shaw, communicated with plaintiffs and a True Homes representative to further discuss reasons why plaintiffs' plans failed to obtain approval. Shaw "[gave] them specifics as to what . . . they could do to move these plans forward." Shaw recommended that plaintiffs submit a third set of plans for a formal review, along with a required $850 fee per lot, and the ACC would submit those plans to defendant POA's retained architect, David Hite, for input. Shaw told plaintiffs that the ACC would relay Hite's recommendations after his review of plaintiffs' third set of proposed plans.

Five days later, plaintiffs submitted the third set of proposed plans and authorized True Homes to pay the $1,700 processing fee for the two lots. On 13 May 2016, Shaw informed plaintiffs that the third set of proposed plans had been denied by the ACC. Shaw sent two hand-sketched drawings by Hite with suggested revisions for the front design and appearance to meet the design guidelines. No direct feedback regarding plaintiffs' proposed plans was ever received by plaintiffs from Hite.

On 3 June 2016, plaintiffs submitted their fourth set of preliminary plans to the ACC. A representative of True Homes also sent an email to Shaw which stated, "Please see attached revised front elevations. Once we have reached agreement on the front, we will work on the side and rear elevations. We reviewed your architect's suggestion for the front elevations." On 20 June 2016, Shaw informed plaintiffs that the ACC denied the fourth set of preliminary plans stating, "the plans submitted do not conform to the desired architectural aesthetic.

. . . The ACC would prefer new plans." Shaw also informed plaintiffs that the ACC's decision could be appealed to the Board.

Plaintiffs appealed to the Board of Directors, and the Board affirmed the ACC's decision to deny plaintiffs' fourth submission of plans on 21 July 2016. In March 2017, True Homes canceled plaintiffs' contracts and refunded their respective $5,000 deposits with interest.

Procedural History

In 2016, plaintiffs commenced an action against defendant POA asserting, *inter alia*, unfair and deceptive trade practices ("UDTP"), fraud, negligent misrepresentation, breach of fiduciary duty, punitive damages, and a request for declaratory judgment that the proposed plans be approved.[3] Defendant POA filed an answer on 25 May 2017.

The matter was heard before the Honorable Lisa C. Bell, Judge presiding, in Mecklenburg County Superior Court on 30 October 2017. Defendant POA filed two separate motions to bifurcate—one motion to bifurcate liability and damages, and a second motion to bifurcate compensatory and punitive damages. The trial court denied the motion to bifurcate liability and damages but granted the motion to bifurcate compensatory and punitive damages. Thereafter, a jury was empaneled.

[3] After plaintiffs filed suit against defendant POA, Hite was asked by defendant POA's Board of Directors to conduct a formal review of plaintiffs' plans following Hite's deposition where he revealed that he only charged $125 per lot for providing the sketches in response to plaintiffs' third submission.

At the conclusion of plaintiffs' evidence, defendant POA moved for directed verdict. The trial court granted the motion for directed verdict as to plaintiffs' UDTP claim. At the close of defendant POA's evidence, the trial court granted defendant's renewed motion for directed verdict as to plaintiffs' claim for breach of fiduciary duty.

The remaining issues were submitted to the jury, which rendered unanimous verdicts in favor of plaintiffs and against defendant POA finding, *inter alia*, that: defendant POA did not act reasonably and in good faith in reviewing and denying plaintiffs' proposed building plans; plaintiffs were damaged by defendant POA's fraud and entitled to recover $1,700 in damages; plaintiffs were financially damaged by the negligent misrepresentation of defendant POA and entitled to recover damages in the amount of $197,041.67; and defendant POA was liable to plaintiffs for punitive damages in the amount of $67,787.

On 13 December 2017, defendant POA filed a motion for judgment notwithstanding the verdict ("JNOV") and, in the alterative, motion for a new trial. The trial court entered the final judgment on 18 December 2017. After entry of judgment, the trial court held a hearing on defendant's post-trial motions and on plaintiffs' motion for reconsideration of its directed verdict on the UDTP claim.

By order entered 23 February 2018, the trial court granted in part defendant POA's motion for JNOV by vacating all but $1 of the jury's $1,700 compensatory damages award on the fraud claim and denied plaintiffs' motion for reconsideration as to the UDTP claim. The trial court granted plaintiffs' request for declaratory judgment by approving plaintiffs' third set of proposed plans. The

trial court denied both parties' motions for attorneys' fees. Defendant POA and plaintiffs both appeal.

On appeal, defendant POA argues the trial court erred by: (I) entering judgment in favor of plaintiffs' fraud claims and (II) entering a declaratory judgment approving plaintiffs' third set of proposed building plans. On cross-appeal, plaintiffs argue the trial court erred by: (III) directing verdict on plaintiffs' claim for UDTP and (IV) vacating the jury award for damages for the fraud claim.

Appellate Jurisdiction

As an initial matter, plaintiffs filed a motion to dismiss based on lack of appellate jurisdiction to review defendant POA's appeal from the trial court's ruling on the post-trial motions. Plaintiffs argue that defendant POA's motion for JNOV and alternative motion for a new trial were filed before judgment was entered, and therefore, the trial court lacked jurisdiction. We disagree.

Typically, our Rules of Civil Procedure require a party to move for JNOV or new trial no later than ten days after entry of judgment. *See* N.C. Gen. Stat. § 1A-1, Rule 50 (2017) ("Motion for a directed verdict and for judgment notwithstanding the verdict") ("Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict[.]"); *see also id.* § 1A-1, Rule 59 ("New trials; amendment of judgments") ("A motion for a new trial shall be served not later than 10 days after entry of the judgment.").

However, our review of plaintiffs' arguments, in many ways, is controlled by the holding in *Kor Xiong v. Marks*, 193 N.C. App. 644, 668 S.E.2d 594 (2008). In *Kor Xiong*, the plaintiff filed a post-trial motion before judgment was entered, and this Court discussed whether the motion was properly before the trial court to invoke jurisdiction. *Id*. at 646–47, 668 S.E.2d at 596–97. Ultimately, this Court held that a post-trial motion, such as a motion for JNOV or a motion for new trial, "may be *filed* before entry of judgment, [but] the trial court does not have jurisdiction to hear and determine the motion until after entry of judgment." *Id*. at 653, 668 S.E.2d at 600.

Here, as in *Kor Xiong*, defendant POA filed a motion for JNOV and new trial prior to entry of judgment on 13 December 2017. Five days later, the trial court entered judgment, and then heard defendant POA's post-trial motions. In an order dated 23 February 2018, the trial court entered its ruling based on defendant POA's motions. Therefore, we hold that trial court properly exercised jurisdiction as defendant POA's post-trial motions were heard and determined after judgment was entered. Accordingly, we deny plaintiff's motion to dismiss, and thus, consider the merits of defendant POA's appeal.[4]

Defendant POA's Appeal

I

[4] We also note that defendant POA filed an alternative petition for writ of certiorari in the event that its appeal was dismissed. However, having determined that defendant POA's appeal is properly before this Court, we dismiss the petition for writ of certiorari as moot.

Defendant POA first argues it was error for the trial court to deny defendant POA's motion for directed verdict—and subsequent motion for JNOV—because there was insufficient evidence to submit plaintiff's fraud claim to the jury. Specifically, defendant POA primarily argues that plaintiffs cannot establish defendant POA made a false representation reasonably calculated to deceive, had the intent to deceive, or that the representation resulted in injury to plaintiffs. After careful consideration, we disagree.

"A JNOV motion constitutes [a] renewal of an earlier motion for directed verdict, and similarly tests the legal sufficiency of the evidence to take the case to the jury." *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000) (internal citation omitted); *see also Latta v. Rainey*, 202 N.C. App. 587, 592, 689 S.E.2d 898, 905 (2010) ("The standard of review of the denial of a motion for a directed verdict and of the denial of a motion for JNOV are identical.").

In ruling on either motion, the trial court must consider evidence in the light most favorable to the non-movant, "giv[ing] the benefit of every reasonable inference that legitimately may be drawn from the evidence and all conflicts in the evidence being resolved in the non-moving party's favor." *Id.* at 593, 689 S.E.2d at 905. "If, after undertaking such an analysis of the evidence, the trial [court] finds that there is evidence to support each element of the nonmoving party's cause of action, then the motion for directed verdict and any subsequent motion for judgment notwithstanding the verdict should be denied." *Id.* (citation and quotation marks omitted).

To survive a motion for directed verdict or JNOV on a claim of fraud, plaintiffs must present evidence that defendant POA engaged in a "(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Id.* at 597–98, 689 S.E.2d at 908. "Additionally, reliance on alleged false representations must be reasonable." *State Properties, LLC v. Ray*, 155 N.C. App. 65, 72, 574 S.E.2d 180, 186 (2002). "The reasonableness of a party's reliance is a question for the jury, unless the facts are so clear that they support only one conclusion." *Id.* at 73, 574 S.E.2d at 186.

Here, sufficient evidence from exists which the jury could find that the ACC never intended to assist plaintiffs in getting approved for their building plans.

At trial, Chairman Shaw testified concerning his involvement in plaintiffs' efforts to obtain approval of their plans, including a conference call with plaintiff Olga Duff, as well as the formal review process of the ACC:

> Q: Did the Plaintiffs ask you on several occasions what specifically could be done to their plans to get approval?
>
> A: [Their True Home representative] had asked me on several occasions.
>
> Q: And did Mrs. Duff ask you on several occasions as well?
>
> . . . .
>
> A: I know certainly it was during the conference call; she was on the conference call.
>
> . . . .

Q: And you told them that they should submit their plans for a full architectural review so that David Hite could make recommendations; is that right, sir?

A: That is what I said, yes.

. . . .

Q: So they asked you specifically what needed to be done to the plans to gain approval; is that right?

A: That was the gist of the conference call; correct.

Q: And then below you state once David, who's the architect, has the opportunity to present solutions that can help gain approval; is that right?

A: That is correct. That's what it says.

Q: So that's why they were submitting the plans. The idea was [Hite] would give recommendations and then that would help them gain approval.

A: That is correct.

Q: And what does a formal [review] consist of, sir? . . .

A: Typically[,] the architect will get a complete set of plans, and they'll review the details not only of the [four] elevations, but the site plan, and at that point make a recommendation.

Q: A recommendation consisting of comments on the site plan, for example, or comments on the elevations, or specifics, do you agree, as to what could be done with those plans?

A: Correct. . . .

. . . .

Q: So let me ask you this, sir. Did you ever pass those comments along to the Plaintiffs that were made aware by Mr. Hite in his formal review that was done as you claim today?

A: I incorporated them into our ACC response.

Plaintiff Olga Duff also testified, in detail, about the conference call with Shaw and her understanding of the changes that needed to be made, prior to the third submission of the plans, in order to meet the ACC's architectural approval:

> Q: [W]hat else were you told at the end of that phone call, if at all, that might help you get your plans approved?
>
> A: [Shaw] suggested -- since we were going around and around getting nowhere, [Shaw] suggested we have a contract with [Hite]. Why don't we -- I think we're in the crossroads. We're in the moment that to gain verification, let's do a formal submission to [Hite] and let [him] articulate for all of us options for architectural detail and direction. Great. We all agreed. At the end of that phone call we all agreed. To initiate that process[,] it was an $850 fee for each submission, and that's the next step.
>
> Q: So [for] your preliminary submissions[,] they weren't able to tell you what they wanted to be changed, so you were supposed to -- or they suggested that you do a formal submission?
>
> A: Yes.
>
> Q: And going back a little bit, after the first submission I believe there's some testimony about the architect providing comments to the ACC. Did you ever receive those comments?
>
> A: Never received the comments. We never received the comments.

Following the conversation with Shaw and pursuant to Shaw's representations, plaintiffs submitted their third set of building plans for a formal review and authorized payment of the $1,700 fee—$850 for each lot.

Hite testified about the vagueness of the design guidelines promulgated by the ACC because the guidelines failed to list a specific style for building plans. It was Hite's testimony that, after receiving plaintiffs' first set of plans, the ACC had already discussed and decided to disapprove the plans. He was of the opinion that the decision to disapprove was made even before he had received and reviewed the third set of plans and offered feedback to Shaw. Shortly after the third submission, Shaw contacted him twice—by email and by phone—to discuss plaintiffs' submission. After speaking with Shaw, he was advised to provide "preliminary sketches" because the ACC was "having trouble explaining what they were looking for in terms of architecture." Shaw asked Hite to find something "salvageable" about plaintiffs' plans to make them acceptable. Hite testified that he did not feel that his conversations with Shaw were "neutral" in terms of how Shaw felt about plaintiffs' plans.

Shaw asked him to provide the sketches in response to plaintiffs' submissions but never asked him to complete a four-step formal review pursuant to his contract.[5] In exchange for his services, Hite testified that he only charged $125 per lot:

> Q: And were you paid for your services of providing the sketches?
>
> A: Yes.

[5] Hite's contract with defendant POA provided that Hite would perform architectural services as a formal overview of proposed plans for an $850 fee. Those services included: 1) an initial visit of the site at the start of construction, 2) review of the application submitted by the ACC, 3) a meeting with the ACC, the homeowner, and the contractor to review the drawings, and 4) final site visit at the end of construction to verify the home was built per the submitted plans.

> Q: Do you recall how much you were paid?
>
> A: I charged $125 for each one.
>
> Q: And is that the only money that you charged the Association or were paid by the Association in 2016?
>
> A: Yes.
>
> Q: So you never charged -- in May of 2016 you never charged the Association $1700 and $250 for sketches and review for the Plaintiffs' lots?
>
> A: No.
>
> . . . .
>
> Q: Why didn't you charge the Plaintiffs for the full 850?
>
> A. It seemed to be kind of a unique situation, so I didn't know -- typically I like to charge as I do things. The Sanctuary was kind [] enough sometimes to actually pay me in advance a lot of times. But on this particular one I just felt like I wasn't sure where it was heading, so I just wanted to just get paid for the work that I was doing for them.

It was only after the filing of plaintiffs' lawsuit and Hite's deposition, that Hite performed, at the request of the Board (not the ACC), a formal review of plaintiffs' plans. After reviewing plaintiffs' plans, Hite testified that plaintiffs had overall "met the objective requirements of the [design] guidelines" which was conveyed in his email to Shaw and the ACC. The ACC wanted "custom" and "luxury" homes, but the design guidelines did not mention those terms.

Alice Herald, a member of the Board of Directors, testified that the Board requested a formal review of plaintiffs' plans after Hite revealed he did not request the full amount of the $850 per lot for a formal review. Herald also confirmed that

Hite's comments from his formal review as requested by the Board were never conveyed by Shaw or the ACC to plaintiffs.

The evidence, viewed in the light most favorable to plaintiffs, supports that Shaw's statements to plaintiffs were reasonably calculated to mislead and did, in fact, mislead plaintiffs. Plaintiffs submitted their third set of plans for a formal review—despite two previous failed attempts to get approval—only after speaking with Shaw during a conference call. Shaw, in his position as chairman of the ACC, was aware that plaintiffs were eager to build on their respective lots and that plaintiffs sought approval from the ACC multiples times. Shaw conveyed to plaintiffs the benefit of submitting plans for a formal review as they would receive recommendations and comments by Hite, to help them get approved. Relying on Shaw's statements, plaintiffs prepared a third set of plans, paid for a formal review, and fully expected to gain approval.

Notwithstanding the representations of Shaw and the ACC, plaintiffs never received written comments from Hite and defendant POA never paid Hite for the formal review. Further, plaintiffs were unable to determine what was necessary for compliance. As a result, plaintiffs were unable to build on their respective lots, despite continuing to pay HOA dues and assessment fees.

A jury could reasonably infer from the evidence that plaintiffs' reliance was reasonable under the circumstances. Thus, based on the misrepresentations upon which plaintiffs relied in submitting their third set of proposed plans for formal review, we find that plaintiffs' evidence in support of their fraud claim was sufficient to present to the jury. Defendant POA's argument is overruled.

II

Defendant POA next argues the trial court exceeded its authority by deeming plaintiffs' third set of proposed building plans as approved. We disagree.

We review a trial court's decision to grant or deny a declaratory judgment under an abuse of discretion standard. *New Bar P'ship v. Martin*, 221 N.C. App. 302, 308, 729 S.E.2d 675, 681 (2012) ("A matter left to the trial court's discretion will not be disturbed unless it is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." (citation and quotation marks omitted)).

"[T]he Declaratory Judgment Act explicitly grants trial courts the discretion to determine whether entry of a declaratory judgment is appropriate[.]" *Id.* (citing N.C.G.S. § 1-257 (20[17]) ("The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding[.]")).

"The purpose of the Declaratory Judgment Act is, to settle and afford relief from uncertainty and insecurity, with respect to rights, status, and other legal relations. . . . It is to be liberally construed and administered." *Id.* (citation omitted). Thus, a declaratory judgement is proper "only when the pleadings and evidence disclose the existence of a genuine controversy between the parties to the action, arising out of conflicting contentions as to their respective legal rights and liabilities under a deed, will, contract, statute, ordinance, or franchise." *Id.* (citation omitted).

Here, defendant POA contends the "Declaratory Judgment Act does not provide for either the jury or the [trial] court to sit as a super-Architectural Control Committee and approve [] plaintiffs' building plans." Yet, defendant acknowledges "plaintiffs offered evidence and the jury found that the ACC did not act reasonably and in good faith."

The jury found, after considering all the evidence presented, that defendant POA's exercise of authority unduly caused harm to plaintiffs as plaintiffs were prohibited from building on their respective lots several years after purchase. Plaintiffs had tried unsuccessfully to submit their proposed plans to defendant POA twice before, but their plans were rejected. Even after plaintiffs paid for a formal review and submitted a third set of plans, defendant POA acted unreasonably and failed to articulate legitimate reasons for plaintiffs to progress their plans towards approval. Because of defendant POA's unreasonable actions, plaintiffs were wrongfully prevented from building their homes.

In the trial court's order dated 23 February 2018, the trial court addressed plaintiffs' third set of proposed plans and ordered the following:

> The Court GRANTS Plaintiffs' request for a declaratory judgment providing that the building plans for Plaintiffs' third submission, as reflected in Plaintiffs trial exhibits 31F and 31G, are deemed approved. Thus, the Court rules that Plaintiffs' third plan submissions are hereby deemed approved. This ruling does not affect the parties' rights or obligations beyond paragraph 4B-3 of the Design guidelines. This ruling is intended to put Plaintiffs in the same position in the building process that they would have been in had the third plan submissions been approved.

Defendant POA contends that a restrictive covenant runs on plaintiffs' lots to provide the ACC with discretionary power to review and approve all building plan. However, there is evidence in the record that defendant POA acted in bad faith and abused its position of power by denying plaintiffs' plans. Therefore, the restrictive covenant is unenforceable. *See Raintree Homeowners Ass'n, Inc. v. Bleimann*, 342 N.C. 159, 163, 463 S.E.2d 72, 74 (1995) (stating that an architectural review committee's exercise in power "to approve the house plans cannot be arbitrary. . . . [A] restrictive covenant requiring approval of house plans is enforceable *only if the exercise of the power in a particular case is reasonable and in good faith*." (emphasis added) (citation and quotation marks omitted)). Defendant POA's actions were arbitrary and in bad faith. Under these circumstances, the trial court properly exercised its discretion, and we overrule defendant POA's argument.

Plaintiffs' Cross-Appeal

III

In their cross-appeal, plaintiffs argue the trial court erred in granting defendant POA's directed verdict as to plaintiffs' UDTP claim because there was sufficient evidence to support the primary element at issue: "in or affecting commerce." Specifically, plaintiffs argue that defendant POA's conduct—changing the design guidelines to favor "luxury" or "custom" homes to satisfy the architectural detail—caused an interference in commerce. We disagree.

As noted above, this Court reviews the sufficiency of evidence to survive a motion for directed verdict and "[i]f there is more than a scintilla of evidence

supporting each element of the non-movant's claim, the motion should be denied." *Poor*, 138 N.C. App. at 26, 530 S.E.2d at 843.

To establish a claim for UDTP, plaintiffs must present evidence that defendant POA engaged in "(1) an unfair *or* deceptive act or practice, *or* an unfair method of competition, (2) in or affecting commerce, (3) which proximately caused actual injury to the [plaintiffs] or to [their] business." *Id.* at 27, 530 S.E.2d at 844. "A practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive." *Faucette v. 6303 Carmel Rd., LLC*, 242 N.C. App. 267, 275, 775 S.E.2d 316, 324 (2015) (citation and quotation marks omitted).

"[Section 75-1.1 of the North Carolina General Statutes] does not apply to every transaction that might be viewed as unfair or deceptive, but applies only if the alleged violator is engaged in 'commerce.' " *Id.* at 276, 775 S.E.2d at 324. By definition, " 'commerce' includes all business activities, however, denominated, but does not include professional services rendered by a member of a learned profession." N.C. Gen. Stat. § 75.1.1(b) (2017). Under the statute, a business's regular interactions with other market participants are regulated, however internal conduct of individuals within a single market participant are not. *White v. Thompson*, 364 N.C. 47, 51–53, 691 S.E.2d 676, 679–80 (2010). Therefore, when unfair or deceptive acts are alleged to only pertain to relationships within a single business or market participant, that conduct is not within the scope of the statute. *Id.* at 53, 691 S.E.2d at 680.

Here, plaintiffs contend the single market participant exception does not apply because the parties were "participating in the market in entirely different

[capacities,]" and "the nature of the wrongful conduct alleged is not solely related to internal business dealings between [p]laintiffs and [d]efendant." Moreover, plaintiffs assert that defendant POA's conduct—although directly affecting them––incidentally affects True Homes and other Guild Builders as market participants who develop homes in the Sanctuary. However, we remain unpersuaded by plaintiffs' contention.

Defendant POA's conduct was confined to the internal affairs of individuals on the ACC and the Board of Directors, all of whom are within a single entity—the Sanctuary. Plaintiffs, as members of the same entity, allege wrongdoing essentially by a single market participant. As such, plaintiffs' UDTP claim against defendant POA falls outside the scope of N.C.G.S. § 75.1.1. Therefore, as plaintiffs have not demonstrated that defendant POA's conduct satisfies the "in or affecting commerce" element, we overrule plaintiffs' argument.

IV

Finally, plaintiffs argue the trial court erred by granting defendant POA's JNOV and reducing the jury's $1,700 award for the fraud claim to $1. We disagree.

"The trial court is vested with discretion to decide whether or not to set aside the jury's verdict or grant judgment notwithstanding the verdict on the issue of damages, and its decision will not be disturbed on appeal absent an abuse of that discretion." *G.P. Publications, Inc. v. Quebecor Printing–St. Paul, Inc.*, 125 N.C. App. 424, 442, 481 S.E.2d 674, 684 (1997). "Ordinarily, [JNOV] is not proper unless it appears as a matter of law that recovery simply cannot be had by plaintiff upon any view of the facts which the evidence reasonably tends to establish." *Hall*

v. Toreros, II, Inc., 176 N.C. App. 309, 313, 626 S.E.2d 861, 865 (2006) (alteration in original).

Here, the evidence at trial established that a total of $1,700 ($850 per lot) was paid by True Homes for a formal review of plaintiffs' third set of proposed plans. Plaintiffs authorized True Homes to pay the fees on their behalf from their respective $5,000 deposits. Thereafter, True Homes refunded their $5,000 deposits with interest when plaintiffs' contracts were canceled.

While the evidence supports the jury's finding of liability for plaintiffs' fraud claim, the evidence was insufficient to support $1,700 in compensatory damages. Given that plaintiffs were reimbursed the total fees paid to the contractor, plaintiffs suffered no actual compensatory damages. Accordingly, the trial court did not err in reducing plaintiffs' jury award for compensatory damages.

We find no error in the judgment of the trial court as to defendant POA's appeal or as to plaintiffs' appeal.

NO ERROR.

Judges TYSON and ZACHARY concur.

Report per Rule 30(e).