

**IN THE SUPREME COURT OF MISSISSIPPI**

**CHARLOTTE JEAN KELLY,**

**APPELLANT**

**VS.**

**CAUSE NO. 2007-CC-00331**

**MISSISSIPPI REAL ESTATE COMMISSION,**

**APPELLEE**

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**BRIEF OF APPELLANT, CHARLOTTE JEAN KELLY**

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**ORAL ARGUMENT NOT REQUESTED**

Respectfully submitted,

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## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Court may evaluate possible disqualification or recusal:

- |    |   |   |
|----|---|---|
| 1. | Thomas Woodrow Farris, Sr.<br>2100 Goodman Road<br>Horn Lake, MS 38637                    | Appellant   |
| 2. | Charlotte Jean Kelly<br>7592 W. Farmington, #109<br>Germantown, TN 38138                  | Appellant   |
| 3. | Honorable John D. Watson<br>P. O. Box 1366<br>Southaven, MS 38671                         | Attorney for Appellant,<br>Charlotte Jean Kelly       |
| 4. | Honorable William F. Travis<br>8619 Highway 51 North<br>Southaven, MS 38671               | Attorney for Appellant,<br>Thomas Woodrow Farris, Sr. |
| 5. | Mississippi Real Estate Commission<br>2506 Lakeland Drive, Suite 300<br>Flowood, MS 39232 | Appellee  |
| 6. | Honorable Paul H. Kimball<br>Maxey Wann PLLC<br>P.O. Box 3977<br>Jackson, MS 39207-3977   | Attorney for Appellee                                 |

  
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## **STATEMENT OF ISSUES**

- ISSUE I:** The Circuit Court's ruling affirming the Mississippi Real Estate Commission's ruling that the actions of Appellant constituted "Improper dealing" was erroneous.
- ISSUE II:** The Circuit Court's ruling affirming the Mississippi Real Estate Commission's ruling that the Appellant acted independently of her supervising Broker and performed real estate services without his full consent and knowledge was erroneous.
- ISSUE III:** The Circuit Court's ruling affirming the Mississippi Real Estate Commission's ruling that the sanctions imposed on appellant were not disproportionate was erroneous..

## **STATEMENT OF THE CASE**

This cause originated as a complaint filed by the Appellee, Mississippi Real Estate Commission, against the Appellant, Charlotte Jean Kelly. After an administrative hearing on April 12, 2004, the Mississippi Real Estate Commission found, by order dated April 20, 2004, that all the Appellants violated Mississippi Real Estate Brokers License Act of 1954 as amended §73-35-21(1)(m) and Mississippi Real Estate Commission Rules and Regulations IV(A)(2). As a result of the alleged violations, the Commission ordered that the non-resident license of Appellant, Charlotte Jean Kelly be revoked. The Appellant herein appealed the order of the Mississippi Real Estate Commission to the Circuit Court of DeSoto County. The Circuit Court of DeSoto County affirmed the decision of the Mississippi Real Estate Commission.

## **STATEMENT OF FACTS**

At the end of July 2003, Robert Praytor, administrator for the Mississippi Real Estate Commission (hereinafter referred to as "the Commission") received a telephone call from a real estate salesperson with Billy Haynes Century 21 Realty in Desoto County, Mississippi. Said salesperson inquired as to whether it was appropriate for a closing attorney to issue a commission check to Farris Realty rather than Century 21 when Century 21 Family Realtors in Germantown, Tennessee was listed on the sales contract. (TR. 39, L. 20 - TR. 40, L. 6). After an investigation of the facts by the Commission, it was determined that the participating real estate agency in the transaction was, in fact, Farris Realty, and not Century 21 Family Realtors, a firm not licensed sell real estate in Mississippi. (TR. 12, L. 8-10). The non-resident licensee operating under Appellant Farris's broker's license, Charles Kelly, had used a sales contract which had the Century 21 Family Realtors in Germantown, Tennessee logo at the top, although Farris was listed as the participating

broker in the body of the contract. (TR. 11, L. 17-23; TR. 16, L. 7-22). It was further determined that this particular transaction was one of several in which the Century 21 Family Realtors logo was listed at the top, but Farris was listed as the participating broker in the body of the contract. (TR. 41, L. 16 - TR. 42, L. 4).

On August 11, 2003, the commission received a letter from Charles Kelly and Appellant Jean Kelly, licensed under Appellant Farris's broker's license, advising that they were unaware that the use of Century 21 forms was improper under the circumstances. (TR. 14, L. 21 - TR. 15, L. 1). In addition, Charles Kelly and Appellant Jean Kelly provided copies of five (5) sales contracts used by them which had the Century 21 Family Realtors logo on the top of them, as well other forms relevant to those five (5) transactions. The dates of the subject contracts ranged from June 7, 2003 to July 9, 2003. Each of these contracts listed Farris as the selling or listing broker. None of the other relevant documents had the "Century 21" logo on them, but rather Thomas Farris or Farris Realty. (TR. 16, L. 1 - TR. 23, L. 2; Exhibits 6-11). All the relevant transactions were Farris Realty listings and the advertising signs were Farris Realty signs. (TR. 35, L. 24 - TR. 36, L. 13).

Charles Kelly testified at the Commission hearing that he and Appellant Jean Kelly were licensed under Appellant Farris as their broker, and that they had originally used a form sales contract which was obtained from the Board. (TR. 31, L. 18-21). However, Charles Kelly determined that the form was too involved and that they needed a shortened version, therefore he modified the form from Century 21 Family Realtors where he also worked, but neglected to remove the Century 21 logo from the top. (TR. 53, L. 17 - TR. 54, L. 10). Charles Kelly testified that he copied and altered the contract forms, not Appellant Jean Kelly nor Appellant Farris. (TR. 51, L. 16-19). Charles Kelly stated that Appellant Farris was in the hospital with serious heart problems

and that Appellant Farris's wife was very gravely ill in the hospital during the time period in which the subject contracts were used, and that Appellant Charles Kelly took it upon himself to prepare the form contract. (TR. 56, L. 9-16). Praytor testified at the Commission hearing that, during his investigation, Appellant Farris advised him that he was unaware that this practice was occurring. (TR. 42, L. 4-8). David Griffith, Chief Investigator for the Commission, testified that Appellant Farris advised him that he did not see any documents regarding the subject transactions except for the closing statements and commission checks. (TR. 25, L. 5-8)

On August 12, 2003, the Commission received a letter signed by Appellant Farris stating that they were unaware that the use of form contracts with the Century 21 logo on them was inappropriate so long as the fact that Farris Realty was listed as the participating broker and they fully disclosed to owners and sellers that Farris Realty, not Century 21, represented them. The letter further advised that use of the contract form had been discontinued. (TR. 12, L. 25 - TR. 13, L. 10).

At no time during the hearing was it alleged nor was any evidence presented that Appellant intended to commit any fraud or misrepresentation by the use of the Century 21 form sales contract. In fact, the only evidence presented regarding intent of the parties was Charles Kelly's statements that they did not mean to misrepresent to anyone that Century 21 was involved in any of the transactions. In addition, there was no allegation nor there any evidence presented that any person was harmed by the actions of the Appellant. (TR. 32, L. 17 - TR. 33, L. 6). Rather, Charles Kelly testified that, at all times, the Appellants made sure that buyers and sellers were advised and understood that Farris Realty, not Century 21 represented them. (TR. 31, L. 24 - TR. 32, L. 5; TR. 51, L. 2-10). At the time of the hearing, the Century 21 form contract was no longer being used, having been discontinued as soon as the Appellant was made aware that the Commission found it



inappropriate. (TR. 23, L. 6-11; TR. 13, L. 1-10).

The Commission's Order found that the Appellant violated Mississippi Real Estate Brokers License Act §73-35-21(1)(m) by committing acts or conduct which constitute or demonstrate "improper dealing".

The Order also found that Appellant Jean Kelly violated Mississippi Real Estate Brokers Rules and Regulations IV(A)(2) as Appellant Jean Kelly acted independently of her supervising broker, Appellant Farris, and performed real estate services without his full consent and knowledge.

As a result of its findings, the Commission revoked the real estate licenses of the Appellant and the Appellant appealed the decision of the Mississippi Real Estate Commission to the Circuit Court. The Circuit Court affirmed the rulings of the Mississippi Real Estate Commission.

#### **SUMMARY OF THE ARGUMENT**

There is no substantial evidence in the record to find that Appellant Jean Kelly engaged in improper dealing in violation of Mississippi Code Annotated §73-35-21(m). In addition, the Commission's finding and affirmation by the Circuit Court that Appellant Jean Kelly acted independently of her supervising broker and performed real estate services without his full consent and knowledge in violation of Mississippi Real Estate Rules and Regulations IV(A)(2) was unreasonable given the extenuating circumstances present in this case. Furthermore, the sanctions imposed upon Appellant Jean Kelly by the Commission and affirmed by the Circuit Court are unreasonable and disproportionate to the violations alleged to have been committed by her. As a result, the Commission's findings of fact and conclusions of law and affirmation by the Circuit Court were arbitrary and capricious and should be reversed.

## ARGUMENT

**ISSUE I: The Circuit Court's ruling affirming the Mississippi Real Estate Commission's ruling that the actions of Appellant constituted "Improper dealing" was erroneous.**

Although a court will generally not review de novo the facts in an administrative appeal, heightened scrutiny of the Commission's findings of facts and conclusions of law may be appropriate where the Commission adopts its own allegations as findings and conclusions. Mississippi Real Estate Commission v. Anding, 732 So.2d 192, 196 (Miss. 1999).

Where a licensee faces suspension or revocation of his or her real estate license, the burden is on the Mississippi Real Estate Commission to present testimony which clearly establishes, by clear and convincing evidence, a licensee's guilt. Id. (citing Mississippi Real Estate Commission v. White, 586 So.2d 805, 808 (Miss. 1991)(quoting Harris v. Mississippi Real Estate Commission, 500m So.2d 958, 963 (Miss. 1986))). On appeal, this court must employ an "arbitrary and capricious" standard of review. The court's review of the commission's findings and actions is limited to a determination of whether the commission's order was: (1) supported by substantial evidence, (2) arbitrary and capricious, (3) beyond the power of the administrative agency to make, or (4) violated some statutory or constitutional right of the complaining party. Id. (citing Mississippi Real Estate Commission v. Hennessee, 672 So.2d 1209, 1214 (Miss. 1996)). This Court should not overturn any finding which is based upon substantial evidence found in the record. Id. (citing Eidt v. City of Natchez, 421 So.2d 1225, 1232 (Miss. 1982); Mississippi State Tax Commission v. Package Store, Inc., 208 So.2d 46 (Miss. 1968)). The Mississippi Supreme Court has defined "substantial evidence" as "more than a scintilla; it must do more than create a suspicion, especially where the proof must show bad faith" Id. (citing Mississippi Real Estate Commission v. Ryan, 248 So.2d 790, 794 (Miss. 1971)(citing 2 Am.Jur.2d Administrative Law §688 at 572 (1962))). In order

to revoke a real estate license “under a charge of bad faith, incompetency or untrustworthiness, or dishonest, fraudulent or improper dealings, the proof may not be beyond a reasonable doubt . . . , but the testimony must clearly establish the guilt of the respondent. Proof of surmise, conjecture, speculation or suspicion is not sufficient.” Id. (citing Mississippi Real Estate Commission v. Ryan, 248 So.2d 790, 793 (citing 2 Am.Jur.2d Administrative Law §393 (1962))). The authority of the Real Estate Commission to revoke the license of a real estate broker is a right to take away that broker’s right to do business and make a living in the practice of his or her profession, therefore, such authority should be exercised with caution. Harris v. Mississippi Real Estate Commission, 500 So.2d 958, 962 (Miss. 1986)(citing Mississippi Real Estate Commission v. Ryan, 248 So.2d 790, 793.

In the case at bar, the Commission filed the complaint against the Appellant and the Commission’s findings of fact and conclusions of law in the Commission’s Order are almost verbatim to the allegations in the Complaint. Therefore, it is appropriate for this Court to apply heightened scrutiny to the Commission’s findings of facts and conclusions of law. At the very least, in order to uphold the decision of the Commission, this Court must determine that the testimony clearly establishes the guilt of Appellant Jean Kelly, because proof of surmise, conjecture, speculation or suspicion are not enough. To uphold the Commission’s decision, this Court must determine that the Commission’s holding was not arbitrary and capricious and that there is substantial evidence in the record to support the Commission’s findings of fact and conclusions of law.

The Commission’s order found that Appellant Jean Kelly, by utilizing a form sales contract with the Century 21 Family Realtors logo on it while representing Farris Realty, violated Mississippi

Real Estate Brokers License Act §73-35-21(1)(m) which states, “any act or conduct whether of the same or a different character than hereinabove specified, which constitutes or demonstrates . . . improper dealing.” Mississippi Code Annotated (1972) as amended §73-35-21(m).

The Mississippi Real Estate Broker’s License Act of 1954 with which we are dealing was designed with an intent “to protect the public from incompetent or dishonest real estate professionals” and to “safeguard the interests of the public”. Smith v. Sullivan, 419 So.2d 184, 186-87 (Miss. 1982)(citing 12 Am.Jur.2d Brokers §19 (1964)(revocation or suspension of license); Annot., 68 A.L.R.3rd 530, 532 (1957)). As a result, the Mississippi Real Estate Commission is vested with the authority to hold hearings for the refusal, suspension, or revocation of real estate licenses on various grounds. Id. at 187 (citing Mississippi Code Annotated (1972) as amended §73-35-21).

On several occasions, the Mississippi Supreme Court has reviewed the Commission’s revocation of real estate licenses based on the Commission’s findings that a real estate professional was guilty of improper dealing. In Smith v. Sullivan, the Commission found that broker Smith, in wrongfully representing more than one (1) party to a transaction without the parties’ knowledge, committed improper dealing, and therefore, revoked his license. The Mississippi Supreme Court held that the Commission’s decision was not arbitrary and capricious as it was supported by substantial evidence in the record. Smith v. Sullivan, 419 So.2d 184, 188 (Miss. 1982). At the Commission’s hearing, there was evidence presented that Smith contracted with the Sullivans to list and sell their property. Smith presented to the Sullivans a purchaser by the name of Brown who he represented was a financially sound man who owned substantial other real estate in the area. An agreement to sell the property was reached between the Sullivans and Brown. Id. at 185. However,

evidence was presented that Smith himself co-signed a loan to purchase the property that the deed of trust on the property was signed by both Smith and Brown, who turned out to be a female interior decorator Smith knew. The title binder on the property testified that Smith asked him not to mention the loan application to the Sullivans. Brown testified that Smith was her agent for purchasing the land, and both Smith and Brown testified that Smith advised Brown in the matter. The Sullivans were not aware that Smith represented anyone other than themselves. Id. at 186. The Mississippi Supreme Court found that this was substantial evidence found in the record that Smith represented more than one (1) party in the transactions without the parties' knowledge and consent, and therefore, was guilty of improper dealing. Id. at 188.

In McDerment v. Mississippi Real Estate Commission, the Commission found, inter alia, that broker McDerment made substantial misrepresentations in connection with a real estate transaction in violation of MCA §73-35-21(a) and that he engaged in acts or conduct which constitutes or demonstrates bad faith, incompetency, or untrustworthiness, of dishonest, fraudulent, or improper dealing in violation of MCA §73-35-21(m), and therefore, revoked his license. The Mississippi Supreme Court held, inter alia, that the Commission's decision was not arbitrary and capricious as it was supported by substantial evidence in the record. McDerment v. Mississippi Real Estate Commission, 748 So.2d 114, 121 (Miss. 1999). Evidence was presented at the Commission hearing that the Buccas entered into a contract for the sale of their home with Rayburn. The contract stated that Rayburn, the buyer, had deposited \$4,000.00 in earnest money with McDerment, and that the earnest money would be forfeited if the Rayburn failed to perform. McDerment provided the Buccas with a copy of the contract not signed by the buyer because he had not yet received the \$4,000.00 from Rayburn. When the Buccas asked for a contract signed by the buyer, McDerment

told them they did not need one. However, Mrs. Bucca obtained a copy of the buyer-signed contract from his office while McDerment was not there. Subsequently, Rayburn failed to perform the contract and the Buccas demanded their share of the earnest money. It was only then that McDerment advised the Buccas that the earnest money had never been deposited with him. Id. at 118. The Mississippi Supreme Court found that this was substantial evidence in the record that McDerment made a substantial misrepresentation in the connection with a real estate transaction and that he was guilty of improper dealing. Id. at 121.

In Mississippi Real Estate Commission v. Hennessee, the Commission found that broker Hennessee made a substantial misrepresentation in connection with a real estate transaction in violation of MCA §73-35-21(a), made false promises of a character likely to influence, persuade or induce in violation of MCA §73-35-21(b), and engaged in acts or conduct which constitutes or demonstrates bad faith, incompetency, or untrustworthiness, of dishonest, fraudulent, or improper dealing in violation of MCA §73-35-21(m), and therefore, revoked her license. The Mississippi Supreme Court found that the Commission's holding was not arbitrary and capricious as there was substantial evidence in the record to support it. Mississippi Real Estate Commission v. Hennessee, 672 So.2d 1209, 1218. (Miss. 1996). Evidence was presented at the Commission hearing that Hennessee acted as the seller as well as the seller's agent in a transaction involving the sale of a home to Davis and Scott. In connection with the sale of the home, Hennessee told Davis and Scott that there was a valid termite certificate on the subject home. Furthermore, the contract required Hennessee as seller to provide a termite certificate showing no visible evidence of infestation. No such termite certificate was provided to Davis and Scott. Hennessee testified that the termite certificate was destroyed in a fire and she could not reproduce it because she could not remember

which company did the inspection. The home, in fact did show evidence of termite infestation. Id. at 1213. The Mississippi Supreme Court found that the evidence showed that Hennessee promised a termite certificate before and on the date of the sale and did not deliver one, and therefore the Commission's holding that Hennessee made a substantial misrepresentation in connection with the transaction and engaged in "acts or conduct which constitute(d) or demonstrate(d) bad faith, incompetency, or untrustworthiness, of dishonest, fraudulent, or improper dealing" was not arbitrary and capricious.

In Mississippi Real Estate Commission v. Ryan, the Commission found that broker Ryan engaged in acts or conduct which constitutes or demonstrates bad faith, incompetency, or untrustworthiness, of dishonest, fraudulent, or improper dealing in violation of MCA §73-35-21(m), and therefore, revoked her license. The Mississippi Supreme Court found that there was not substantial evidence in the record to support the Commission's findings, and the holding was, therefore, arbitrary and capricious. Mississippi Real Estate Commission v. Ryan, 248 So.2d 790, 794. (Miss. 1971). In connection with the sale of the Elliots home to the Osbourns in which Ryan was the real estate agent, the Osbourns alleged that Ryan falsely represented to them that the outstanding mortgage on the home was "approximately \$18,000" when, in fact, the mortgage indebtedness was \$19,918.64. Id. at 791. Throughout the evidence presented at the Commission hearing, buyers, Mr. and Mrs. Osbourn, testified that they "were under the impression" and that they "were told and have the contract to show" and that "it is on the contract here that there was \$18,000 owing on the house." Mr. Osbourn testified that he and his wife and Ryan had an oral understanding that the indebtedness was approximately \$18,000.00. Id. at 793. The contract stated that the Seller certifies that there are no outstanding liens on the property except the mortgage of "approximately

\$18,000.00.” The Mississippi Supreme Court held that the simple fact that the Osbourns were under the impression that Ryan was representing to them that the indebtedness was only \$18,000.00 was not substantial evidence that Ryan violated §73-35-21(m), as there was nothing in the record to show that Ryan intentionally misled the Osbourns. Id.

For the reasons stated hereinabove, heightened scrutiny of the Commissions findings and fact and conclusions of law are appropriate in this case. With heightened scrutiny, this Court should determine whether the commission’s order was: (1) supported by substantial evidence, (2) arbitrary and capricious, (3) beyond the power of the administrative agency to make, or (4) violated some statutory or constitutional right of the complaining party. Mississippi Real Estate Commission v. Anding, at 196 (citing Mississippi Real Estate Commission v. Hennessee, 672 So.2d at 1214). In order to revoke a real estate license “under a charge of . . . improper dealings, . . . the testimony must clearly establish the guilt of the respondent. Substantial evidence means “more than a scintilla; it must do more than create a suspicion. Id. (citing Mississippi Real Estate Commission v. Ryan, 248 So.2d at 794 (citing 2 Am.Jur.2d Administrative Law §688 at 572 and §393 (1962))).

In each of the above cited cases wherein the Supreme Court held that the Commission's finding of improper dealing was supported by substantial evidence, there was some type of fraudulent or bad faith intent involved on the part of the real estate licensee to misrepresent a fact to a buyer or seller which was clearly established in the record. In fact, the term "improper" dealing implies a fraudulent intent. Black's Law Dictionary defines "improper" as "fraudulent or otherwise wrongful". Black's Law Dictionary (1996). In addition, in each of these cases, there was some type of harm inflicted on one (1) or more parties by the licensee’s actions or conduct.

However, in the one case cited hereinabove, Mississippi Real Estate Commission v. Ryan,



wherein the Supreme Court found the Commission's findings to be arbitrary and capricious and without substantial evidence in the record to support it, the Court based its decision on the fact that any misunderstanding of the buyer was incidental, because there was no substantial evidence in the record that Ryan *intended* to mislead the buyer.

Such is precisely the case here. There is not a scintilla of evidence in the record that Appellant Jean Kelly intended to defraud or misrepresent to any person that she represented Century 21 Family Realtors rather than Farris Realty. In fact, the evidence in the record is that the use of the Century 21 Family Realtors logo on the sales contract was a simple oversight or mistake by Charles Kelly. The record shows that Appellant Jean Kelly made sure to advise all buyers and sellers that she represented Farris Realty, and not Century 21, and made sure that all persons understood this fact. In fact, all listing agreements, advertising signs, and all other documents used in connection with their real estate transactions had Farris Realty on them rather than Century 21. The use of other Farris Realty forms and signs and the fact that Farris Realty was listed in the body of each Century 21 form sales contract defies any implication that the Appellant intended to defraud anyone or misrepresent to anyone that Century 21 was the broker involved in the transaction. The Commission presented no evidence otherwise . . . no evidence that any person was under any false impression regarding who the Appellant represented or that anyone was harmed. It should also be noted that the Appellant immediately discontinued the use of the Century 21 sales contract form upon being notified that the Commission deemed it inappropriate.

All the grounds listed in Mississippi Code Annotated (1972) as amended §73-35-21 giving the Commission authority to suspend or revoke a real estate license describe conduct which is in violation of the intent of the Mississippi Real Estate Brokers License Act . . . to protect the public

from incompetent or dishonest real estate licensees. The actions of Appellant Jean Kelly for which the Commission revoked her license do not fall within the type of conduct or actions which the act was intended to protect against. There is nothing in the record to suggest that any buyer or seller was under the impression that Appellant represented Century 21 rather than Farris Realty. Furthermore, there was no evidence presented that any buyer or seller relied on such impression or was harmed by the Appellant's simple mistake of leaving the Century 21 logo on their form sales contract. In fact, all evidence in the record suggests that all persons understood the true facts and relationship of the parties in all relevant transactions.

For these reasons, it is clear that there was no substantial evidence in the record that the Appellant were guilty of improper dealing. Therefore, the Commission's revocation of her license was arbitrary and capricious and should be set aside by this Court.

**ISSUE II: The Circuit Court's ruling affirming the Mississippi Real Estate Commission's ruling that the Appellant acted independently of her supervising Broker and performed real estate services without his full consent and knowledge was erroneous.**

The Commission's order found that Appellant Jean Kelly acted independently of her supervising broker, Appellant Farris, and performed real estate services without his full consent and knowledge in violation of Mississippi Real Estate Brokers Rules and Regulations IV(A)(2) which states:

A real estate broker who operates under the supervision of a responsible broker must not at any time acted independently as a broker. . . . and that affiliated broker shall not perform any real estate service without the full consent and knowledge of his employing or supervising broker.

(Mississippi Real Estate Brokers Rules and Regulations IV(A)(2).

In Mississippi Real Estate Commission v. Anding, the Mississippi Supreme Court cited the four-part analysis for a Court's review of an administrative agency's decision. The Anding Court

went on to state that overturning an administrative agency's decision is appropriate where, "the state agency has acted capriciously, unreasonably, arbitrarily, has abused its discretion or has violated a constitutional right of the party." Mississippi Real Estate Commission v. Anding, 732 So.2d at 196 (citing Mississippi Real Estate Commission v. Hennessee, 672 So.2d at 1214)). First, as no improper dealing occurred, any allegation of independent action by Appellant Jean Kelly is a non-issue.

It is true that Appellant Jean Kelly had a duty to refrain from acting independently of Appellant Farris and to refrain from performing real estate services without Appellant Farris's full consent and knowledge. However, the evidence in the record shows that Appellant Farris's wife had been very gravely ill, and that Appellant Farris was in the hospital with serious heart problems requiring operations during the time period in question. There is no evidence in the record that Appellant Jean Kelly made it a practice to act independently of Appellant Farris, only allegations that she did so during the time period in which the Century 21 form contracts were used. During this time period, Appellant Farris was extremely ill and in the hospital with heart complications. It is unreasonable to suggest that Appellant Jean Kelly clear each and every detail such as the form used for the sales contract with Appellant Farris while he was lying in his hospital bed. It was impractical and impossible for them to do so. This is particularly true since the use of the form was an oversight on the part of Charles Kelly.

Appellant Farris's illness and hospitalization were extenuating circumstances which the Commission unreasonably failed to take into account in determining that Appellant Jean Kelly acted independently of Appellant Farris and performed real estate services without Appellant Farris's full consent and knowledge. The Commission acted unreasonably in revoking their licenses under the

circumstances presented, and its holding should be overturned by this Court as arbitrary and capricious.

**ISSUE III: The Circuit Court's ruling affirming the Mississippi Real Estate Commission's ruling that the sanctions imposed on appellant were not disproportionate was erroneous..**

The Mississippi Real Estate Brokers License Act was enacted with its intent to "protect the public from incompetent or dishonest real estate professionals" and to "safeguard the interests of the public". Smith v. Sullivan, 419 So.2d at 186-87 (citing 12 Am.Jur.2d Brokers §19 (1964)(revocation or suspension of license); Annot., 68 A.L.R.3d 530, 532 (1957)). The grounds under which the Commission is authorized to revoke a real estate license under Mississippi Code Annotated (1972) as amended §73-35-21 all serve the purpose of the Act . . . to protect the public from harm by a real estate licensee.

The revocation of the license of Appellant Jean Kelly, on the other hand, does not serve the purpose of the Act. As previously discussed, there is no evidence in the record, or even any allegation by the Commission, that there was any dishonesty or fraudulent intent by the Appellant or that any person was harmed by her conduct in this case. In fact, the evidence suggests that the use of the Century 21 Family Realtors logo on the sales contract was a simple oversight, and that all persons the Appellant dealt with in connection with real estate transactions were fully advised and understood that Farris Realty and not Century 21 Family Realtors represented them. Furthermore, the evidence in the record shows that the practice of using the Century 21 Family Realtors form sales contract was discontinued immediately once the Appellant was made aware that the Commission

deemed it inappropriate.

Due to the extenuating circumstances involved in this case, being Appellant Farris's illness and hospitalization, and the fact that no harm was alleged or occurred, the sanctions imposed on Appellant Jean Kelly were unreasonable and disproportionate to the violations alleged to have been committed by them. Furthermore, such extreme sanctions do not serve the purpose of the Act. Therefore, this Court should overturn the decision of the Commission which was affirmed by the Circuit Court as to the sanctions imposed upon Appellant Jean Kelly.

### **CONCLUSION**

There is no substantial evidence in the record to find that Appellant Jean Kelly engaged in improper dealing in violation of Mississippi Code Annotated §73-35-21(m). The Commission's finding and the affirmation by the Circuit Court that Appellant Jean Kelly acted independently of her supervising broker, Appellant Farris, and performed real estate services without his full consent and knowledge in violation of Mississippi Real Estate Rules and Regulations IV(A)(2) were unreasonable given the extenuating circumstances present in this case. Furthermore, the sanctions imposed upon Appellant Jean Kelly by the Commission and affirmed by the Circuit Court are unreasonable and disproportionate to the violations alleged against them. As a result, the Commission's findings of fact and conclusions of law which were affirmed by the Circuit Court were arbitrary and capricious and should be reversed by this Court.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I, John D. Watson, Attorney for Appellant Charlotte Jean Kelly, do hereby certify that I have this day mailed, via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing *Brief of Appellant, Charlotte Jean Kelly* to the following individuals at their regular mailing addresses:

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Honorable William F. Travis  
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VIA HAND DELIVERY

Honorable Robert P. Chamberlin  
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VIA HAND DELIVERY

This the 30<sup>th</sup> day of August, 2007.

  
\_\_\_\_\_  
JOHN D. WATSON, MS BAR   
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