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IN THE SUPREME COURT OF MISSISSIPPI

RITA BREECE MCINTOSH **APPELLANT**

VS. **NO. 2015-CA-01086-SCT**

MISSISSIPPI REAL ESTATE COMMISSION **APPELLEE**

REPLY BRIEF OF APPELLANT

ORAL ARGUMENT IS REQUESTED

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COMES NOW, Rita Breece McIntosh, Appellant ("McIntosh"), by and through her counsel of record, and files this reply brief to the brief of the Mississippi Real Estate Commission ("Commission" or "MREC").

PROLOGUE

Under Mississippi law, administrative agencies have only those powers provided by statute. No statute gives the Commission the authority to impose sanctions on a licensee for contacting a lender or a selling agent in the course of a real estate transaction. Nor is there a statute that gives the Commission the authority to sanction a licensee for asking an appraiser to wait to enter her client's property. In this case, the purpose of that request was to allow McIntosh time to meet with her client to discuss and explain the options available under the contract, if the appraiser Logan Long ("Long") entered the property and appraised it for less than the contract price and the effect that would have on the timely marketing of their property (R. 388, ¶¶ 9 & 11). In this case, the Commission suspended McIntosh's license for contacting a lender to inquire is there was an opt-out procedure if Long was chosen, and asking Long to "hold up" in response to his text request to enter her client's property (R. 423).

With only one exception (*Miss. Code Ann.* § 89-1-525), the power of the Commission is limited to taking action against any violator of the Real Estate Brokers License Law of 1954

("Law") (*Miss. Code Ann. § 73-35-1, et. seq.*) and the MREC Rules and Regulations ("Rules"). The specific section of the Law for the Order entered in this case is "improper dealing" prohibited under *Miss. Code Ann.* § 73-35-21(1)(m)(1972, as amended). Which states:

> (m) Any act or conduct, whether of the same or a different character than hereinabove specified, which constitutes or demonstrates bad faith, incompetency or untrustworthiness, or dishonest, fraudulent or improper dealing.

Since McIntosh filed her initial brief, and before the Commission filed its brief, the Mississippi legislature amended this section of the Law by adding the following sentence at the end of the above section:

> However, simple contact and/or communication with any mortgage broker or lender by a real estate licensee about any professional, including, but not limited to, an appraiser, home inspector, contractor, and/or attorney regarding a listing and/or a prospective or pending contract for the lease, sale and/or purchase of real estate shall not constitute conduct in violation of this section.

A new substantive provision was added and was given the "m" designation. The "summary" section was changed to *Miss. Code Ann.* § 73-35-21(1)(n).

Thus, the 2016 amendment rendered moot the first factual ground for the charge of "improper dealing" against McIntosh. This Code section will hereinafter be referred to as *Miss. Code Ann.* § 73-35-21(1)**(m)** **or** *Miss. Code Ann.* § 73-35-21(1)**(n)** as the context may require.

The term "improper dealing" is not found in *Black's Law Dictionary*, but "deal" is defined as the "act of buying and selling" (Black's, Seventh Ed., 1999, West Group, p. 405.) "Dealing" is defined as "a method of business; a manner of conduct" (*Merriam Webster's Collegiate Dictionary*, Eleventh Ed. 2003, p. 319.)

Thus, the term "improper dealing" in relation to real estate is necessarily based on some conduct in real estate transactions, which is considered improper under the Law or the Rules, or

in regard to *Miss. Code Ann.* § 89-1-501-*Miss. Code Ann.* § 89-1-523. On the Commission's website, there are 137 cases which date back to 2006. Of those 137 cases, **no** Commission Order has been issued on the sole section of "improper dealing" without a factual breach of the Law or the Rules (R. 697-701).

Therefore, if provisions of *Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301, et seq.* ("*Dodd-Frank*") were removed from the Complaint in this case, there would be no factual basis to support the charge of "improper dealing." In fact, the actions McIntosh took would not be a violation of any federal laws or regulations. See the Expert Reports of Joe W. Parker, MAI, CRE, FRICS (R. 625-630) and Michael W. Boteler, IFAS, GA-78 (MS) (R. 631-637).

McIntosh's previous experience with Long prompted her to contact the lender to ask if there was an opt-out procedure if Long were to be selected. McIntosh wanted to protect her client from suffering from Long's misunderstanding of appraisal guidelines. Starting just before, and continuing for a time coinciding with this matter, Long had appraised one of McIntosh's listings for $23,000.00 less than the contract price, because he did not understand an appraisal guideline concerning line item adjustments. Rita testified through her affidavit that the specific property had a shop which Long had not valued properly. (R. 388, ¶ 10). Long had prepared a document titled "Valuation Errors" (R. 482-486) and sent it to McIntosh on three separate occasions to explain why he appraised her listing for less than the contract price. (R. 158, 4-17) The Commission's expert witness, Robert Praytor ("Praytor"), the Administrator of the Commission testimony revealed two errors on the first page of Long's handout. One of the guidelines that Long did not understand was that line item adjustments can exceed 10 percent of the sales price of a comparable. Praytor testified: "...they can as long as you explain."(R. 159. 16-23; R. 160, 2-6 & 12-16).

There are no state laws or regulations that prohibit a listing broker from telling an appraiser not to enter her listed property at that particular time. However, there are provisions of the MREC Rules that require licensees to act in the best interests of their clients. (Rule 1601 4.1, *et seq.*). That is exactly what McIntosh did in this case. Her actions were supported by Praytor's testimony. (R. 124, 3-16) on page 6, *infra.* regarding McIntosh contacting the lender and his statement regarding Agency Rules (R. 131, 6-23).

APPELLANT'S ISSUE NUMBER 1

The Commission's power is limited to the "the enforcement and administration of the provisions of this chapter." (*Miss. Code Ann.* § 73-35-35). It has no jurisdiction over federal laws. Yet federal laws and regulations weave their way through this entire case and form the factual grounds for the "improper dealing" charge. *Dodd-Frank* is referred to in Long's Complaint and quoted in the Commission's Complaint (R. 501-502). Neither "appraiser independence requirements" nor interference with "the appraisal process" are found in the Law or the Rules.

In the Commission's Order, under Findings of Fact, the Commission cites the same portion of *Dodd-Frank* in Section VI, followed in Section VII with the following: "[Praytor] further stated McIntosh had no part in the selection of the appraiser and her only role was to cooperate with the process to further the transaction." Praytor stated that McIntosh was not charged with violating *Dodd-Frank* (R. 46-47). That was immediately followed by Conclusions of Law, in which *Miss. Code Ann.* § 73-35-21(1)(**m**) was quoted. (R. 48)

The only other authority given to the Commission is found in *Miss. Code Ann.* § 89-1-525, the authority to enforce the Real Estate Transfer Disclosure Requirements, *Miss. Code Ann.* § 89-1-501 through *Miss. Code Ann.* § 89-1-523.

When made aware of this case, the Legislature recognized the Commission's misinterpretation of "improper dealing" under *Miss. Code Ann.* § 73-35-21(1) (m) and application to McIntosh's actions. The Legislature amended this statute to specifically exclude from the Law, brokers contacting lenders regarding certain professionals. This included McIntosh's contact with the lender regarding a possible appraiser opt-out procedure in this case. If the original statute was intended to prohibit brokers from contacting lenders, the Legislature would not have taken the extraordinary step to amend the statute.

The 2016 amendment made unquestionably clear the intent and meaning of "improper dealing." Improper dealing must be based on a breach of the Law or the Rules as stated in the Law. Therefore, contrary to the content of the Complaint and the Order, and regardless of Praytor's and the Commission's denial, the grounds for this entire case firmly rest in federal law. Thus, the Commission is attempting to arbitrarily expand its authority to include federal laws and regulations dealing with appraiser's independence and the appraisal process.

APPELLANT'S ISSUE NUMBER 2

The Commission's Order is not supported by substantial evidence. There is a void of evidence that McIntosh did anything prohibited by the Law or the Rules. McIntosh's previous experience led her to believe that Long was not familiar with appraisal guidelines. And based on that belief, her fiduciary duty to the Sellers prompted her to ask if there was a way to opt out of having Long perform the appraisal on this property if he were to be selected.

There is no evidence in the record to support the allegation of interference with the appraisal process. McIntosh did nothing to influence the value placed on the property by Long. Long did not know of McIntosh's questions until twelve days after he submitted his appraisal report.

The question to be answered is: What was McIntosh's conduct that formed the basis of

the charge of "improper dealing?" Praytor testified that McIntosh's "contact with the lending institution ... was actually violating Mississippi Real Estate Administrative Rules..." (R. 121, 9-22). However, the Commission did not specify any other Rules in the in the Complaint, nor in its Order. Praytor did testify that the Rule to which he referred is MREC Rule 1601 4.1 through the end. (R.131, 6-23). MREC Rule 1601 4.1, *et seq.* concerns agency relationships and is the basis for the actions McIntosh took in the best interests of her client. The 2016 Amendment made that conduct moot.

Praytor testified that if McIntosh was thinking of her previous experiences with Long, "then every time that they submitted a contract to any lender that Mr. Long was on their approved list, she ought to be calling them" (R. 124, 3-16). Praytor testified that McIntosh had a duty to her client to ask if there is a way to opt out if he should be selected. Praytor testified further that McIntosh's duties to her client never cease (R.128, 7-9). Thus, her agency duties do not stop when a contract goes to a lender. The Commission's expert and the Administrator of the Commission Robert Praytor thus gave testimony justifying McIntosh's conduct.

McIntosh's two expert witnesses opined that McIntosh breached no laws, federal or state. Both Joe Parker and Mike Boteler testified that in their opinion McIntosh did nothing to breach State law or MREC Rules. Both Parker and Boteler state in their Expert Reports that McIntosh did not violate any federal law, state law or the MREC rules. (Parker, R. 629-630, ¶¶ 3 and 9) (Boteler, R. 636, ¶¶ 3 and 9).

The Commission cannot contend that *Dodd-Frank* and appraiser independence was not the factual basis for the Complaint, the hearing and the Order. And, since McIntosh did nothing to influence the value of Long's appraisal, and she did not intimidate, threaten or coerce the lender, she also did nothing contrary to *Dodd-Frank* (R. 310, 1-311, 1).

Long texted McIntosh on February 3, 2014 at 3:15 p.m. and turned in his report on February 6, 2014, around 10:29 a.m. (R. 584)

The burden of proof placed upon the Commission to legally suspend McIntosh's license is the familiar clear and convincing evidence standard. *Mississippi Real Estate Comm'n v. White,* 586 So.2d 805, 808 (Miss. 1991). See also *Mississippi Real Estate Comm'n v. Hennessee*, 672 So.2d 1209 (Miss. 1996).

In the case of *Mississippi Real Estate Commission v. Anding*, 732 So.2d 192 (Miss. 1999), the parties basically agreed on the facts, as in this case. Anding was charged with a breach of *Miss. Code Ann.* § 73-35-21(1)(k) and *Miss. Code Ann.* § 73-35-21(1)(m). The record in *Anding* was lacking clear and convincing evidence that Anding did anything wrong. In *Anding*, since the Commission's allegations were adopted as "findings of fact and conclusions of law," the Court's review of the case required a "heightened scrutiny." The Commission did not even charge McIntosh with a breach of the Law as the ground for the alleged "improper dealing." Since the Commission's allegations in this case were adopted as findings of fact in the Order, the Court's review of this case requires a "heightened scrutiny."

The Commission's Order is not supported by substantial evidence, much less clear and convincing evidence.

APPELLANT'S ISSUE NUMBER 3

The Commission's Order was clearly arbitrary and capricious, because it was not based upon substantial evidence, not issued according to reason, not based on and with a total disregard for the surrounding facts.

Of the 137 Orders referenced *supra,* there are five Orders in which "improper dealing" is the only **stated** violation. However, those five cases were all based on the respondent not having a real estate license, or not having an active license. Therefore, those five cases were really

based on a breach of *Miss. Code Ann.* § 73-35-1, which requires a license to act as a real estate broker (R. 698-701). That lack of an active real estate license as the basis for the "improper dealing' charge. These 137 cases should have been considered "settled controlling principles" by the Commission under the Supreme Court's definition of "capricious. *Pub. Employees' Ret. Sys. v. Marquez*, 774 So.2d 421 (Miss. 2000) (citing *Burks v. Amite County Sch. Dist.*, 708 So. 2d 1366 at 1370 (Miss. 1998)).

APPELLANT'S ISSUE NUMBER 4

McIntosh was denied "due process" by an oppressive, biased hearing in which she was deprived of a lunch break and her experts were not allowed to testify in regard to the allegations of the Complaint, *i.e.* appraisals, *Dodd-Frank*, the appraisal process and appraiser independence.

From the very beginning, this case was nothing more than an inquisition and it was apparent that the Commission was determined to punish McIntosh regardless of the facts and the Law. It started when Long filed his Complaint with the Commission instead of the Mississippi Real Estate Appraiser Licensing & Certification Board, as he was directed to do at the official website of the United States Government (Long's Complaint, Ex. E) (R 339). Long testified that even though the website stated the Mississippi Appraisal Board was the place his complaint should be filed, Praytor had advised him to file it with the Commission (R. 221, 7-15). The Commission Complaint quoted two sections from *Dodd-Frank* concerning the independence of appraisal practices. At the hearing, the Commission deemed those very topics irrelevant.

In its brief, the Commission did not admit that there was no lunch break, nor did it deny that no lunch break was taken. Instead, the Commission argues that McIntosh "...even implies, without basis in the record, that McIntosh was *denied* a lunch break during the hearing." (Com. Br. 30). However, as the Commission states on the first page of its Order "the verbatim transcript of the hearing being taken by an official court reporter," as is custom and practice when

reporting a hearing, made entries to reflect when the hearing went "off the record," and the purpose, if stated by the Chairman. In this record when the Commission took the only break during the hearing, it was documented by the court reporter. "Mr. Steadman: Gentlemen, we're going to take about a five-minute recess, please. (OFF THE RECORD)" (R. 239, 19-23)

McIntosh was faced with an elusive situation. Both Long's Complaint and the Commission's Complaint allege breach of *Dodd-Frank.* Based on those Complaints, McIntosh hired two appraiser experts. At the hearing, the Commission stated that this case is not about *Dodd-Frank* and refused to allow McIntosh's experts testify concerning Dodd-Frank after sitting in the hearing for over five hours. Then, the Commission's Order is based on alleged breaches of a specific section of *Dodd-Frank,* threatening Long's independence and interfering with the appraisal process.

The hearing panel ignored or appeared to be unaware of *Dodd-Frank* being quoted in the Complaint (R. 501-502). It also appears that the hearing panel ignored or was unaware of Miss. A.G. Opinion No. 98-0736. Chairman Steadman: "John, I think the three of us agree with you, and certainly there's no question that Mr. Parker is qualified. I just don't think any testimony he could give us is going to be relevant to what we are going to rule on" (R. 317, 10-14). Mr. Edwards: "Those are the two [No. 3, No. 9] of the ten opinions that potentially, in my – to me, might have anything germane. "The valuation, the *Dodd-Frank Act*, those other things, to me, are not germane to what we are being asked to rule on" (R. 319, 7-12). Parker's Opinions: "3. It is my opinion that Rita did nothing to breach the Mississippi Brokers License Act. 9. It is my opinion that Rita did nothing that breached the MREC Rules" (R. 629-630). Yet, the same quote from *Dodd-Frank* concerning "the independence of appraisal practices" that was in the Complaint, also appears in the Order under Findings of Fact. It appears as though the drafters of the Complaint and the Order, were not on the hearing panel, and the decision in this case had

been determined before the hearing.

REPLY TO STATEMENT OF THE CASE BY APPELLEE

The Statement of the Case by the Commission sounds more like the Complaint and is replete with unproven allegations. The following statements are simply not true and are not supported by evidence in the record: "The subject matter ...below concerned the admitted efforts of McIntosh...to influence and interfere with the process attendant the *selection* of the appraiser engaged by the *buyer's* chosen lending institution...and then to prevent that appraiser...from performing the appraisal." (Com. Br. 2) The Commission makes several references in its brief to the selection of the appraiser by the lending institution. The lending institution did not select the appraiser. The Appraisal Management Company (AMC) selected Long. There is no evidence in the record that McIntosh ever contacted or attempted to contact Long or the AMC.

In its Statement of The Case the Commission refers to its power to discipline a licensee for "any act or conduct" deemed by the Commission to constitute "'improper dealing' in activities governed by the statutes, rules and regulations which the Commission is charged to enforce." Commission Brief, page 2. (Com. Br. 2). That statement makes clear that because the Law, nor the Rules mention *Dodd-Frank* or any other federal law, appraiser independence, or the appraisal process, the factual basis of the charges against McIntosh are beyond the Commission's power. It is in its Statement of the Case that the Commission includes the previous language of *Miss. Code Ann.* § 73-35-21(1)(m) in a footnote. However, the Commission does not include the 2016 amendment to that section, which is quoted *supra.*

REPLY TO STATEMENT OF FACTS BY APPELLEE

The Commission's Statement of Facts includes many misstatements of alleged facts, mischaracterizations of Rita's statements/actions and much argument. The section titles are particularly misleading. The Commission uses words designed to imply that McIntosh was guilty

of the charges leveled against her. There is no evidence in the record to support many of these factual allegations. And most of McIntosh's actions included in the Commission's brief are totally irrelevant to the issues of this case and are not governed by the Law or the Rules.

The Commission stated: "McIntosh admitted she learned after the property was appraised that her suggested listing price had been based in part on mistaken or otherwise incorrect information from her client sellers regarding the square footage of the subject property." (Com. Br. 4) [Emphasis added] The Commission's language makes it sound like McIntosh admitted some guilt, instead of learning a mistake was made by her client.

"McIntosh expressed concerns about the buyers' choice of lender even before there was a contract." (Com. Br. 4). This is irrelevant, and was based on another transaction that Red Rock that had been processing for about 90 days at that time. (R. 388, ¶ 8). McIntosh's concern, arising from her fiduciary duties to her client, was based on her experience with the lender. She did not want his transaction to linger with Red Rock for 90 days.

"McIntosh's interference with the buyer/lender relationship." (Com. Br. 5). There is no evidence whatsoever to support this allegation.

"McIntosh's efforts that the lender not select Logan Long to perform the appraisal." (Com. Br. 5). The Commission includes an accurate quotation in the first indented paragraph. "I hope that he is not on your list and **if** there is a way to opt out if he should be selected." [Emphasis added] McIntosh asked a question.

"McIntosh's conduct after learning Logan Long had indeed been engaged to perform the appraisal despite her efforts he not be selected." (Com. Br. 6). There is no evidence of any conduct except McIntosh asking if there was an opt-out procedure if Long was selected.

"McIntosh wants the appraisal reassigned to 'anyone but' Logan Long." (Com. Br. 7). There is no evidence that McIntosh ever made any effort to have him replaced. All she did on

February 3, was to ask: "Please ask April if there is any way we can pass on him." That is just another question. This question cannot be construed as interference with appraisal process. Further, McIntosh's contact with Hines was irrelevant because she was not the appraiser, lender or AMC. McIntosh posed the same question to April (R. 480).

"McIntosh ignored Logan Long's second request for access information." This title is accurate. However, the first sentence below it is not true. "Having received no response from McIntosh to his first inquiry, Logan Long texted McIntosh again the next day, Tuesday, February 4, with a follow up request for access information." (Com. Br. 7). McIntosh did respond to Long's first inquiry with "Hold up Logan I'll get back to u."

"McIntosh was angry that Long [again appraised property well below the contract price, not that he] completed the appraisal assignment." (Com. Br. 8). McIntosh was upset that an appraiser had entered the property, as indicated by her statement "Who did the appraisal? (R.365). Will the Commission be allowed to sanction a licensee for their questions, their desires, their thoughts, their emotions, and their feelings?

The Commission referred to the value she wanted, instead of the contract price. What McIntosh wanted was the contract price on behalf of her client.

The Commission stated: "McIntosh maintained throughout the Commission's investigation that Logan Long had not been authorized to complete the appraisal." (COM. Br. 24). That is an extreme mischaracterization of McIntosh's statement contained in her letter reply to Long's response to her response to his Complaint. (R. 438-447). McIntosh repeatedly (too numerous to cite) said that Long did not have permission from the property owner to enter the property. McIntosh never said that he "had not been authorized to complete the appraisal." Her statement is the following:

> By entering the home without the homeowner's permission (so that he could complete the appraisal and collect a fee), he denied the homeowner

> the opportunity to cancel the appraisal request (if that is what the owner would have ultimately chosen to do) resulting in the homeowner bearing the cost of a full appraisal (rather than a cancellation fee) and lessening the options available to the Seller. (R. 445 2d ¶).

The Commission stated: "The Commission's Complaint made no allegation of a violation of the Federal *Dodd-Frank* law." (Com. Br. 12) However, in its Complaint, the Commission quoted a specific section of *Dodd-Frank.* 15 U.S. Code § 1639e(b)(3): "seeking to influence an appraiser or otherwise encourage a targeted value in order to facilitate the making or pricing of the transaction." The very next line of the Complaint reads as follows: "The above and foregoing described acts of the Respondent constitute a violation of the Mississippi Real Estate Brokers License Law of 1954, as amended §§ 73-35-1, *et seq.*, Miss. Code Ann., more specifically, § 73-35-21(1)(m)." The referenced section follows. (R. 501-502). That same section from *Dodd-Frank* is quoted again in the Order. (R. 46-47). How can language from *Dodd-Frank* be quoted in the fact section of the Complaint and the Order and not be considered an factual ground for charge in the Complaint and the ruling in the Order?

Next appears this from the Commission's brief :

> Praytor testified the Commission's Complaint alleging improper dealing by McIntosh was based on McIntosh's improper interference in the appraisal process undertaken by the lender chosen by the buyer, whom McIntosh did not represent. (Com. Br. 13) (R. 111-112).

Other than Praytor's testimony above, there is no evidence to support any interference in the appraisal process, which is only found in federal law.

REPLY TO COMMISSION'S ARGUMENT

The Commission states: "McIntosh asked to 'op-out' should Long be selected as the appraiser. (Doc. 13-3, p. 33)." (Doc. 20. p. 26). The words in Doc. 13-3, p. 33, are: "I hope that he is not on your list and **if** there is a way to opt out if he should be selected." (R. 355) [Emphasis added] That is another statement in the Commission's brief intended to mislead the Court.

The Commission repeatedly alleges in its brief that McIntosh failed to cooperate with Long. McIntosh, based on previous experiences with Long's appraisal work, and as the seller's agent, told Long to hold up so her client could consider the options available to the client. One of those options would be to cancel the contract and face breach of contract remedies. That is usually returning the buyer's earnest money deposit. Most people, buyers or sellers, do not want to file suit for damages or for specific performance. If the appraisal is performed, the property cannot be appraised again for six months (R. 388, ¶ 9).

In its brief, the Commission states the following:

> Though McIntosh disputes the Commission's findings, this Court must defer to the Commission's findings "if there is even a quantum of credible evidence which supports the agency's decision." *Miss. Real Estate Com'n v. McCaughan*, 900 So.2d 1169, 1177 (Miss. Ct. App. 2004)(internal citations omitted). Upon such evidence in the record, this Court must affirm the decision of the Commission in this case even if it believes "the preponderance of the evidence supports a different outcome." *Id.* (Com. Br. 20).

This is a misstatement of the law. The internal citation that was omitted by the Commission is *Hale v. Ruleville Health Care Center*, 687 So.2d 1221 (Miss. 1997). *Hale* can be easily distinguished from McCaughan and McIntosh in the following ways: *Hale* was a workers' compensation case and Hale was not a licensed professional. McCaughan and McIntosh are licensed real estate brokers. The Commission is not the Workers' Compensation Commission (WCC) and thus not given the highly deferential standard of review afforded the WCC. Further, "case law from this Court indicated that it is only in rather extraordinary cases that a circuit court reverse the findings of the [Workers' Compensation] Commission." Citing *Walker Mfg. Co. v. Cantrell*, 577 So.2d 1243, 1247 (Miss. 1991). *Hale* 1225. The evidence against McIntosh must be clear and convincing. *Mississippi Real Estate Comm'n v. White*, 586 So. 2d 805, 808 (Miss.

1991). And the statutes must be construed in favor of McIntosh. *McFadden v. Ms. State Bd. of Medical Licensure,* 735 So.2d 145 (Miss. 1999).

The Commission also states that: "Pursuant to *McCaughn* [sic], supra, this court can easily discern the requisite 'quantum of credible evidence' necessary to affirm the Commission's decision, even if other evidence might lead the Court to a different outcome." (Doc. 20, p. 29). However, *White* clearly states the clear and convincing standard must be followed. The standard in *Hale* is not appropriate in a Commission case. Further, substantial evidence is required.

As to Praytor's testimony that McIntosh "had no standing to be contacting the buyer..." "She should not be contacting the lender and instructing the lander what she wants." (Com. Br. 22). McIntosh never contacted the buyer, and there is no evidence that she did. McIntosh did not "instruct the lender," she just asked a question. The Commission continues to overlook the word "**if**."

"The Commission's denial of McIntosh's Motion to Dismiss alleging no jurisdiction of federal law had no bearing on its jurisdiction to consider whether her actions violated Mississippi law governing the real estate activities of a Commission licensee." (Com. Br. 27). The Commission cannot deny that *Dodd-Frank* appears in the Complaint and in the Order under Findings of Fact. A reasonable interpretation of "improper dealing" would indicate that some conduct was improper and prohibited under the License Law, "whether of the same or a different character than hereinabove specified [in this section]..." There is no act, action or conduct by which McIntosh breached either the Law or the Rules. If this Court allows the Commission to move forward without statutory restraint, it is unknown which other federal law the Commission will attempt to enforce next.

Interference in the appraisal process is part of *Dodd-Frank.* Was a breach of *Dodd-Frank* involved or not? McIntosh prepared for a hearing based on the Complaint, which was based on

Dodd-Frank, which was the factual basis for the "improper dealing" charge and alleged violation. McIntosh hired two expert appraisers. The Commission stated at the hearing that the case did not involve *Dodd-Frank* and would not let McIntosh's experts testify as to appraisals, *Dodd-Frank*, appraiser independence, the appraisal process, etc. Then the Commission issued its Order quoting *Dodd-Frank*. Was this entire matter an act with smoke and mirrors? It was certainly an elusive target.

REPLY TO CASES CITED BY APPELLEE

The cases cited by the Commission can easily be distinguished from this case. Every one of the cited cases involving the Commission was based on a breach of the Law or the Rules.

Harris v. Mississippi Real Estate Comm'n, 500 So.2d 958, 966 (Miss. 1986) can be distinguished from the instant case by the fact that it was based on breaches of *Miss. Code Ann.* § 73-35-21(1)(a), *Miss. Code Ann.* § 73-35-21(1)(f), and Rule 6 (now 1601, 3.1 A.)

Mississippi Real Estate Comm'n v. McCaughan, 900 So.2d 1169 (Miss. Ct. App. 2004) can be distinguished from the instant case by the fact that it was based on breaches of *Miss. Code Ann.* § 73-35-21(1)(a), Rule IV A (1) (now 1601, 3.1 A), Rule IV B (5) (now 1601, 3.2 F) and Rule E 2 g (5) (now 1601, 4.2 G 5). The Commission, in its argument, cites *McCaughan* for the following: "if there is even a quantum of credible evidence which supports the agency's decision." The internal citation that was omitted was *Hale v. Ruleville Health Care Center*, 687 So.2d 1221 (Miss. 1997). *Hale* was discussed supra on pages 14-15 of this brief.

McDerment v. Mississippi Real Estate Comm'n, 748 So.2d 114, 118 (Miss. 1999). can be distinguished from the instant case by the fact that it was based on breaches of *Miss. Code Ann.* § 73-35-21(1)(a), and Rule IV B (4) (now 1601, 3.2 D). In the case at bar, the Commissioners were dealing with appraisal laws and regulations, the appraisal process, and other appraisal matters.

None of the Real Estate Commissioners were appraisers. Also, they were dealing with federal laws and regulations in which they professed no expertise.

Because the licensure statutes and regulations at issue are penal, the Commission is required to prove its case by clear and convincing evidence. The statutes and regulations at issue must be strictly construed in favor of McIntosh. *McFadden* at 152; *Hogan v. Mississippi Bd. of Nursing*, 457 So.2d 931, 934 (Miss. 1984).

Holt v. Miss. Real Estate Bd. of Dental Examiners, 131 So.3d 1271 (Miss. Ct. App. 2014) can be distinguished from this instant case in at least two elements. Holt was practicing dentistry during a period of license suspension. He had previously agreed by consent agreement that his license would be suspended for five years. He breached the terms of the consent agreement. The hearing on his breach of said consent agreement was an informal, nonadjudicatory agency hearing, which did not involve his license rights being decided. His actions fell within the definition of "dentistry;" and thus, he was practicing dentistry during a period of license suspension.

Mississippi Real Estate Comm'n v. White, 586 So.2d 805 (Miss. 1991) can be distinguished from the instant case by the fact that it was based on breaches of *Miss. Code Ann.* § 73-35-21(1)(f), and Rule 1601, 3.4 A & B.

Palmer v. Mississippi Real Estate Comm'n, 14 So.3d 67 at 73 (Miss. Ct. App. 2008) can also be distinguished from the case at bar. Palmer was found guilty of undisclosed dual agency *Miss. Code Ann* § 73-35-21(1)(e), *Miss. Code Ann.* § 89-1-521 (1), and MREC Rule IV.E.3(c)(3)(now 1601, 4.3 C). Palmer was also found guilty of improper dealing, because the details of the transaction were not accurately reflected in the contract of sale or on the closing statement. In this case, a 20% down payment was provided by a non-profit corporation, deposited into the buyer's account to allow the lender to verify closing funds, and then removed.

The funds were immediately re-paid to the corporation by the Seller. Thus, the Seller had in reality sold the property, which had contract price of $126,000 for about $100,000. The Buyer was a high credit risk. The lender and investor were not aware of this. Palmer also breached Rule 1601, 3.2 F by preparing a false sale contract showing an amount higher than the actual selling price. Palmer also did not have a written listing agreement with the owner.

CONCLUSION

The factual basis for a charge of "improper dealing" must be a breach of the Law or the Rules. In this case, the "improper dealing" charge is not based on any action or conduct in a real estate transaction which is within the power of the Commission. The real basis for the charge of "improper dealing" was an alleged breach of *Dodd-Frank* dealing with appraisals. But McIntosh's experts were not allowed to testify about appraisals. The limitation of McIntosh's expert witnesses' testimony clearly showed bias against McIntosh. However, both of McIntosh's experts opined that McIntosh did not breach any law or MREC Rule. (Parker, R. 629-630, ¶¶ 3 and 9) (Boteler, R. 636, ¶¶ 3 and 9) Their reports state that McIntosh did not violate any federal law or regulation.

Praytor advised McIntosh to take the same actions the next time they have a contract, ask if Long is on the approved list. The Commission's own expert witness provided testimony contrary to the allegations of the Complaint and the findings and law of the Order. The Commission's expert also testified that the sole basis of the charge of improper dealing was McIntosh's contact with Lowery. Yet, there is no law or Rule that prohibits a Seller's real estate agent from contacting a lender. Praytor's testimony was contradictory. Praytor gave clear testimony justifying McIntosh's actions. However, Praytor's testimony was supportive of the Commission's allegations when he was questioned by Commission Counsel.

Thus, the evidence to prove the charges against McIntosh was not substantial, much less clear and convincing. Because the evidence was not substantial, nor clear and convincing, and the Commission did not follow "settled controlling principles," the Order is arbitrary and capricious. Punishing McIntosh for some action, which is not prohibited by state law or rule, is clearly not fair or just.

Will this Court interpret the Law as it is written and has been enforced by the Commission in at least 137 previous cases, or will this Court grant the Commission carte blanche to determine what conduct in real estate transactions constitutes improper dealing in the future?

Based upon the absence of the Commission's power, the lack of substantial evidence much less clear and convincing evidence, the arbitrary and capricious nature of the Order, and the lack of a fair and unbiased hearing, this Court should reverse the Commission's Order.

McIntosh further respectfully requests the following relief:

(1) That the Order be reversed and expunged from her record with the Commission;

(2) That the extra continuing education credits that she earned in compliance with the Order be applied to her future continuing education requirements;

(3) That a posting be placed on the Commission website within ten days after the period for any further appeal has expired, and remain on the website for an equal period of time as the present posting has been posted, that clearly states the reversal of the Commission's Order. (Present posting is in Addendum.) (www.mrec.ms.gov);

(4) That McIntosh be awarded all appellate costs of both appeals;

(5) That the Commission reimburse McIntosh the $2,050.00 in transfer fees she paid to the Commission to transfer her agents' licenses to another responsible broker, and back to herself after her suspension ended, which were incurred as a direct

consequence of the Order in case;

(6) That the Commission dismiss all pending cases, and set aside all orders in previous cases, which are based on *Dodd-Frank*; and

(7) That the court consider changing Rule 5.08 of the Uniform Circuit and County Court Rules to exclude those professions that are not likely to harm the life, health, welfare, property or finances of the public, unless the specific facts of the case show an act or acts that have already caused harm, or could cause harm to the public, which support a denial of supersedeas.

Respectfully submitted this the 30th day of August, 2016.

/s/ K. F. Boackle
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CERTIFICATE OF SERVICE

I, K. F. Boackle, attorney for Appellant, Rita Breece McIntosh, certify that I have this day electronically filed the above and forgoing REPLY BRIEF OF APPELLANT with the Clerk of the Supreme Court using MEC, which sent notification of such filing to all counsel of record and other interested parties. I also certify that I have this day served by electronic mail, a true and correct copy of REPLY BRIEF OF APPELLANT to:

Honorable Judge John H. Emfinger
Rankin County Circuit Judge
jhemfinger@rankincounty.org

This the 30th day of August, 2016.

/s/ K. F. Boackle
K. F. Boackle