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TRAMMELL CROW V. HARKINSON

MEADERS: May it please the court. My name is Kim Meaders, and I represent a number of parties in this litigation that have come to be known as "Crow" for Trammell Crow. This is a case that involves the application of sec. §20b of the Real Estate License Act, which I will refer to as "RELA". Rela provides an action may not be brought in a court in this state for the recovery of a commission for the sale or purchase of real estate unless the promissory agreement upon which the action is brought or some memorandum thereof is in writing and signed by the party to be charged. Section 20b has been applied very strictly in consistency by our courts for almost 60 years. And should continued to be applied strictly in this case.

HECHT: But you can interfere with a contract if it does not those requirement we've held in Clements?

MEADERS: There has been 2 cases that permit recovery for the tortious interference of a contract that does not meet the requirements of §20b. Both of those cases however are very limited and only allow recovery against an intervening third party broker.

HECHT: You don't argue that either is wrong?

MEADERS: I do not argue that either of those are wrong,. Both of those cases: Clements v. Withers out of this court in 1969; LA & N Interests out of the Houston CA, both of those cases specifically hold that the party in that case, the plaintiff could not have recovered against the owner himself. And again in LA & N Interests the same quote is made: "You cannot recover against the owner or the seller of a property for a real estate commission unless you have an agreement signed by them." And the purpose for that distinction is based on the public policy of Rela.

As stated in this court in Boyert v. Taubert(?) they said: Permitting a broker to recover commissions based on his allegations of an oral promise would be in direct opposition of the expressed will of the legislature and would unduly expose the public to fraudulent claims based on verbal promises."

HECHT: Well how does that keep the agent from the broker from recovering against his principal for interfering with the fee contract?

MEADERS: The way the question is worded it's assuming that the agent for the principal that's already a party to the transaction is interfering. In both of the cases where it allowed the tortious

interference claim to survive there were the principals to the transactions, the seller and the buyer. They maybe represented by a broker at the time. The cases are not against that broker that represents them and has always been an existing party to the transaction. The cases have been against an intervening broker that comes and tries to steal away the client from one of the two brokers that are already the existing party.

HECHT: Why does it make any difference though?

MEADERS: The difference is and it's cited in the case I believe it is LA & N Interests says: That the public policy concerns of Rela are to protect the public, the buyers and the sellers. The public policy is not to protect an intervening third party broker that has knowledge of the act. It's just not intended to protect that party.

OWEN: Under LA & N if we were to apply that case here you would not be able to sue the codefendants; wouldn't that be the application of LA & N?

MEADERS: I am the codefendants, and I yes I agree with you. Under the LA & N Interests case you are not allowed to sue the buyer or the seller of the agreement.

OWEN: But you would be able to sue Patterson?

MEADERS: Actually Patterson was an existing party to the agreement as well. He's the buyer. In this case it's actually a lease agreement so he's the tenant. So under the holding of LA & N Interests you cannot sue Patterson. If anything you may have a suit against the party the alleged Massey. I don't know if you recall their pleadings, but in their factual statement they claim that Patterson went out and got another broker named Massey and Massey came in to try to steal the deal away against Harkinson. All of those facts are in dispute but for assuming they were correct that would be the only party that he would potentially have a cause of action against and Massey is not a party to this litigation.

ENOCH: It's not clear from the CA judgment, but from their opinion it looks like the CA says: The cause of action that exists against the Crow companies is a tortious interference claim for interfering with Harkinson's representation agreement with Patterson. A third party to the agency relationship could interfere with that couldn't it? I mean there is nothing that exempts Crow just because I was the object of this contract from interfering with a contract between a principal and agent?

MEADERS: The buyer's representation letter to which they are claiming Crow tortiously interfered is a one page letter that states that Harkinson will provide reasonable services and assistance to finally _____ that Hunt agrees to refer all offerings to Harkinson and that Harkinson will look to the buyer or seller for his commissions. It does not comply with Rela. It's not signed by the owner. It doesn't even have an owner's name in it.

ENOCH: But the agreement doesn't even propose to pay a commission does it?

MEADERS: Exactly. It doesn't even outline a commission amount.

ENOCH: So Rela's not even an issue on the agreement between the principal and the agent as far as the Crow parties are concerned because that agreement says nothing about a commission be paid. It just says that the agent is going to have to look to somebody else to pay their commission.

MEADERS: The reason that Rela is an issue is because this is a suit for real estate commissions. And the Act says you cannot recover your real estate commissions unless you have...

ENOCH: I understand that. The posture of this case is that the contract that the Crows have been sued for violating isn't a contract. I mean there's nothing in that contract about commissions. So if there is some sort of damage it has something other than a commission as some other damage right?

MEADERS: That's true but they've sued for a real estate commission under that contract. The thing is that I believe this contract with this buyer's representation letter is simply a red herring. Because what they're claiming is on the first day I met Strater he promised me 4-½% commission no matter what happens with this deal. And he can't recover on that so he holds this up and says this is my document.

HECHT: Let me ask you a hypothetical. A principal has an exclusive agency agreement with an agent. He wants the agent to get his commission from the seller and says that can be up to 4-½%. So he goes and finds property and he negotiates a 4-½% commission with the seller. His principal then says you know this is coming out of my pocket one way or the other so I'm not going to allow you to be paid a commission more than 2% because I am trying to reduce my own costs in this acquisition. Is that interfering with the agent's fee agreement with the seller?

MEADERS: Are you presuming that in his negotiation with the buyer that he has signed a written commission agreement entitling him to 4-½%?

HECHT: Yes.

MEADERS: I say once you have a signed commission agreement, yes...

HECHT: No, no, no, he doesn't want to sue the seller yet. The buyer is telling him you go 4-½%. I know the seller agreed to pay you that, but that's not fine with me because the seller's just going to add it on my cost. So I want you to go take 2% or 1% or some lesser amount.

MEADERS: I still agree. I think that he does have a cause of action. That's the Boyles case. The

Boyles case says: If you have a legal right to recover your commission and then someone interferes with that legal right once you have it in writing, you can pursue a cause of action.

HECHT: Even if it's your own principal?

MEADERS: That's really not a question to be addressed to me. But I would presume that even your own principal. Let me just quickly respond to your question. The thing is his damages under this letter are the right to negotiate with Crow. He did negotiate with Crow. It just wasn't as lucrative as he wanted. So it's kind of a circular argument. It's kind of like tortiously interfering with yourself because the only damage is the right to negotiate with Crow. He didn't negotiate with Crow. Crow just wasn't under an obligation to pay him $350,000 as he demanded.

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CO-PETITIONER

ENOCH: Mr. Kittelson if Withers v. Clements controls this case do you lose?

KITTELSON: I don't think so your honor. Let me first explain something that perhaps has been overlooked by the court. It's finally been identified that I represent Mr. Patterson. Mr. Patterson was an officer-shareholder and a director of the Hunt Companies, the tenant. The tenant rep. letter also further states in addition to looking to the landlord to get paid, says and I'm quoting from page 4 of Harkinson's response: "And all person request for a proposal will clearly state that the economics of the replacement or renewal transaction must accommodate the fee and there will be no direct charge to Hunt products for these services." What Mr. Patterson has been accused of is an attempt to reduce Mr. Harkinson's fee to save Hunt Products money. That's not a breach of that agreement. With respect to your question your honor...

HECHT: So in my hypothetical, you would take the different view?

KITTELSON: Based on the agreement that was signed. It says it will not affect whatsoever Hunt Products. If it does then my client has a right to negotiate that commission.

HECHT: Well it always does.

KITTELSON: Right

HECHT: The parties don't print up the money. It comes out of somebody's pocket.

KITTELSON: Right. To answer your question your honor with respect to Clements, I think it's been further articulated in LA & N under similar facts where there was an exclusive rep. letter. Another broker came in and closed the deal, got the commission, they found no cause of action against the person that signed the rep. letter, but they did say that the action of tortious interference may be sought against the intervening third party broker. Here there is no intervening third party broker. The only person was Massey who was not sued.

HECHT: To be sure I understand. If the fee agreement was in writing and enforceable under the agreement, and your client had this letter agreement, whatever it is with the agent, and wanted the fee reduced, the commission reduced, that would not be tortious interference?

KITTELSON: No it wouldn't because it's a contract claim. And tortious interference implies that there is a third party here. And I think that's something that's also been overlooked.

ENOCH: Let me ask a question now. The summary judgment that brought this case here was a summary judgment based solely on the Rela, that the contract that ostensibly was interfered with didn't meet the requirements of §20. Isn't that the only issue that's here? In fact isn't that the only youissue briefed in this court?

KITTELSON: With respect in this court your honor yes. As to the summary judgment proceeding there are additional bases for denying the claim, but the thrust of the entire summary judgment I believe...

ENOCH: What was the basis in the summary judgment that was brought then in the TC? The briefing up here is simply that this was not a contract that could be interfered with is the issue that's before us on the claim made by Harkinson against Patterson. And that claim is that Patterson interfered with Harkinson's commission agreement with the Crow company. Isn't that correct?

KITTELSON: Purported. I mean it was an oral agreement.

ENOCH: Well you say an oral agreement...

KITTELSON: Well there's no written agreement with the prodefendants as to the commission.

ENOCH: Let's talk about that. In Withers there was an agreement of the parties that was in writing that failed to meet §20 because it didn't have an adequate property description; correct?

KITTELSON: I'm not sure if it was §20, but they applied the statute of frauds and said it implies that there must be a legal description of the property.

ENOCH: But it was a commission agreement. So §20 is the one that made it applicable, made the real estate frauds applicable to....

KITTELSON: There was a writing that was signed. Yes.

ENOCH: There was a writing that was signed that _____ a commission. It had to be under §20. Section 20 means all the other requirements of the Real Estate Act apply and that meant that it had to be an adequate property description, correct?

KITTELSON: Correct

ENOCH: Section 20 on a commission agreement requires it to be in writing and it also requires it to be signed by the party to be charged doesn't it?

KITTELSON: Correct.

ENOCH: That's a requirement. In distinguishing this case from Withers you have a written document that covers the commission in this case do you not?

KITTELSON: No. The only written document that exists is the exclusive rep letter, and it doesn't say anything about the amount of the commission, when it's to be paid.

ENOCH: The summary judgment record demonstrates there was a writing submitted to the Strater that Strater did not sign; is that correct?

KITTELSON: I believe that may be correct but that does not make it a written agreement because there has to be a signature.

ENOCH: Right. Under §20 you do not get a commission unless there is a written agreement that's signed by the party to be charged.

KITTELSON: Correct.

ENOCH: So this agreement, this extensible agreement out here was not a writing that was signed so it doesn't comply with §20 does it?

KITTELSON: Correct.

ENOCH: But if a party can interfere with an agreement of the parties even though it doesn't

comply with §20, why isn't Withers still controlling in this case?

KITTELSON: Again I think LA & N a subsequent case as articulated in its own view how come it should be applied. And basically they say that it should only apply to intervening third party brokers. Because the purpose of the Act is to protect the public, which would be buyers, sellers, landlords, tenants. I assume that the public would not include a fellow license broker - a broker coming in trying to cut someone out of a deal. With respect to Mr. Patterson and the Hunt defendants as a member of the public, he was a tenant, under the exclusive rep letter he had the absolute right to do what he had done.

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RESPONDENT

PANNILL: May it please the court. Let me just state that this is not a suit for a real estate commission. We did not plead for a real estate commission. There is no summary judgment evidence that we have filed a suit for a real estate commission.

HECHT: But it sort of amounts to that?

PANNILL: Your honor we've pled for compensatory damages. We had contract theories in the initial pleading, and in the pleadings that we've filed since then, which the CA has ruled against us on. We asked for a commission under those theories. We've asked for damages of at least $346,000.

HECHT: Which approximates the commission?

PANNILL: It does your honor but we're before the court on summary judgment and pleadings aren't evidence in summary judgment. There's only one speck of evidence about the summary judgment amounts, the damage amounts - damages was not the issue in the TC. The only evidence is a reference to interrogatory No. 12 on page 717 of the transcript, the transcript by the Hunt parties, by the moving parties, that makes a reference to Interrogatory 12, which has nothing to do with damages. There is no damages evidence before this court. So this is not a suit for real estate commission. We are suing for compensatory damages, which the jury would set as, in fact they concede this in their reply brief, the jury was set as the reasonable profit that Harkinson could have earned had the exclusive not been interfered with or had the oral or written agreement for a commission not been interfered with, or had the oral agreement for a commission not been interfered with.

HECHT: What are the damages that result from interference with the exclusive agreement?

PANNILL: I think the damages result from what...I think the jury or the court if it's tried with the court would have to determine what Harkinson could have earned...

BAKER: Those are economic damages would you agree?

PANNILL: Yes they are tort damages, they are laid out under §774 of the Restatement of Torts.

HECHT: But the principal under that agreement doesn't owe the agent anything; agrees not to pay the...they both agree that the commission will not be coming from the principal.

PANNILL: The principal owes the agent the duty of not destroying his opportunity to earn a commission. He certainly owes him that, and he destroyed it.

HECHT: So in that regard if there is a letter agreement like this, some sort of exclusive agreement like as in this case, and if there were a written commission agreement on the other side for 4-½% and the principal says: Look, I just can't do the deal at 4-½%, I appreciate you bringing this to me, but either we are going to have to keep looking and I don't know if are ever going to find anything or you're going to have to reduce your commission because that's all the money there is; is that interference with the enforceable?

PANNILL: No it's not interference at all. But that's not what we have.

HECHT: Why isn't it?

PANNILL: Because in this case, in the first place the record reflects that they did go to Harkinson and they said: Will you compromise on your commission? And he said: Yes, I will. They said: Will you take $75,000 less on your commission? And he said: Yes I will do that. But then without discussing it with Harkinson while he was negotiating for them following his exclusive agreement which incidentally provides that Hunt Products agrees to refer all inquiries or offerings received directly to Harkinson, this is Patterson Ex. 7 at 1562 of the transcript. Instead of referring all inquiries to Harkinson, they went behind his back, they hired another broker, they sent the other broker over to talk to Trammell Crow, Trammell Crow immediately sensed that Harkinson had lost control of his principal. Patterson says to Trammell Crow brokers: Tell us. We'd like to learn more (this is in the record about how we can save money by our broker receiving a smaller commission. Mr. McClain, the other party, said: I didn't think this was ethical at the time. This seemed to me to be a problem of business ethics to discuss lowering his commission behind his back. They just got together and cut Harkinson's throat. That is interference with his opportunity to earn a commission on the part of Patterson...

OWEN: They could have done it over the bargaining table. But you're saying that because...

PANNILL: They could have done it. It they did it with Harkinson present and Harkinson says this in his deposition: If they had talked to me about it sure I was willing to negotiate my commission. Brokers

always negotiate commissions. But they didn't negotiate. They went and essentially his principals got together with Trammell Crow and they agreed on a commission of 10¢ on the dollar for him and then they shoved it down his throat.

OWEN: If three of them had set down together at the bargaining table, the Hunt people, the Crow people, and your client, and it had come down to the point that your client's principal said: I won't do this deal unless you only take $30,000 and he said no. Could his principal go forward with the deal and still not violate any obligation owed to your client?

PANNILL: I don't think so your honor because the agreement says that Harkinson will look solely to the landlord for his fee and that there be no direct charge to Hunt Products for these services. And under the agreement I think they have to let Harkinson have the opportunity to earn a fee. There's no fiduciary duty on Harkinson's part to simply...

OWEN: If Harkinson's principal says: I'll do the deal but I will only do it if you reduce your fee to $30,000; Harkinson says no; does a principal have the right to go forward and sign the lease in any event?

PANNILL: Well let me say that that's not what happened in this case.

OWEN: I'm asking you the hypothetical.

PANNILL: As a hypothetical I don't think Harkinson's principal has the right to go ahead and sign the deal on any event. I think Harkinson' principal has got to protect Harkinson's right to earn a reasonable commission.

OWEN: Based on what document?

PANNILL: Based on the exclusive letter agreement.

OWEN: What is he violating if they go forward without any other broker and sign a deal that's palatable to your client's principal?

PANNILL: He's violating his agreement which gives Harkinson the exclusive right to represent them and gives Harkinson the right to look to go and negotiate a fee with the landlord. I might say that the record indicates that this whole problem was discussed in April when Harkinson signed this exclusive letter agreement and Patterson himself negotiated the exclusive letter agreement and said: What is your fee? And Harkinson said: I am going to charge 4.5%, which is the amount that is in dispute now. And Patterson said: Well that's alright, we accept that. And there is a letter in the record that puts the 4.5%. So this had

already been agreed on. So under those circumstances I don't think and the state of this record they can go and say you have to take less than a 4.5% commission because they've already agreed to a 4.5% commission.

Now if Harkinson agrees, if they go to Harkinson with or without the other side and say we need to get the broker's commission down; and Harkinson agrees to that, then I think they can make the deal. And I think in fact the record shows that's what would have happened. Harkinson said sure I will compromise.

OWEN: In the exclusive agency agreement would the Hunt group have been able to go out individually and themselves sign a lease without any other agent involved?

PANNILL: Not for the 1 year period of exclusive. It says: The letter authorizes Jeff Harkinson, the first sentence, to represent exclusively Patterson, McClain Group in negotiations for either renewal or replacement office space, office warehouse lease space for Hunt Products Co. And then it says: This representational agreement will be in effect for 1 year.

HECHT: Why doesn't this importantly circumvent §20?

PANNILL: I don't think §20b of the Real Estate License Act is involved in the case topside or bottom. That's a whole different statute, whole different problem.

HECHT: Well in essence you're going to get a commission and you don't have a written agreement. So if you look at the case that way, it looks like this is just an end run around the statute.

PANNILL: It's not an end run around the statute your honor. In the state of the summary judgment record, and that's all we have is a summary judgment on the question of whether or not this agreement can violate the Act that issue is really the issue of whether it's an end run around the agreement based on a commission is not present. In addition to which what we've sued for is whatever compensatory damages we could earn under the agreement. The jury could set the compensatory damages at $30,000. They could this is all that...in fact this is the testimony of the other side: We would never have given him more than $30,000. They could set...there is another transaction in the record from Catellis Development. They could say: well he could have done the Catellis thing. The jury's got to go back and put itself in the position of the parties at the time and see what predict in essence what Harkinson likely would have earned. And it's not necessarily a commission.

Section 20B, this court has said in the Clements case: it's a rule of evidence - that's Hutchens v. Slemens, when the case first came out this court has said. In the Clements this court said: the public policy that's important is that parties perform their agreements even if they are oral agreement and even if they are

unenforceable. And this is a far as the statute goes.

PHILLIPS: The gloss that LA & N put on Clements and Withers is just wrong?

PANNILL: No your honor I don't think it's wrong. I just don't interpret it the way the petitioners do. I don't think it's a question of status. Owners of real estate have got some kind of shield law out of the Real Estate License Act, and I don't believe this could should so hold.

PHILLIPS: So all 20B does is it bars contract damages?

PANNILL: Yes your honor.

PHILLIPS: That's the sum total of what it says?

PANNILL: It's a personal defense; it's a waiveable defense. There are many, many different ways in which the statute of frauds can be weighed. And the fact is that when the parties...we have to analyze and break ourselves out of the oral contract mode and think to ourselves: We are suing one party, which is the Trammell Crow party. We are suing the Trammell Crow party not for violating their contract with us. The CA said we can't do that. We are suing them for interfering with our exclusive agency agreement. They are a third party to that agreement.

BAKER: Doesn't it clearly say that in any case where he's involved that he looks to the "landlord" to get his commission? Isn't in this case Trammell Crow the prospective landlord, making them a party to the agreement in a sense?

PANNILL: First of all some of the parties to this agreement are brokers. Some of the parties in the Trammell Crow group of defendants are brokers. Lizers a broker, he's also a lawyer. Strater is a broker. He's also a lawyer. The other parties to the agreement include parties who are simply managers. They are not owners at all. The only owners are the principal life insurance company and the Trammell Crow partnership.

BAKER: Wasn't Trammell Crow No. 60, the one that you are suing for tortious interference?

PANNILL: We are suing them for tortious interference.

BAKER: Aren't you suing all these other people Strater and so forth?

PANNILL: Yes sir. We are saying they are all third parties. They admit it. They admit it in the record. They all interfered with this exclusive agency agreement. They all got together.

BAKER: The answer to my question that Trammell Court is a third party and not a beneficiary of this agreement?

PANNILL: Of the oral agreement?

BAKER: No, of the exclusive representative agreement?

PANNILL: No your honor I don't think they are a beneficiary of the exclusive representation agreement. It doesn't name them for one thing. They weren't even in the picture in April when the agreement was signed.

BAKER: Doesn't it contemplate by its very terms that any case where Mr. Harkinson negotiates a lease that he's to look to the owner of the property for his fee?

PANNILL: Exactly.

BAKER: And so that in every case he knows Hunt Properties is not going to pay and he has to look to Trammell Crow or whoever it is; and that's the import of the agreement?

PANNILL: He does have to look to whoever the owner...

BAKER: _____ contemplated parties to any negotiations that Mr. Harkinson engages in which is one of the criteria for a third party beneficiary isn't it?

PANNILL: I do not believe that Trammell Crow is a third party beneficiary of this agreement. I don't think that was what the parties had in mind. It was not designed to protect Trammell Crow. I think what happened here is Trammell Crow has got the right to bargain with him and to pay him or not pay him and to agree or not agree on any size commission. What they don't have the right to do is come and deal directly with his principal. They knew...we have two lawyers who were dealing with his principal. They know they don't have the right to deal directly with his principal. And yet they did it. They are dealing with him on one level about the lease. They are cutting his throat on the commission behind his back with his principal.

HECHT: If there is an action for interference here though, then the broker will be able to recover damages in a large number of cases in which he would not be able to recover if his sole cause action was on the contract?

PANNILL: I don't agree with that your honor. The broker can only recover damages for tortious interference if the party on the other side goes out and interferes with some other contract. He's got to

do more than just not sign a written contract.

HECHT: But anytime the seller says I'm not going to pay you your commission because I don't think I ever agreed to pay it to you, and the broker goes to the buyer and says: wait a minute, I've got a deal with this guy", you are setting up an interference claim?

PANNILL: You're only setting up an interference claim your honor if the owner of the property goes over and...remember the owner of the party had the exclusive representation agreement since Sept. 11; they had it in front of them. Everybody admits that. They knew he was the exclusive representative. Only if they go over and interfere with that exclusive you have tortious interference. In the words of the present political campaign the answer to the landlord like Trammell Crow is just don't do it. You have this exclusive here, you know you're not supposed to go talk to the people on the other side - just don't talk to them. Then you can negotiate as hard as you want to. You can say I am not going to pay you any commission.

ENOCH: If I understand your point, if I sent an agent to go find some space, your agent finds this space and comes back with an agreement, Patterson here could either accept the deal or not accept the deal based on whether or not they saw that they were going to have pay part of this commission or not pay part of the commission. They could accept the deal or not accept the deal. What you're saying is that having been presented with some willing lessors, that Patterson could not then go to the lessors directly and say we will do this deal, but only if you don't pay the commission?

PANNILL: Exactly so.

ENOCH: So that's the interference?

PANNILL: And that's because Patterson has signed this exclusive letter agreement which says I won't do that.

OWEN: Can you tell us exactly what the breach of the exclusive letter agreement is?

PANNILL: The breach of the exclusive letter agreement is making it far less valuable. It's hindering Harkinson's performance of that agreement. Hindering Harkinson's ability to go out and..

OWEN: What was the breaching event? What constituted a breach here of the exclusive...

PANNILL: The breach of the exclusive letter agreement is when Patterson goes to an intermediary who worked for Trammell Crow and says: I agreed to 4-½% back in April, but I think that's much too much money now. It's going to produce him over $300,000 and I want that cut. I know that's going to

come out of my rent and I want it cut out of my rent and will the brokers for Trammell Crow shaved his commission if Harkinson's shaves his commission can you get Trammell Crow to agree to that? It doesn't say that to Harkinson...

OWEN: You conceded that all of that could have been done at the bargaining table.

PANNILL: You cannot do it indirectly, but you can do it directly. In other words you can do it in the light of the day. You can't do it in the dead of night.

OWEN: What was the breaching event though? Was it the conversations or the...

PANNILL: The breaching event is Patterson picks up the telephone, he calls Tom Lizer, he's a lawyer and a broker for Trammell Crow; he says I would like to learn more about how I can save money by my broker receiving a smaller commission?

OWEN: If he had done that at the bargaining table with Harkinson present it would have been okay?

PANNILL: I don't think I would go that far. I think he's got to get Harkinson's agreement to lower his commission. Harkinson is his agent and he's got to protect his agent's ability to earn the commission. The commission doesn't have to go to zero. There's a suggestion in the briefs that well they offered to pay him something. They offered to pay him $30,000 - 10¢ on the dollar. I don't think it has to go to zero. It simply has to hamper his ability to negotiate his commission deal. And once Trammell Crow knows that Harkinson has lost control of his prospect, Trammell Crow can simply say you know you can take it or leave it. It was just what they did say. We don't care whether you take this deal or not. Take your client somewhere else laughing behind their back because they know they've already made an under the table deal with his client. That's the breaching agreement and that's the interference by Trammell Crow.

And the answer to the problem is you don't have a problem of commission agreement. The answer to the problem is brokers when they have an exclusive in front of them on behalf of the landlord, they simply don't deal with the other side surreptitiously. They don't try to negotiate the commission of the other side with the principal. It's wrong.

CORNYN: Will you explain to me why under Texas law that you can sue for tortious interference in a recovery of judgment based upon interference with an unenforceable contract in some circumstances? For example in the Travel Masters case we said you can't recover for tortious interference with a covenant not to compete, but yet in Clements v. Withers we said you could. Can you reconcile those for me?

PANNILL: My recollection of the Travel Masters case is that in that case the court said: this is an

unreasonable covenant not to compete. And we're not going to let you interference with unreasonable covenants not to compete. But you can interfere with a broker's commission, an oral broker's commission agreement. And let me say that when we're talking about oral agreements Harkinson has a written agreement in this record. There is a written agreement which is sent to him, faxed to him by Strader on October. 2, which is signed by Strater's secretary with Strater's name.

CORNYN: Well I think you accurately described the facts of the case. But what I'm trying to figure out is some underlying rationale by which you can distinguish recovery for tortious interference based upon the interference with an unenforceable contract in some circumstances and not others.

PANNILL: I think it's a question of public policy.

CORNYN: Is it your argument that in Clements v. Withers that the reason tortious interference was allowed of interference with an unenforceable real estate commission contract is because the public policy at issue is not as broad or as comprehensive as it was in Travel Masters?

PANNILL: The statutes of frauds is not a shield law. The statute of frauds is merely a rule of evidence. This court has said that for 100 years.

CORNYN: Even though a party can't enforce that contract, you can still recover the same amount of money damages from a third party who tortiously interferes?

PANNILL: I respectfully suggest that issue is not before the court because we don't have any amount of damages that's been awarded in this case. It needs to be tried first. But I don't think you simply...we can't go to the jury and say we had a deal for 4-½% - give us 4-½%. We have to go to the jury and say here are the range...here's what was happening at the time, here are the other negotiations, here is what Trammell Crow offered to pay, here's what Octameyer thought it was worth, here's what we could have done. The jury has got to select so it's not the same as a commission agreement.

CORNYN: The jury would be free to award any amount in its discretion.

PANNILL: It could award zero. They could be free to award $30,000. It's a whole different kettle of fish from a suit on a contract.

CORNYN: But you would be arguing under those circumstances that it was at least in the amount of the oral contract would you not?

PANNILL: Your honor I'm probably going to argue for Mr. Harkinson for the largest amount of damages I could possibly justify. But the jury is free to reject that, which I don't think it is in a commission

agreement.

HECHT: But the purpose of 20b is to remove disputes to the extent possible over the fee agreement for the broker so that it would be in writing and you will know rather than having these oral allegations?

PANNILL: Your honor I think the purpose of 20b as I understand Hutchens v. Slimins, and Clements v. Withers, is to prevent frauds on the public by real estate brokers who invent commission agreements. In this case the commission agreement is admitted.

HECHT: And so why isn't that circumvented when a broker says to a seller we've got an agreement; and the seller says oh no we don't, we never have had an agreement, and I'm selling this property to the buyer and I'm not paying you a commission. And the broker goes to the buyer and says: If you buy this property from the seller you're interfering with my commission agreement. Why doesn't that circumvent 20b?

PANNILL: Well that's not our case your honor. Our case it's admitted everybody admits we had an oral agreement. It's not a question about whether there's an oral agreement and under summary judgment all the facts favoring Harkinson and the inferences are taken as true. So 1) we have an agreement.

HECHT: All I'm saying the broker may win or lose that case. He may be able to prove up an oral agreement, or he may not be able to prove up an oral agreement. But the purpose of 20b is not to have that be a dispute. Let that be undisputed.

PANNILL: Yes your honor but this court has said ever since Hutchings v. Slemons and I believe before Hutchings v. Slemons that the statute of frauds is a rule of evidence and it cannot be used to perpetrate a fraud. And in this case all the parties simply looked at Jeff Harkinson as a chicken to be plucked. There were no ethics at all on what was done to Jeff Harkinson.

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REBUTTAL

MEADERS: A lot of the facts that he has presented here today are simply red-herrings. He said Harkinson is just a chicken to be plucked. Harkinson first looked at the property in Sept., 1991, a deal closed in Nov. For 6 weeks of work he expects to get paid $350,000 based on the oral agreement. What you look at is whether or not there is an agreement signed by the parties to be charged. That's the only issue here. And the secondary issue is whether o not he's seeking recovery of real estate commissions.

ENOCH: In Withers that argument was made by Clements that they were actually a party to this transaction because they entered into an agreement with I think it was the seller that they would hold Hall not liable if he got sued by Withers for not paying a commission. And they said we're parties to this transaction so we can't be held liable. And the SC said well maybe there's something on the contract, but that doesn't absolve them of the tort of tortious interference. It seems to me one of the arguments you're making is because it was Patterson who was in privity with Harkinson that was doing some of this, then Harkinson has no claim. Am I understanding your... mean the argument that LA & N did to it it had to be somebody who was not a member of any of this transaction?

MEADERS: I think you're right. LA & N's interpretation at least of that case is that it has to be an intervening broker. It cannot be one of the principal parties to the transaction. And at all times there's a lot of things that my opposing counsel stated that we admitted. We did not admit that we were a third party to those transactions. We did not admit that we tortiously interfered. We did not admit that we agreed to a commission agreement orally, and we did not admit to many of the things that he said.

ENOCH: But the summary judgment posture of this case you don't...the summary judgment posture of this case is not such that before us is a dispute on that oral agreement?

MEADERS: You're right. The summary judgment should not look at the oral agreement. In fact there are 6 Texas SC cases that says parole evidence is inadmissibility. You have to look and see if there's a signed writing by the party to be charged.

GONZALEZ: Can't we look at the written agreement between Harkinson and Hunt's exclusive agreement?

MEADERS: I think it's a red herring.

GONZALEZ: That's not the question. Can we look at that agreement? There's an exclusive written agreement between Harkinson and Hunt Products is that correct?

MEADERS: Yes.

GONZALEZ: We can look at it?

MEADERS: Yes.

GONZALEZ: You knew about it?

MEADERS: Yes.

GONZALEZ: You could have dealt with Mr. Harkinson and be a hard ball and be as hard nose about the negotiations as you wanted to be and say we are not going to pay you a dime. Correct?

MEADERS: We did negotiate with Harkinson.

GONZALEZ: At some point you went behind his back.

MEADERS: No at some point...

GONZALEZ: At some point you cut him out of the deal.

MEADERS: That's not true.

GONZALEZ: Explain it to me?

MEADERS: What happened was we are the landowner. We were called by the property owner and says you know we're tied on this deal. They were in near bankruptcy. We can't do this deal. Is there anyway that we can lower his commission amount from 4-½% and do the deal? And we responded yeah. We have no signed agreement with him. Of course it's negotiable. How does that make going behind his back.

HECHT: If your reading of LA&N is right you could have?

MEADERS: We could have gone behind his back? There 's a number of cases that have much more egregious facts than the one of this...the facts of this are not egregious. He stands up and says we cut his throat. He got paid $30,000 for about 10 hours of work.

HECHT: But the troublesome thing is apart from the facts which everybody seems intent on arguing, the rule in this case seems to either be on the one side that we can totally circumvent §20b with interference claims, or on the other side that there's no way a party to a real estate transaction can interfere with a fee agreement. And those are two pretty unwanted extremes to pick from.

MEADERS: They are extremes but Justice v. Willard, LA & N Interests, Cook v. City of Plano, Sims v. Robinson, Spear, there's probably 6-10 cases that if you went with the latter ruling you would overrule. You would change the rulings in Amarillo, Houston, Dallas, and Eastland. It would change dramatically the state of the law in this case and it would open a floodgate of litigation.

CORNYN: Does that mean that the exclusive agency agreement was worthless insofar as Mr. Harkinson was concerned?

MEADERS: An exclusive agency agreement is a little different than a buyer's representation letter. And here we have a buyer's representation letter. I'm not saying that it's worthless. I'm just saying that you can't use that couple it with the verbal negotiations of the party, which public policy denies you can recover and say somehow together you can get right back to the owner and circumvent 20b.

CORNYN: What you're saying is the exclusive agency agreement is no impediment to rendition of judgment in favor of your client?

MEADERS: I'm saying the buyer's representation is a red herring and has absolutely nothing to do with this case and that despite the buyer's representation letter these cases are barred as a matter of law by §20b.

CORNYN: And so anyone who gets an exclusive agency agreement from hereon out if we agree with you is forewarned I guess that they are of no value in controversies like this?

MEADERS: It's not that they are of no value. They are of no value if you're trying to establish the amount of the commission you get from an owner later on. The buyer's representation letter doesn't mention the owner, it's not signed by the owner, doesn't even mention the property, doesn't mention the commission amount. And if you did permit that to allow you to recovery almost every buyer that has a broker has a buyer representation letter, that broker could just waltz into any unsuspecting owner you know start negotiating a deal and then at closing said: Yeah you verbally promised 6-½%, cash up front, you know at the beginning of these negotiations. It's going to be landowner beware and it's going to open a flood gate of litigation that Rela was exactly intended to bar because despite the semantics it's based 100% on the verbal negotiations of the parties because the buyer's representation letter doesn't say anything.