THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Judge

RECEIVED
MAY 29 2013
S.C. Supreme Court

Case No. 06-CP-29-1354
Unpublished Opinion No. 2011-UP-291

Larius G. Woodson and Maurissa Woodson ..... Petitioners,

v.

DLI Properties, LLC, Allen Tate Co., Inc.,
Melia C. Faile and Alan Cauthen,
of whom:

Allen Tate Co., and
Melia C. Faile are the .....Respondents.

BRIEF OF PETITIONERS

John Martin Foster
Post Office Box 106
Rock Hill, S. C. 29731-6106
(803) 324-8100
Attorney for Petitioners

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Pursuant to Rules 242(i), S.C.A.C.R, the Petitioners have prayed for the issuance of a writ of certiorari to review the final decision of the Court of Appeals in the matter above. That Petition has been granted.

QUESTIONS PRESENTED FOR REVIEW

I. When there is a discrepancy between an oral ruling of the court and its written order, does the written order control?

II. What is the source or basis for the Circuit Court's ruling as stated in its Order denying the Petitioners' Motion to Alter or Amend Judgment?

III. Was the Petitioners' reliance on the statements and nondisclosure of Respondents reasonable, and did their consequent expenditure of time and money, place this dispute outside the Statute of Frauds?

IV. Is there evidence of fraud and tort on the part of the Respondents which precludes them from using the Statute of Frauds as a defense?

V. Have the Petitioners produced sufficient evidence of fraud on the Respondents' part, and shown that Petitioners had a duty to speak?

VI. Do The Respondents bear an individual liability for their actions and for their failure to speak?

VII. Do the Respondents' actions constitute Unfair and Deceptive Trade Practices?

VIII. Have the Petitioners adequately plead their damages?

STATEMENT OF THE CASE

This matter involves a contract to purchase unimproved real property in Lancaster County by Petitioners LARIUS and MAURISSA WOODSON. DLI PROPERTIES, LLC

(hereafter "DLI") was the owner of the property. MELIA FAILE (hereafter "FAILE"), a broker working for ALLEN TATE CO., INC., (hereafter "ALLEN TATE") represented DLI in its attempts to sell the property.

DLI and the WOODSONS negotiated for the sale of the property. On Friday, August 4, 2006, the WOODSONS received a recorded phone message from FAILE stating that agreement had been reached and instructing them to drop off their deposit and the signed contract.

On Saturday, August 5, 2006, the WOODSONS delivered their contract signed to FAILE's office and left their check for the down payment. This check was retained and deposited by ALLEN TATE. Over the next few days, in reliance on FAILE's message, the WOODSONS contacted various persons and acted to secure a loan and employ a builder.

During the same period after August 5, 2006, DLI, through FAILE and ALLEN TATE, received another offer on the real property from the Defendant CAUTHEN. Neither FAILE, ALLEN TATE by its broker in charge, or DLI, informed the WOODSONS of these facts.

On Wednesday, August 9th, 2006, after DLI and CAUTHEN had signed an agreement on the property, FAILE informed the WOODSONS that another contract had been entered into.

After filing suit but prior to the filing of the Motions for Summary Judgment, the retained down payment was proffered back to the Petitioners.

By their Complaint filed October 21, 2006, the WOODSONS alleged fraud and negligent misrepresentation against DLI, ALLEN TATE and FAILE. They also alleged Unfair Trade Practices and breach of good faith, and prayed for unspecified damages.

By their Answer, ALLEN TATE and FAILE plead, *inter alia*, the Statute of Frauds. [Record on Appeal, p.37, Answer of above, Third Defense, p.12.] The Respondents ALLEN TATE CO., INC. and MELIA FAILE moved for Summary Judgment. The Circuit Court granted Respondents Summary Judgment as to all causes of action by Order dated July 13, 2008.

The Petitioners filed a Motion to Alter or Amend with the Circuit Court which was denied. This Appeal followed.

The Court of Appeals affirmed on the grounds stated in its Unpublished Opinion filed June 14, 2011. The Petitioners filed their Petition for Rehearing on June 29, 2011. By Order filed August 4, 2011, this Petition was denied.

ARGUMENT: GROUNDS OF APPELLATE DECISION

I. When there is a discrepancy between an oral ruling of the court and its written order, the written order controls.

The decision of the Court of Appeals states, in relevant part:

> Here, we cannot determine whether summary judgment was appropriate because the trial court's order fails to articulate its reasons for granting summary judgment. However, we do not vacate and remand this case because the trial court might have articulated its decision during the summary judgment hearing and the Woodsons failed to provide a hearing transcript. Because the Woodsons failed to satisfy their burden of providing a sufficient record, therefore, we affirm the appeal.
> [Opinion No. 2011-UP-291, 3d PARA., June 14, 2011; emphasis added.]

To state the holding briefly, because the Lower Court "might" have stated oral reasons for its ruling, and because its statements at the motion's argument (or lack thereof) are not reflected in the Record, the issues raised on appeal may not be addressed.

With respect, this statement of the relation between a Judge's oral statements at hearing and the final order is fundamentally incorrect. Rule 58, S.C.R.C.P. states, in relevant part:

> (a) Entry Upon Verdict or Decision. Subject to the provisions of Rule 54(b)[1]:
>
> (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court;
>
> (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly prepare the form of the judgment, or direct counsel to promptly prepare the form of judgment, to which may be attached the decision, order or opinion of the court, and after review and approval by the court, the clerk shall promptly enter it.
>
> Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and entered in the record. Entry of the judgment should not be delayed for the taxing of costs.

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1. Rule 54(b), S.C.R.C.P. deals with multiple claims or multiple parties.

It is counsel's understanding of Rule 58 that a written order is required and that only a written order can be effective. This is also the position taken by our Appellate Courts. In *Corbin* v. *Kohler Co.*, 351 S.C. 613, 571 S.E.2d 92 (Ct.App. 2002), the Court of Appeals held:

> [Appellant] Kohler asserts the trial judge's statements reflect his misunderstanding of the standard of review. Kohler maintains the Circuit Court reviewed the Commission's decision based on a "cracked door" standard of review in which a mere scintilla of evidence would be sufficient to sustain the decision of the Commission. This argument has no merit because the statements by the judge were merely contemporaneous colloquy. The judge and the lawyers were talking in the course of working through the attorneys' arguments. The judge's final written order represents the decision of the court.
>
> "No order is final until it is written and entered." First Union Nat'l Bank v. Hitman, Inc., 306 S.C. 327, 329, 411 S.E.2d 681, 682 (Ct.App. 1991), aff'd, 308 S.C. 421, 418 S.E.2d 545 (1992) (citing Rule 58(a), SCRCP). See also Case v. Case, 243 S.C. 447, 134 S.E.2d 394 (1964) (judgments in general are not final until written and entered); Bayne v. Bass, 302 S.C. 208, 394 S.E.2d 726 (Ct.App. 1990) (divorce decree is not final until written and recorded). "Until written and entered, the trial judge retains discretion to change his mind and amend his oral ruling accordingly." Ford v. State Ethics Comm'n, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001); First Union Nat'l Bank, 306 S.C. at 329, 411 S.E.2d at 682. See also Case v. Case, 243 S.C. at 451, 134 S.E.2d at 396 (holding even if the trial judge made oral ruling in favor of one party, such pronouncement is not a final ruling on the merits nor is it binding on the parties until it has been reduced to writing, signed by the judge, and delivered for recordation).
>
> "It is well settled that a judge is not bound by a prior oral ruling and may issue a written order which is in conflict with the oral ruling." Badeaux v. Davis, 337 S.C. 195, 204, 522 S.E.2d 835, 839 (Ct.App. 1999). See also Owens v. Magill, 308 S.C. 556, 419 S.E.2d 786 (1992) (ruling judge was not bound by prior oral ruling and could issue written order which conflicted with prior oral ruling). "To the extent the written order may conflict with the prior oral ruling, the written order controls." Parag v. Baby Boy Lovin, 333 S.C. 221, 226, 508 S.E.2d 590, 592 (Ct.App. 1998). "The written order is the trial judge's final order and as such constitutes the final judgment of the court. The final written order contains the binding instructions which are to be followed by the parties." Ford, 344 S.C.

at 646, 545 S.E.2d at 823 (citing Rule 58, SCRCP).

[*Id.*, 351 S.C. 613, 620-621, 571 S.E.2d 96-97 (Ct.App. 2002); ACCORD, *Serowski* v. *Serowski*, 381 S.C. 306, 672 S.E.2d 589 (Ct.App. 2009).]

The above is the same reasoning affirmed recently by this Court:

> It is well settled that when there is a discrepancy between an oral ruling of the court and its written order, the written order controls. SEE *Ford v. State Ethics Comm'n*, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001); *Corbin v. Kohler Co.*, [SUPRA]; *Parag v. Baby Boy Lovin*, 333 S.C. 221, 226, 508 S.E.2d 590, 592 (Ct.App. 1998).
>
> [*Cole Vision Corp.* v. *Hobbs*, 394 S.C. 144, ___, 714 S.E.2d 537, 540 (2011).]

II. The source or basis for the Circuit Court's ruling is stated in its Order denying the Petitioners' Motion to Alter or Amend Judgment.

The Petitioners assert that the source or basis for the Lower Court's ruling herein is stated in its Order denying the Petitioners' Motion to Alter or Amend Judgment. [RECORD ON APPEAL, p.002.] The Lower Court there stated:

> Upon receiving the notice for the Motion to Reconsider, the Court elected to make a decision on this motion by receiving each parties' memorandum of law.
>
> After careful consideration of said motion and memorandums submitted by the parties, the Court finds that there is no basis of granting the motion and, therefore, Plaintiffs' Motion to Alter or Amend Judgment is hereby denied.
>
> [*Id.*, 2d and 3d PARA.S; emphasis in original.]

Petitioners submit that the language of the Lower Court in the Order cited above can only be read to mean that its reasoning was limited to the arguments of the Memoranda, all of which are included in the Record on Appeal, and discussed in the Briefs of counsel. Because all bases for the Court's ruling are thus indicated, there is no requirement for any further documentation thereof.

The proper disposition of this appeal, in the absence of any appellate ruling on the issues, would have been to remand the same for clarification, if the same were needed.

ARGUMENT: STANDARD OF REVIEW

An appellate court reviews the grant of Summary Judgment under the same standard applied by the Trial Court. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006).[2] The Trial Court should grant summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), S.C.R.C.P.; *Russell* v. *Wachovia Bank, N.A.*, 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. *Law* v. *S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). A Court considering Summary Judgment makes neither factual determinations nor considers the merits of competing testimony. *David v. McLeod Reg'l Med. Ctr.*, *SUPRA*, 367 S.C. at 250, 626 S.E.2d at 5. However, Summary Judgment is appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. *ID.* To survive a motion for Summary Judgment, the non-moving party must offer some evidence that a genuine issue of material fact exists as to each element of the claim. *Steele* v. *Rogers*, 306 S.C. 546, 552, 413 S.E.2d 329, 333 (Ct.App. 1992).

In setting out its arguments herein, the Petitioners would note that, to their knowledge, there is no dispute over the facts in this case. They note that the Circuit Court has issued only a "generic" order granting the Respondents Summary Judgment, without any specific findings of fact or conclusions of law. Given this background, the Petitioners have reiterated in their Brief the arguments presented to the Circuit Court below as to all points raised by the Respondents' Motions for Summary Judgment.

ARGUMENT: REASONABLE RELIANCE

The Petitioners' reasonable reliance on the statements and nondisclosure of Respondents, and their consequent expenditure of time and money, place this dispute outside the Statute of Frauds.

The Respondents argue that the failure of DLI to execute the contract places it squarely within the grounds of protection afforded by the Statute of Frauds, S.C. Code § 32-3-10 (West).

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2 This paragraph is quoted, with stylistic changes only, from *Chastain* v. *Hiltabidle*, 381 S.C. 508, 673 S.E.2d 826, 829 (Ct.App. 2009).

The Petitioners assert this matter is removed from the operation of the Statute. It has long been recognized in this State, as in most American jurisdictions, that the doctrine of equitable estoppel may be invoked to preclude a party to the contract from asserting the enforceability of a contract by reason of the fact that it is not in writing as required by the Statute of Frauds. *Smith* v. *Williams*, 141 S.C. 265, 139 S.E. 625 (1925); *Pollock* v. *Pegues*, 72 S.C. 47 (1905); *Atlantic Wholesale Co.* v. *Solondz*, 283 S.C. 36, 320 S.E.2d 720 (Ct.App. 1984); 73 AM.JUR.2D *Statute of Frauds* § 471 (2002).

The elements of such an estoppel are listed by the Court of Appeals in *Powers Construction Co.* v. *Salem Carpets*, 283 S.C. 302, 322 S.E.2d 30 (Ct.App. 1984) as:

> (1) the presence of a promise unambiguous in its terms;
> (2) reasonable reliance upon the promise by the party by whom the promise is made;
> (3) the reliance is expected and foreseeable by the party who makes the promise; and
> (4) the party to whom the promise is made must sustain injury in reliance on the promise.
> [*ID.*, 283 S.C. at 307, ftn.4.]

Of the above elements, the unambiguity of the promise, or representation, is obvious: the agreement existed in written form, agreed to by all parties, lacking only the signature of DLI, which had been promised by FAILE in her recorded conversation.

The WOODSONS relied on the representation of FAILE and such reliance was reasonable. There was no ambiguity in her wording and they were, deliberately, told nothing by any Defendant or agent to indicate there was not a binding contract in existence.

By the standards of a reasonable man, the reliance by the WOODSONS on FAILE's representation and silence was expected and foreseeable. They were not told to wait for final approval, nor was any reason given for them to do so. They were told that they had an agreement as to all terms, with only technical issues to clean up.

Finally, there can be no question that proof exists that the WOODSONS have suffered damage by reason of the Defendants' failure to honor their contract. The WOODSONS have acted, and expended time and monies, in reliance. There is no real factual dispute on this point.

ARGUMENT: PRECLUSION OF STATUTE OF FRAUDS

The evidence of fraud and tort on the part of the Respondents precludes them from using the Statute of Frauds as a defense.

In further response to the Respondents' argument based on the Statute of Frauds, Petitioners assert that a tortfeasor cannot be permitted to use the Statute of Frauds as a defense to a wrongful act, or as a means to consummate a fraudulent design. 73 AM.JUR.2D *Statute of Frauds* § 492 (2002) and precedent cited thereunder. As argued herein and before the Circuit Court, the Petitioners have produced sufficient evidence of fraud and tort to warrant a full trial on those causes. If sufficient grounds exist to try the issues of fraud and tort, the defense of Statute of Frauds is not available to the Respondents.

ARGUMENT: THE RESPONDENTS' DUTY TO SPEAK

The Petitioners have produced sufficient evidence of fraud on the Respondents' part, and have shown that Petitioners had a duty to speak.

It is well established that nondisclosure is fraudulent where there is a duty to speak. *Manning* v. *Dial*, 271 S.C. 79, 245 S.E.2d 120 (1978); *Ardis* v. *Cox*, 314 S.C. 512, 431 S.E.2d 267 (Ct.App. 1993). In this case, there was intentional nondisclosure of the existence of another offer and of DLI's intent to treat the agreement with the WOODSONS as contingent. [RECORD ON APPEAL, p.70 - 71, Deposition of FAILE, p.28, 18 - 29, 22.]

This Court has set out the circumstances under which a duty to speak exists.

> The duty to disclose may be reduced to three distinct classes:
>
> (1) where it arises from a preexisting definite fiduciary relation between the parties;
>
> (2) where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied;
>
> (3) where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties.
>
> [*Ardis* v. *Cox*, 314 S.C. 512, 517, 431 S.E.2d 267, 270 (Ct.App. 1993), citing *Jacobsen* v. *Yaschik*, 249 S.C. 577, 585, 155 S.E.2d 601, 605 (1967); *paragraphing added.*]

The Petitioners do not argue that ALLEN TATE or FAILE had a fiduciary relationship

with them [situation (1) above], nor that the contract was "intrinsically fiduciary" or called for "perfect good faith and full disclosure" [situation (3) above.] They do argue that they had the right to expressly repose trust and confidence in ALLEN TATE and FAILE with regard to this transaction [situation (2) above]. Their basis for this assertion is S.C. Code § 40-57-137 (West), which sets out the duties of real estate brokerage companies, such as ALLEN TATE, and licensees, such as FAILE. That statute provides, in relevant part:

> (O) (1) Prospective buyers and sellers of unlisted real estate who do not choose to establish an agency relationship with a licensee but who use the services of the licensee are considered customers. . . .
>
> (2) A licensee offering services to a customer shall:
>
> . . .
>
> (e) be fair and honest and provide accurate information in all dealings.
>
> . . .
>
> (4) A licensee offering services to a customer may not knowingly give a party in a real estate transaction false information; however, the licensee is not liable to a party for providing false information to the party if the real estate licensee did not have actual knowledge that the information was false and discloses to the party the source of the information. . . . No licensee is liable for failure to disclose a matter other than those matters enumerated in this subsection. Violations of this subsection do not create liability on the part of the real estate licensee absent a finding of fraud on the part of the licensee. [*ID.*]

Petitioners are unaware of any other type of transaction, or dealing between private individuals in South Carolina, and which is not traditionally designated as fiduciary, in which such requirements are placed upon the agents of one party. S.C. Code § 40-57-137(O) places those requirements on a real estate transaction where a brokerage company or licensee agent is used. The requirement applies not only to the company and broker, but to the seller, by reason of its use of a broker bound to those requirements. To use the language of *Ardis* and *Jacobsen*, *SUPRA*, the statutory requirements of S.C. Code § 40-57-137(O) constitute "circumstances", state that the "nature of the [parties'] dealings", or define the parties' "position towards each other", such that a trust and confidence requiring disclosure, a duty to speak, is necessarily implied.

The position argued above is also that recognized by the commentators of AMERICAN JURISPRUDENCE 2D:

A party who makes a statement which at the time is true, but who subsequently acquires new information that makes it untrue or misleading, must disclose such information to anyone whom the party knows to be acting on the basis of the original statement or be guilty of fraud.

[FTN.7, citing *Peddinghaus* v. *Peddinghaus*, 314 Ill.App.3d 900, 248 Ill.Dec. 122, 733 N.E.2d 797 (1st Dist. 2000), *APPEAL DENIED*, 191 Il1.2d 536, 250 Ill.Dec. 459, 738 N.E.2d 928 (2000); *Bradford* v. *Vento*, 997 S.W.2d 713 (Tex.App. Corpus Christi 1999), *REV'D ON OTHER GROUNDS*, 48 S.W.3d 749 (Tex. 2001); RESTATEMENT SECOND, TORTS 551(b), comment f .]

[37 AM.JUR.2D *Fraud and Deceit* § 209 (2002).]

This rule, as stated by the commentators of AMERICAN JURISPRUDENCE 2D and by the SECOND RESTATEMENT on Torts, is directly on point. ALLEN TATE and FAILE made representations; new information made those representations untrue or misleading. Their duty to speak existed when the facts changed; their failure to speak is proof of fraud.

ARGUMENT: INDIVIDUAL LIABILITY DUE TO FAILURE TO SPEAK

The Respondents have invoked the general rule that an agent is not liable for lawful acts done within the scope of his, her or its authority for or on behalf of a disclosed principal. *Lawlor* v. *Scheper*, 232 S.C. 94, 101 S.E.2d 269 (1957); 3 AM.JUR.2D *Agency* § 291 (2002). It is certainly true that DLI's status as principal was fully disclosed, and that, as recited above, there is evidence that the decision to keep the WOODSONS ignorant of the Respondents' actions was with DLI's full consent and knowledge. [RECORD ON APPEAL, p.70 - 71, Deposition of FAILE, p.28, 18 - 29, 22.]

The Petitioners make two arguments. First, in light of the requirements of S.C. Code § 40-57-137(O) (West) quoted above, the Respondents cannot come within the general rule as to agents cited above: they cannot demonstrate that their actions and inaction were lawful. By the evidence adduced, those matters were in direct conflict with the statutory directives of this State. Insofar as the Respondents engaged in unlawful acts, their position as agents affords them no protection.

Second, and more generally, it has long been recognized that agency law does not insulate an agent from liability for the agent's own torts. *Lawlor* v. *Scheper*, *SUPRA*; 3 AM.JUR.2D

Agency § 298 (2002). This is because an agent's tort liability is not based on the contractual relationship between the principal and agent, but on the common law obligation that every person must so act or use that which he, she or it controls as not to injure another. 3 AM.JUR.2D *Agency* § 298 (2002) citing, *INTER ALIA*, *Hopkins* v. *Clemson Agr. College*, 221 U.S. 636, 31 S.Ct. 654, 55 L.Ed. 890 (1911).

The causes of action plead by the WOODSONS against ALLEN TATE and FAILE are for fraud and negligent misrepresentation, respectively. All elements of those causes have been plead and evidence for each element exists.

The Petitioners acknowledge that S.C. Code § 40-57-137(O)(4) (West), quoted above, contains language exempting a licensee such as FAILE from liability "for failure to disclose a matter other than those matters enumerated in this subsection". Since that Subsection (O) of the Statute under 2(e), also quoted above, contains the requirement that the licensee has the responsibility to "be fair and honest and provide accurate information in all dealings", Petitioners argue the exemption in (O)(4) is a distinction without a difference.

ARGUMENT: UNFAIR AND DECEPTIVE TRADE PRACTICES

The Respondents have argued that the WOODSONS cannot establish any of the elements of an unfair or deceptive trade practice as defined under S.C. Code § 39-5-10 *ET SEQ.* (West). As stated in their Memorandum to the Circuit Court, their argument, however, is based mainly on the lack of a public impact, as required under *Noack Enterprises* v. *Country Corner Interiors*, 290 S.C. 475, 351 S.E.2d 347 (Ct.App. 1986), one of the first and basic interpretations of the SC UTPA Statutes.

Since *Noack*, this Court has clarified the requirement of public interest by its holding in *Daisy Outdoor Advertising* v. *Abbott*, 322 S.C. 489, 473 S.E.2d 47 (1996). There, the Supreme Court found that impact on the public was synonymous with a potential for repetition. It also discussed what evidence of that element would consist of, stating:

> Plaintiffs in prior cases generally have shown potential for repetition in two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence [citation omitted], or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts [*citations omitted*]. Sometimes, the potential for repetition or other adverse impact on the public interest will be apparent. Conversely, it will sometimes be apparent that an action

has no real potential for repetition. For example, unfair or deceptive acts in the sale of a business itself, or in sales outside the ordinary course of business, are not readily susceptible to repetition and, therefore, have no impact on the public interest. . . .

Generally, plaintiffs will prove potential for repetition by the two means described above. We decline to hold, however, that those are the only means for showing potential for repetition/public impact. Rather, each case must be evaluated on its own merits. We expressly reject any rigid, bright-line test that delineates in minute detail exactly what a plaintiff must show to satisfy the potential for repetition/public impact prong of the UTPA test.

[*ID.*, 322 S.C. at 496-97, 473 S.E.2d at 51.]

Petitioners argue that the potential for repetition, and thus the impact on the public, is shown by the very fact that such behavior has been the subject of legislative enactment in S.C. Code § 40-57-137 (West). The General Assembly obviously found that the dealings between a buyer of real estate, and a real estate brokerage company or licensee, had sufficient impact on the public, and that the practices forbidden by the Statute had enough chance of repetition, to warrant legislative action. The Petitioners submit that finding is conclusive on the question of public impact, and that the alleged actions and inaction of the Respondents ALLEN TATE and FAILE, as alleged, can constitute unfair trade practices PER SE.

ARGUMENT: DAMAGES ARE ADEQUATELY PLEAD.

The Respondents have argued a failure of proof based upon the Petitioners' failure to allege actual amounts of damage in their discovery. First, counsel is unaware that there is a requirement to set out more than general categories of damage by the Complaint or in response to a Motion for Summary Judgment. Secondly, and in specific response to this allegation, counsel would quote the response given on this point to Respondent's Interrogatory No. 3:

The Plaintiffs' Complaint sets out or references their claimed damages as to their causes of action.

If, as the Plaintiffs assert, they possess the superior equitable claim to the subject real property, they have lost the time and cost of this suit to enforce their claims. They have lost the use and enjoyment of the real property until final determination. As to the value of those damages, the Plaintiffs can only reference the existing precedent as to how

such value is quantified. The Plaintiffs acknowledge that against such damages, they must set off the interest and payments which they would have paid if their contract had been honored.

If The Plaintiffs have lost the real property, to the extent the Court may find that that Defendant CAUTHEN has a superior equitable claim, they have lost the real property and have incurred the costs of this civil action. As to the value of those damages, the Plaintiffs can only reference the existing precedent as to how such value is determined.

As allowed under the Plaintiffs' causes of action, they have asserted UFTPA, which allows them triple their actual damages, plus their reasonable costs and attorneys' fees.

As allowed under the Plaintiffs' causes of action, they have asserted fraud and negligent misrepresentation, which causes allow them a claim to punitive damages, which amount can only be quantified by the trier of fact.[3]

[*ID.*]

The WOODSONS have adequately presented evidence of their reliance on the Respondents' assurances and their losses in consequence. If the Respondents require a loss to which a dollar figure can be attached, it will be remembered that they have admitted to holding the Plaintiffs' downpayment for the better part of a year before proffering it back. [RECORD ON APPEAL, P.75, Deposition of FAILE, p.46, 10 - 20.] Even if the Petitioners are to be denied the equitable remedy of specific performance, they are entitled to pre-judgment interest on their downpayment from August 21, 2006 [the date the check was cashed] until the date the same was proffered. This is sufficient to respond to the Respondents' argument.

CONCLUSION

The Court of Appeals has disposed of this appeal on a ground unknown to counsel and, on knowledge and information, unknown to the law and precedent of this State. This Court, by the Appendix, possesses all grounds and all arguments invoked herein. On all bases urged for

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3 The language from the Interrogatory quoted above was placed before the Circuit Court by inclusion in the Petitioners' Memorandum in response to the Motions for Summary Judgment. The inclusion thereof was not contested by the Respondents.

the grant of Summary Judgment, the Petitioners have demonstrated legal and factual grounds for this case to go forward. They pray for reversal of the opinion issued by the Court of Appeals, and the Orders of the Circuit Court.

Respectfully submitted,

John Martin Foster
Post Office Box 106
Rock Hill, S. C. 29731-6106
(803) 324-8100
Attorney for Petitioners

May 28, 2013

Rock Hill, South Carolina

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CERTIFICATE OF SERVICE

I certify that on May 29, 2013, I served the Brief of Petitioners, together with the Appendix required by Rule 242(e), S.C.A.C.R., and this Certificate of Service on the following counsel of record, parties or persons:

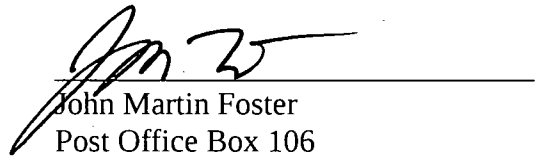
Thomas L. Ogburn, III
Poyner & Spruill, LLP
Attorneys for Respondents
301 S. College, Suite 2300
Charlotte, N.C. 28202

by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving

it in a conspicuous place therein; of if the office was closed or the person to be served has no office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein, all pursuant to Rule 233(b), S.C.A.C.R.

May 28, 2013



John Martin Foster
Post Office Box 106
Rock Hill, S. C. 29731-6106
(803) 324-8100
Attorney for Petitioners