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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Op. No. 2013-UP-066 (S.C. Ct. App. Filed Feb. 6, 2013)

Dudley N. Carpenter and Jane G. Carpenter............Respondents.

v.

Charles L. Measter and Barbara P. Measter............Petitioners,

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RETURN TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This Petition arises from an unpublished, per curiam opinion issued by the Court of Appeals. The Petition contains no reference to Rule 242, SCACR or any of the factors listed in that rule as considerations governing review. None of those factors weigh in favor of granting a writ of certiorari in this case. There are no novel questions of law, no substantial constitutional issues, and there is no conflict with any prior decision of this Court or the Court of Appeals. The Petitioners, the Measters, do not present any argument as to why this Petition should be granted, instead they rehash some of the arguments presented to the Court of Appeals. Given all of the foregoing, this is not a case that warrants discretionary review by this Court pursuant to Rule 242, SCACR.

Respondents request that this Court uphold the Court of Appeals' decision remanding this case for entry of a directed verdict for Respondents' claim for violation of the Residential Property Condition Disclosure Act, S.C. Code Ann. § 27-50-10 to -270 (2007 & Supp. 2012) as well as a determination of attorney's fees pursuant to S.C. Code Ann. § 27-50-65 (2007) and the Court of Appeals' decision affirming the trial court's denial of Petitioners' motions for directed verdict and JNOV as to the breach of contract claim.

QUESTIONS PRESENTED

I. **DID THE COURT OF APPEALS PROPERLY REVERSE AND REMAND THE TRIAL COURT'S DENIAL OF THE CARPENTERS' MOTION FOR DIRECTED VERDICT AS TO THE CARPENTERS' CLAIM FOR VIOLATION OF THE RESIDENTIAL PROPERTY CONDITION DISCLOSURE ACT (SOUTH CAROLINA CODE § 27-50-10, ET. SEQ.)?**

II. **DID THE COURT OF APPEALS CORRECTLY AFFIRM THE TRIAL COURT'S DENIAL OF THE MEASTERS' MOTIONS FOR DIRECTED VERDICT AND JNOV AS TO BREACH OF CONTRACT?**

COUNTER-STATEMENT OF THE CASE

Dudley "Chip" and Jane Carpenter (the "Carpenters" or "Respondents") filed this action against Petitioners (the "Measters") on January 7, 2008, related to damages the Carpenters incurred with the purchase of a condominium on Seabrook Island, South Carolina. (R. pp. 22-30). The Complaint alleges six causes of action: breach of contract, breach of the South Carolina Residential Disclosure Act S.C. Code Ann. §27-50-10 ("Disclosure Act"), fraud, breach of contract accompanied by a fraudulent act, negligent misrepresentation, and breach of South Carolina's Unfair Trade Practices Act. (R. pp. 22-30).

Prior to trial, Petitioners moved for summary judgment asserting various arguments against Respondents' six causes of action. Judge Markley Dennis subsequently issued an order granting Petitioners motion to dismiss two of Respondents' claims (for fraud and negligent misrepresentation) but denying their motion as to unfair trade practices. (R. p. 3). The order did not dismiss, or even address, Respondents' three other causes of action.

When this case was called for trial before a different judge, Deadra Jefferson, the Measters filed a motion requesting that Judge Jefferson interpret Judge Dennis's order as dismissing all of the Carpenters' causes of action, including the causes of action that were not mentioned in the prior order. (R. pp. 32-33). Judge Jefferson acknowledged that the Carpenters' UTPA claim was clearly still in the case, but she directed the parties to obtain clarification from Judge Dennis as to the intent of his prior order regarding the three causes of action that were not addressed in that prior order. (R. p. 173, lines 12-14). It was confirmed that counsel for Respondents would voluntarily dismiss the UTPA claim and seek clarification from Judge Dennis (as directed by Judge Jefferson) on the remaining causes of action. (R. p. 174, lines 16-19).

Judge Jefferson then issued a form order which requested clarification from Judge Dennis as to the intent of his order, and stated that after Judge Dennis' reconsideration, the matter would be restored to the trial roster (if there were any causes of action remaining), or the case would be dismissed with prejudice. (R. p. 4).

The Carpenters, as directed by Judge Jefferson, then moved for Judge Dennis to clarify his order under Rule 54(b), SCRCP. (R. pp. 89-145). Judge Dennis then issued an order dated February 23, 2010 which ruled nunc pro tunc to clarify his prior order and which stated that that prior order denied the Measters' motion for summary judgment as to breach of contract, breach of contract accompanied by fraudulent act, and breach of S.C. Code Ann. §27-50-10, *et. seq.* (R. pp. 5-6). Stated otherwise, Judge Dennis clarified that the Carpenters' claims for breach of contract, breach of contract

accompanied by fraudulent act, and breach of S.C. Code Ann. §27-50-10 were not and never had been dismissed and were still active. Judge Dennis then tried the case.

At the end of their case and at the end of trial, the Carpenters moved for directed verdict on all causes of action (R. p. 317, R. pp. 375-376) and the Measters similarly moved for directed verdict dismissing the Carpenters' causes of action. (R. p. 376). At the end of the Measters' case, the trial judge partially granted the Measters' motion for directed verdict and dismissed the Carpenters' claims for breach of the Disclosure Act and breach of contract accompanied by fraudulent act. (R. pp. 377-389). The case proceeded to the jury on the Carpenters' breach of contract action and the jury returned a verdict in favor of the Carpenters in the amount of $65,000. (R. p. 414, lines 9-12). The Measters then moved for JNOV (R. pp. 146-162) and filed this notice of appeal on May 9, 2011. No motions for new trial were filed by the Measters.

On December 11, 2012, the Court of Appeals heard oral arguments in the matter. By way of an unpublished, per curiam opinion filed February 6, 2013, the Court affirmed the trial court's decision denying the Measters' motions for directed verdict and JNOV on the breach of contract claim and reversed the trial court's decision denying the Carpenters' motion for directed verdict as to the Carpenters' claim for violation of the Residential Property Condition Disclosure Act, S.C. Code Ann. § 27-50-10, *et seq.* and remanded the action to the trial court to determine if attorneys' fees should be awarded as provided in that Act. The Measters petitioned for rehearing before the Court of Appeals, and the Court denied that petition by Order dated March 20, 2013. The Measters then filed this petition for writ of certiorari.

FACTS

This matter arises out of the purchase of a condominium by the Carpenters from the Measters. The contract to purchase the residence (the "Agreement") is dated March 17, 2007, and the closing took place on July 17, 2007. (R. pp. 416-421) The Carpenters paid $675,000 for the residence. (R. p. 416). The sellers are both attorneys (R. pp. 274-275, R. pp. 281-282) and, in fact, Mr. Measter is a highly-credentialed international maritime arbitrator. (R. pp. 282-283). The Measters were required, and did, execute a Residential Property Disclosure Statement ("Disclosure Statement") related to the sale of the property as mandated by South Carolina law and the Agreement. (R. p. 418). Although the Measters could have declined to provide a Disclosure Statement, or could have made "No Representation" as to any specific aspect of the residence, they chose to make a disclosure and explicitly stated that there were no problems related to the:

> Foundation, floors or structural components.
>
> Water seepage or leakage.
>
> Heating or air conditioning (the Measters represented the age of the heating unit as being one half year old and the cooling unit one year old).
>
> Violations of building codes.
>
> Lawsuits or proposed assessments that could affect title to the property. (R. pp. 422-425).

Contrary to their express representations in the Disclosure Statement that there were no problems with the residence, the undisputed evidence at trial established that at the time of the contract execution and closing the Measters were members of an <u>active</u> class action lawsuit (R. p. 333, R. pp. 335-336) which alleged defects to both common

and private elements related to the foundations, floors and water intrusion, and which sought damages, including loss-of-use damages, on behalf of the Measters as individual class members. (R. pp. 349-356 and R. pp. 436-484). That class action lawsuit alleged that there were damages in excess of $15 million suffered by the class members (R. p. 354) and, in fact, the Measters received compensation of approximately $16,000 because of their status as plaintiffs in that suit. (R. p. 257, 279).

In addition, approximately two months prior to the closing, the Annual Meeting of the regime was held and the minutes were mailed to the Measters which stated that structural repairs were just about to commence to their particular building. (R. pp. 267-269). Moreover, the repair contractor who was about to commence repairs to the Measters' building met with Mr. Measter before the closing and advised him that the major structural repairs were about to commence to the building. (R. pp. 238-240). The repairs that were actually performed to the Carpenter unit were extensive and included four-by-four holes that were cut through the floors of each room in the residence (R. p. 234), the floor finishes were ruined and had to be replaced (R. pp. 205-206) and the Carpenters were dispossessed from their unit from four months while those repairs were performed. (R. pp. 294-295).

In fact, the day that the Carpenters were scheduled to move into their unit, they were approached by a contractor (the same repair contractor who told Mr. Measter that the repairs were about to start) and told that they would not be able to move in for an extended period of time. (R. pp. 197-199). Moreover, there was testimony that the

Measters had made prior repairs to their particular unit to correct sagging floors. (R. pp. 244-245, R. pp. 271-272).

ARGUMENTS

I. THE COURT OF APPEALS PROPERLY REVERSED THE TRIAL COURT'S DIRECTED VERDICT IN FAVOR OF THE MEASTERS ON THE CARPENTERS' CLAIM FOR VIOLATION OF THE RESIDENTIAL PROPERTY CONDITION DISCLOSURE ACT (SOUTH CAROLINA CODE § 27-50-10, *ET SEQ.*) AND REMANDED TO THE TRIAL COURT FOR ENTRY OF DIRECTED VERDICT FOR THE CARPENTERS ON THIS CLAIM AND A DETERMINATION OF ATTORNEY'S FEES.

The Court of Appeals properly found that the trial court's directed verdict for the Measters on the Carpenters' claim for violation of the Residential Property Condition Disclosure Act, S.C. Code Ann. § 27-50-10, *et seq.* was unsupported by the evidence. The undisputed evidence introduced at trial established as a matter of law that the Measters violated the Disclosure Act. As such, the Court of Appeals properly remanded this issue to the circuit court for entry of a directed verdict for the Carpenters on this claim. The Carpenters are entitled to a remand of this action with instructions to the lower court to consider an award of attorneys' fees to the Carpenters as the prevailing party in this matter.

A disclosure statement is required unless the parties to the contract agree otherwise. S.C. Code Ann. §27-50-30 (13). In this action, Paragraph 19 of the Agreement To Buy and Sell Real Estate Condominiums (the "Agreement") provided that the Measters would execute a Seller's Property Condition Disclosure Statement. (R. pp. 416-421). The Measters had the option of providing a disclosure statement or not providing a disclosure

statement, and they elected to provide one. Both the Disclosure Statement signed by the Measters and S.C. Code Ann. §27-50-60 of the Disclosure Act provide as follows:

> If the owner discovers, after his delivery of a disclosure statement to a purchaser, a material inaccuracy in the disclosure statement or the disclosure is rendered inaccurate in a material way by the occurrence of some event or circumstance, the owner shall correct promptly the inaccuracy by delivering a corrected disclosure statement to the purchaser or make reasonable repairs necessitated by the occurrence before closing.

The Disclosure Statement and S.C. Code Ann. §27-50-65 go on to state:

> An owner who knowingly violates or fails to perform any duty prescribed by any provision of this article or <u>who discloses any material information</u> on the disclosure statement that he <u>knows to be false, incomplete, or misleading</u> is liable for actual damages proximately caused to the purchaser and court costs. The court may award reasonable attorney fees incurred by the prevailing party.

The Disclosure Statement (R. pp. 422-425) defines what a "No" representation by the Measters on the form would mean. The Disclosure Statement reads:

> If you check "No" for any question, you are stating that you have no actual knowledge of any problem. If you check "no" and you know there is a problem, you may be liable for making an intentional misrepresentation.

The Disclosure Statement then goes on to state, in all capital letters and in bold print "DO YOU HAVE KNOWLEDGE OF ANY PROBLEM (MALFUNCTION OR DEFECT) WITH ANY OF THE FOLLOWING."

The Measters checked "No" on several pertinent items, indicating they had <u>no knowledge</u> of any deficiencies with the following:

1. Foundation, floors or structural components.
2. Water seepage or leakage.
3. Heating or air conditioning (the Measters represented the age of the heating unit as being one half year old and the cooling unit one year old).

4. Violations of building codes.

5. Lawsuits or proposed assessments that could affect title to the property.

At trial, the following undisputed facts were introduced into evidence. These facts establish as a matter of law that the Measters violated the Disclosure Act.

1. The Measters were members of an active class action lawsuit that alleged claims for defects to all the buildings, and the Carpenters' building, for both the common elements and the private elements.

- The Measters bought their unit in 1998. (R. p. 323, lines 19-22).
- There had been general structural problems and water intrusion problems with all of the buildings as far back as 1990 that were generally known to the regime members. (R. p. 254, lines 6-20) (R. pp. 436-484).
- A class action was filed on August 18, 2000 (R. pp. 436-484) against the regime officers alleging that there were structural deficiencies and water intrusion in the buildings that had not been corrected. (R. pp. 257-258) (R. pp. 436-484).
- The Measters were members of that class action. (R. p. 333, lines 1-13).
- The class action lawsuit was still active at the time of the sale to the Carpenters, and there were motions regarding attorneys' fees and other issues. (R. pp. 335-336).
- There were known structural problems with all of the buildings, including building 8 (where the Measter/Carpenter unit was located), where all of the buildings had to be jacked up and repaired. (R. p. 258, line 22-p. 260, line 20).
- Interior problems because of the sagging buildings included cracked sheetrock on the inside and sagging floors. (R. p. 261, line 15-p. 262).
- The class action pleadings state that deficiencies exist in all the buildings that will cause deteriorating and sagging floors and walls, carpentry and doors out of trim and out of line, and with all conditions continuing to

worsen. (R. pp. 351, lines 6-13). (R. pp. 448-450 and R. pp. 474-475);

- and that the damages would damage not only the regime but "the individual property of the plaintiffs' in the class." (which included the Measters) (R. p. 351, lines 21-24);

- and that it would cost in excess of $15 million to fix all of the problems "and to compensate the class for the resulting loss of use for the apartments during said repairs." (R. p. 354, lines 4-15).

- One purpose of the class action was to compensate each of the individual owners for the amounts that they would be assessed to fund the repairs to the common elements. (R. p. 357, line 8-p. 358, line 17);

- and it was specifically known that repairs and funds and assessments would be needed for the repair of building 8. (R. p. 359).

- The Measters were active members of the community and with the HOA board, "they attended meetings and voiced their opinions on certain items". They also attended the hearing where the funds for the class action settlement were disbursed. (R. p. 361, line 21-p. 362, line 12).

2. Regime documents, provided to the Measters prior to the sale to the Carpenters, explicitly documented that major repairs were about to begin on their particular building.

- The annual meeting of the HOA regime is a big deal (R. p. 267) and Notice is given to all of the owners. (R. p. 267) and agendas are provided and meeting minutes are provided. (R. p. 267).

- The report for the Annual Meeting (R. pp. 428-431) held on June 2, 2007, was provided to each of the unit owners. (R. p. 267).

- At the time of that report, repairs to building 8 were to begin "immediately" (R. p. 270, lines 4-9) which included the "repair of the sagging, sinking three-bedroom stacked buildings" which contained the Carpenters' unit. (R. pp. 268-269).

- The settlement proceeds from the class action (approximately sixteen thousand dollars) were supposed to be used to fund the repairs to the

buildings. (R. p. 270, line 10-p. 271, line 1).

- Herman Hatfield, the contractor who did the repairs, talked with Mr. Measter in June, 2007, when Mr. Measter walked out of his unit. (R. pp. 238-240).
- Hatfield told Mr. Measter that he was going to do the repairs including jacking up of the entire building. (R. p. 240).
- Measter responded that "it wasn't no worry of his, he'd sold his unit." (R. p. 240, lines 16-17).
- Hatfield saw Mr. Measter at the building a couple of weeks later and Mr. Measter asked when the repairs were going to start and Mr. Hatfield said he did not know when. (R. p. 241, lines 19-24).
- The Hatfield testimony is effectively undisputed by Mr. Measter. When repeatedly asked about the conversation, Mr. Measter did not deny that it took place, he simply replied that he did not recall it. (R. pp. 284-286, line 6).

3. The repairs to the Measters' unit were extensive and included both the common elements and the interior private elements.

- The floors in building 8 were noticeably sagging. (R. p. 232).
- The floors had to be jacked up to make them level. (R. p. 232).
- The jacking moved up the entire building and impacted the flooring. (R. pp. 231-232).
- In order to fix the Carpenters' unit, Hatfield had to cut four-foot by four-foot holes in every floor. (R. p. 234).
- Hatfield had to jack up unit 1964 (the Carpenters' unit) and had to cut holes in the interior walls to check the framing. (R. pp. 236-237).
- Large holes were cut in every single room. (R. p. 200, line 18-p. 201, line 5) and ruined all of the tile floors and floor coverings. (R. p. 203, lines 9-25) which the Carpenters had to replace. (R. p. 205, line 20-p. 206, line 17).

4. There was testimony that prior repairs had been made to the Measters' unit to try to level the sagging floors in the unit.

- When Hatfield started work on the Measter unit, he saw evidence that there had been prior repairs made to fix sagging floors. (R. p. 244, line 11-p. 245).
- Another witness, Ken Schneider, also saw evidence in the Measter unit that there has been prior repairs to fix sagging floors. (R. pp. 271-272, line 7).
- The Measters admitted that they had done renovations which included replacing all the floors in their unit. (R. p. 338, lines 10-15).

5. The Measters understood the significance of the disclosure statement and understood that they had to fill it out completely and list deficiencies whether or not they related to common elements or private elements.

- When Mrs. Measter filled out the disclosure statement she understood that it was her obligation to complete it as to the entire unit, regardless of whether the deficiencies related to common elements or private elements. (R. p. 276, line 9-p. 277, line 19).
- Mrs. Measter sent an email after the closing stating that the Carpenters were terribly upset and were consulting a lawyer about suing them about misrepresentations. "Not only do I not blame them, Charlie and I are very embarrassed that we knew nothing about this." (R. pp. 329-331).
- The Measters' real estate agent, Janice Franklin, understood the importance of the disclosure statement and sat down with the Measters and reviewed each of the disclosures before they were filled out. (R. pp. 341-343).
- If Ms. Franklin had known of any of the Measters' misrepresentations, she would have told the Measters to complete the form differently. (R. pp. 341-344).

The Measters were inarguably obligated to truthfully complete a Disclosure

Statement and to correct any material disclosures that were inaccurate. They breached this obligation by failing to disclose any of the deficiencies discussed above. In light of the undisputed testimony, it is almost laughable that the Measters deny that they made "false, incomplete or misleading" disclosures.

Although the Measters argue that they had no obligation to disclose any of the above-referenced evidence because it affected only the "common elements" of the buildings, the facts established that the deficiencies impacted both the common elements and private elements, and individual claims for damages were being made on behalf of the Measters as members of the class. Moreover, a critical fact remains that the Measters could have made no representation as to the deficiencies that existed; however, they explicitly and affirmatively misrepresented that the deficiencies did not exist when they in fact did. The fact that the Measters could have legally chosen not to have made representations did not release them under the contract or the Disclosure Form from making false statements. As such, the undisputed evidence introduced at trial established as a matter of law that the Measters violated the Disclosure Act.

Moreover, the Measters argue that the definition of "common elements" derives from the South Carolina Horizontal Property Act, S.C. Code Ann. § 27-31-10 to -440 (2007 & Supp. 2012) for purposes of interpreting the common elements exception to the Disclosure Act. Similarly, the Measters argue that the Master Deed's definition of "Apartments" determines whether the defects complained of are common elements excluded by the Disclosure Act's exception. However, like the Court of Appeals found, to the extent that the foundations, floors, main walls, and ceiling are inextricably

intertwined to a condominium unit such that they directly affect the unit's intended use and value, the legislature could not have possibly intended to include them in the common elements exclusion to the Disclosure Act. See Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) (holding that courts will reject a statutory interpretation that would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention). Here, the evidence unequivocally establishes the structural problems with the regime's buildings directly affected the unit sold to the Carpenters and required remediation construction that damaged both the unit's common elements and private elements.

The underlying case went to the jury only on the Carpenters' claim for breach of contract. The Carpenters' claim for breach of contract was based on the fact that the Measters made misrepresentations in the Disclosure Statement, and the Disclosure Statement was required to be completed as a condition of the contract. Therefore, the jury verdict in favor of the Carpenters for the breach of contract necessarily established the facts to prove that the Measters violated the Disclosure Act by making misrepresentations on it. As such, if this Court agrees with the Court of Appeals and finds that the trial judge improperly granted the Measters' motion for directed verdict on the Disclosure Act and improperly denied the Carpenters' motion for directed verdict under the Disclosure Act, the only issue remaining would be for a remand of this case solely for the determination of the propriety of attorneys' fees under the Disclosure Act Section 27-50-65.

II. THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL

COURT'S DENIAL OF THE MEASTERS' MOTIONS FOR DIRECTED VERDICT AND JNOV ON THE BREACH OF CONTRACT CLAIM.

The Court of Appeals correctly held that the trial court properly declined to rule as a matter of law that there existed no breach of contract because there was sufficient evidence that the Measters breached the contract's implied covenant that the parties must act in good faith and deal fairly with each other. See Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006) (holding that in ruling on a motion for directed verdict, the trial court must view the evidence and the inferences reasonably drawn therefrom in the light most favorable to the party opposing the motion); McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006) (holding that the trial court should deny a directed verdict motion when either the evidence yields more than one inference or its inference is in doubt).

The Carpenters asserted a cause of action for breach of contract, and the Measters' liability may be based on a breach of any of the contract's terms, including the implied covenant of good faith, as long as the breach caused damage to the Carpenters. See Williams v. Riedman, 339 S.C. 251, 267, 529 S.E.2d 28, 36 (Ct. App. 2000) ("[T]he implied covenant of good faith and fair dealing has been viewed as *another contract term.*" (emphasis added)).

There was a host of evidence introduced at trial to permit this Court to affirm both the Court of Appeals and the trial judge, and from which the jury rightfully found, that the Measters breached their contract's implied covenant that the parties must act in good faith and fairly deal with each other. See Williams v. Riedman, 339 S.C. 251, 267, 529 S.E.2d

28, 36 (Ct. App. 2000) ([T]here exists in every contract an implied covenant of good faith and fair dealing."); see also Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999) (holding that an appellate court will only reverse the trial court's ruling when no evidence supports the ruling or when the ruling is controlled by an error of law).

Paragraph 19 of the Agreement To Buy and Sell Real Estate Condominiums (the "Agreement") provided that the Measters would execute a Seller's Property Condition Disclosure Statement. (R. pp. 416-421). The Measters had the option of providing a Disclosure Statement or not providing a Disclosure Statement, and they elected to provide one. (R. p. 418). Paragraph 19 of the contract provides in pertinent part:

> Buyer and Seller agree that a Seller's Property Condition Disclosure statement, as required by South Carolina Code of Laws, as amended, Section 27-50-10, et. seq. has been provided to Buyer by Seller prior to the ratification of this agreement. If the Seller discovers, after his delivery of a disclosure statement to a Buyer, a material inaccuracy in the disclosure statement or the disclosure is rendered inaccurate in a material way by the occurrence of some event or circumstance, the Seller shall correct promptly the inaccuracy by delivering a corrected disclosure statement to the Buyer or make reasonable repairs necessitated by the occurrence before closing.

The Disclosure Statement (R. pp. 422-425) defines what a "No" representation by the Measters on the form would mean. The Disclosure Statement reads:

> If you check "No" for any question, you are stating that you have no actual knowledge of any problem. If you check "no" and you know there is a problem, you may be liable for making an intentional misrepresentation.

The Disclosure Statement then goes on to state, in all capital letters and in bold print "DO YOU HAVE KNOWLEDGE OF ANY PROBLEM (MALFUNCTION OR DEFECT) WITH ANY OF THE FOLLOWING"?

The Measters checked "No" on several pertinent items, indicating they had <u>no knowledge</u> of any deficiencies with the following:

1. Foundation, floors or structural components.

2. Water seepage or leakage.

3. Heating or air conditioning (the Measters represented the age of the heating unit as being one half year old and the cooling unit one year old).

4. Violations of building codes.

5. Lawsuits or proposed assessments that could affect title to the property.

At trial, the evidence established the following facts which support the trial court's, the Court of Appeals, and the jury's finding that credible evidence existed to establish that the Measters made misrepresentations in the Disclosure Statement and breached their contract:

1. The Measters were members of a class action lawsuit that was still active and which alleged claims for defects to all the buildings, and the Carpenters' building, for both the common elements and the private elements.

- The Measters bought their unit in 1998. (R. p. 323, lines 19-22).

- There had been general structural problems and water intrusion problems with all of the buildings as far back as 1990 that were generally known to the regime members. (R. p. 254, lines 6-20) (R. pp. 436-484).

- A class action was filed on August 18, 2000 (R. pp. 436-484) against the regime officers alleging that there were structural deficiencies and water intrusion in the buildings that had not been corrected. (R. pp. 257-258) (R. pp. 436-484).

- The Measters were members of that class action. (R. p. 333, lines 1-13).

- The class action lawsuit was still active at the time of the sale to the

Carpenters, and there were motions regarding attorneys' fees and other issues. (R. pp. 335-336).

- There were known structural problems with all of the buildings, including building 8 (where the Measter/Carpenter unit was located), where all of the buildings had to be jacked up and repaired. (R. p. 258, line 22-p. 260, line 20).

- Interior problems because of the sagging buildings included cracked sheetrock on the inside and sagging floors. (R. p. 261, line 16-p. 262).

- The class action pleadings state that deficiencies exist in all the buildings that will cause deteriorating and sagging floors and walls, carpentry and doors out of trim and out of line, and with all conditions continuing to worsen. (R. pp. 351, lines 6-13). (R. pp. 448-450 and R. pp. 474-475);

- and that the damages would damage not only the regime but "the individual property of the plaintiffs' in the class." (which included the Measters) (R. p. 351, lines 21-24);

- and that it would cost in excess of $15 million to fix all of the problems "and to compensate the class for the resulting loss of use for the apartments during said repairs." (R. p. 354, lines 4-15).

- One purpose of the class action was to compensate each of the individual owners for the amounts that they would be assessed to fund the repairs to the common elements. (R. p. 357, line 8-p. 358, line 17);

- and it was specifically known that repairs and funds and assessments would be needed for the repair of building 8. (R. p. 359).

- The Measters were active members of the community and with the HOA board, "they attended meetings and voiced their opinions on certain items". They also attended the hearing where the funds for the class action settlement were disbursed. (R. p. 361, line 21-p. 362, line 12).

2. The Measters were specifically aware, prior to the sale to the Carpenters, that major repairs were about to begin on their particular building.

- The annual meeting of the HOA regime is a big deal (R. p. 267) and Notice is given to all of the owners. (R. p. 267) and agendas are provided

and meeting minutes are provided. (R. p. 267).

- The report for the Annual Meeting (R. pp. 428-431) held on June 2, 2007, was provided to each of the unit owners. (R. p. 267).

- At the time of that report, repairs to building 8 were to begin "immediately" (R. p. 270, lines 4-9) which included the "repair of the sagging, sinking three-bedroom stacked buildings" which contained the Carpenters' unit. (R. pp. 268-269).

- The settlement proceeds from the class action (approximately sixteen thousand dollars) were supposed to be used to fund the repairs to the buildings. (R. p. 270, line 10-p. 271, line 1).

- Herman Hatfield, the contractor who did the repairs, talked with Mr. Measter in June, 2007, when Mr. Measter walked out of his unit. (R. pp. 238-240).

- Hatfield told Mr. Measter that he was going to do the repairs including jacking up of the entire building. (R. p. 240).

- Measter responded that "it wasn't no worry of his, he'd sold his unit." (R. p. 240, lines 16-17).

- Hatfield saw Mr. Measter at the building a couple of weeks later and Mr. Measter asked when the repairs were going to start and Mr. Hatfield said he did not know when. (R. p. 241, lines 19-24).

- The Hatfield testimony is effectively undisputed by Mr. Measter. When repeatedly asked about the conversation, Mr. Measter did not deny that it took place, he simply replied that he did not recall it. (R. pp. 284-286, line 6).

3. The repairs to the Measters' unit were extensive and included both the common elements and the interior private elements.

- The floors in building 8 were noticeably sagging. (R. p. 232).

- The floors had to be jacked up to make them level. (R. p. 232).

- The jacking moved up the entire building and impacted the flooring. (R.

pp. 231-232).

- In order to fix the Carpenters' unit, Hatfield had to cut four-foot by four-foot holes in every floor. (R. p. 234).

- Hatfield had to jack up unit 1964 (the Carpenters' unit) and had to cut holes in the interior walls to check the framing. (R. pp. 236-237).

- Large holes were cut in every single room. (R. p. 200, line 18-p. 201, line 5) and ruined all of the tile floors and floor coverings. (R. p. 203, lines 9-25) which the Carpenters had to replace. (R. p. 205, line 20-p. 206, line 17).

4. There was testimony that prior repairs had been made to the Measters' unit to try to level the sagging floors in the unit.

- When Hatfield started work on the Measter unit, he saw evidence that there had been prior repairs made to fix sagging floors. (R. p. 244, line 11-p. 245).

- Another witness, Ken Schneider, also saw evidence in the Measter unit that there has been prior repairs to fix sagging floors. (R. pp. 271-272, line 7).

- The Measters admitted that they had done renovations which included replacing all the floors in their unit. (R. p. 338, lines 10-15).

5. The Measters understood the significance of the disclosure statement and understood that they had to fill it out completely and list deficiencies whether or not they related to common elements or private elements.

- When Mrs. Measter filled out the disclosure statement she understood that it was her obligation to complete it as to the entire unit, regardless of whether the deficiencies related to common elements or private elements. (R. p. 276, line 9-p. 277, line 19).

- Mrs. Measter sent an email after the closing stating that the Carpenters were terribly upset and were consulting a lawyer about suing them about misrepresentations. "Not only do I not blame them, Charlie and I are very

embarrassed that we knew nothing about this." (R. pp. 329-331).

- The Measters' real estate agent, Janice Franklin, understood the importance of the disclosure statement and sat down with the Measters and reviewed each of the disclosures before they were filled out. (R. pp. 341-343).

- If Ms. Franklin had known of any of the Measters' misrepresentations, she would have told the Measters to complete the form differently. (R. pp. 341-344).

The Measters had a contractual obligation to truthfully complete a Disclosure Statement and to correct any material disclosures that were inaccurate. They breached this obligation by failing to disclose any of the deficiencies discussed above. Although the Measters argue that they had no obligation to disclose any of the above-referenced evidence because it affected only the "common elements" of the buildings, the facts established that the deficiencies impacted both the common elements and private elements, and individual claims for damages were being made on behalf of the Measters as members of the class. Moreover, a critical fact remains that the Measters could have made no representation as to the deficiencies that existed; however, they explicitly and affirmatively misrepresented that the deficiencies did not exist when they in fact did. The fact that the Measters could have legally chosen not to have made representations did not release them under the contract or the Disclosure Form from making false statements. As such, there was ample evidence to support the jury's verdict and the trial court's denial of the Measters' motions for directed verdict and JNOV that the Measters breached their contract with the Carpenters.

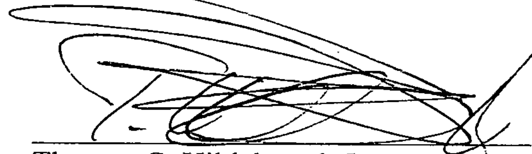
The evidence shows the Measters knew of the structural problems with the

regime's buildings and the resulting class action litigation that ultimately yielded funds with which to reimburse unit owners for repairs. Therefore, the Court of Appeals properly affirmed the trial court's denial of the Measters' motions for a directed verdict and JNOV on the breach of contract claim. This Court should likewise do the same.

CONCLUSION

The Measters have failed to present any argument for this Court that implicates the considerations listed in Rule 242(b), SCACR and the Court of Appeals correctly decided this matter. Therefore, this Petition should be denied.

Respectfully submitted,



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May 24, 2013

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Op. No. 2013-UP-066 (S.C. Ct. App. Filed Feb. 6, 2013)

Dudley N. Carpenter and Jane G.
Carpenter.. Respondents.

v.

Charles L. Measter and
Barbara P. Measter ....Petitioners,

PROOF OF SERVICE

I, Thomas C. Hildebrand, Jr., an attorney with Parker Poe Adams & Bernstein, LLP, attorney for the Respondents, hereby certify that I have served a copy of the Return to Petition for Writ of Ceriorari along with the Proof of Service with a revised/corrected caption (the Respondents' original filing with the incorrect caption was served on May 20, 2013) upon the below-named individuals and/or counsel this 24th day of May via U.S. Mail, postage prepaid and addressed as follows:

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