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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No.: 2020-CP-37-00765

The Estate of David Greene Appellant,

v.

MT Investments, LLC, Lakewood Capital Group, LLC, Marina Bay Property Owners
Association, Inc., and John Doe(s), Members of MT Investments, LLC Defendants,

Of Whom

MT Investments, LLC, Lakewood Capital Group, LLC, and John Doe(s), Members of MT
Investments, LLC are Respondents.

INITIAL BRIEF OF APPELLANT

OCTOBER 27, 2022

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Statement of the Issues on Appeal

1. Did the lower court err in stating a non-reliance clause in the Purchase and Sale agreement defeated Appellant's action for Negligent Misrepresentation?
2. Did the lower court err in finding Respondents owed no duty of care to Appellant?
3. Did the lower court err in holding Appellant was unable to prove the element of "justifiable reliance" on the representation Lot 14 was designed to have a full U-shaped dock in their Negligent Misrepresentation action?

Statement of the Case

This appeal arises out of actions for Breach of Contract and Negligent Misrepresentation brought by Appellant, Estate of David Greene, against Respondents, MT Investments, LLC, Lakewood Capital Group, LLC, and John Doe(s), Members of MT Investments, LLC for pecuniary damages associated with a purchase and sale contract for a lakefront lot (hereinafter “Lot”) number 14 in Marina Bay subdivision in Oconee County. Initially Plaintiff, Adam Greene, as personal representative for the Estate of David Greene, filed a Summons and Complaint on October 15, 2020. Respondents filed a motion to dismiss, motion for judgment on the pleadings, and raised standing issues, as Adam Greene was the heir to the Lot, not the initial purchaser. As a result, probate was opened and an Amended Summons and Complaint were filed on April 15, 2021, with the Plaintiff identified as “The Estate of David Greene.” Respondents filed an Answer to the Amended Complaint on May 11, 2021 and a motion for summary judgment and an amended motion for summary judgment on April 22, 2022. Appellant responded with a memo in opposition to summary judgment on May 31, 2022.

The lower court scheduled and conducted a hearing on the motion for summary judgment on June 2, 2022, before the Honorable R. Lawton McIntosh. The lower court issued a ruling on June 30, 2022, and found:

With regards to the breach of contract claim, the parole evidence rule prevented introduction of extrinsic evidence of the contract terms and the doctrine of merger prevented Appellant from offering evidence in addition to the deed. (Order p.5).

With regard to the Negligent Misrepresentation action, the lower court found there was no evidence Respondents represented to the Appellant he could have a full U-shaped dock on the Lot he purchased and there was no evidence that the Appellant relied on any such representation from Respondents additionally, there was a valid non-reliance clause in the contract; and

With regard to Negligence action, the lower court found there was no duty prescribed to Respondents with regards to accurately representing the type of dock Lot 14 would be allowed, as dock permits were totally up to Duke Shoreline Management. (Order pp.6-7).

As a result, summary judgment was granted on all causes of action for Respondents. This appeal followed. Appellant served the Notice of Appeal on Respondents by and through their representative counsel on July 27, 2022.

Statement of the Facts

On or about August 27, 2016, the late David Greene purchased a lot located at 906 Twingate Lane, Seneca SC, 29672 (Lot 14 in subdivision Marina Bay) (hereinafter the “Lot”) from Respondents MT Investments, LLC, Lakewood Capital Group, LLC, and John Doe(s), Members of MT Investments, LLC, for Two Hundred Twenty-Four Thousand Nine Hundred No/100ths (\$224,900.00) dollars. (Purchase and Sale Contract, EX. A1). The Deed for the Lot is recorded with the Oconee County Register of Deeds in Deed Book 2210 at Page 15. (Deed, EX. A9-10). Respondents provided David Greene with the Marina Bay Property Report, which he also signed on August 27, 2016, along with the Purchase and Sale Contract. (Marina Bay Property Report, EX. B1-2). This report set forth: “Lots 7-20. ...developed to meet the application requirements by Duke Energy Lake Management’s standards to apply for a Dock Permit”. (*Id.*).

This report goes on to list lots falling into other categories, such as, non-dockable lakefront lots, lakefront lots with limited dock size, and lots where the availability of a dock permit may change due to changing wetlands vegetation buffer. (*Id.*).

This detailed Report with regards to the type of dock allowed on each lot was accumulated by Respondents’ project manager, Earl Sullivan, via lot surveys, inspections, and several meetings with Duke Energy Shoreline Management where they discussed the initial subdivision plat and shoreline directives. (Sullivan Dep. 11:4-20; 14:3-17; 15:17-25; 16:1-2). The information gathered by the project manager was relayed to the Respondents’ marketing department of Respondent Lakewood Capital Group, LLC to print in the Marina Bay Property Report. (*Id.*).

This Report contained the pertinent dock specifications allowed by Duke Shoreline Management for each lot. The contents of this Report informed the sales employees and potential

buyers of exactly what type of dock could be constructed on a specific lot, and in turn, what the buyers would be getting for their purchase price. The Marina Bay Property Report provided no indication that the categorization of Lot 14 as a dockable lakefront property was subject to any change. (Plaintiff's Exhibit B1-2).

In fact, outside of extreme shoreline vegetation changes, it is rare for lakefront lots to change from a status of unlimited type dock construction to a limited dock construction designation. (Sullivan Dep. 16:13-25; 17:1-9).

Additionally, the Marina Bay Property Report set forth that there were "no established sizes or designs required for docks installed in Marina Bay according to Shoreline Management Guidelines"; with the only limitation being "the maximum allowed square footage is 1,000 square feet." (Plaintiff's Exhibit B1-2).

David Greene signed the Purchase and Sale Contract and the Marina Bay Property Report on August 27, 2016. David Greene passed away on May 19, 2018, leaving the Lot to his son Adam Greene via a Deed of Distribution recorded with Oconee County Register of Deeds in Deed Book 2492 at Page 69. (Deed of Distribution, EX D1-2).

Adam Greene applied for a dock permit with Duke Energy Lake Shoreline Management to have a full U-shaped dock installed on the inherited property. In response, Duke informed him that he could not install a dock on the Lot, as it would require crossing the neighbors' projected property line. Lot 14 was not designed in a manner to allow for a full u-shaped covered dock. The only dock permit available to Appellant was a swimming platform or an uncovered L-shaped dock in which Respondents negotiated with Duke Energy Lake Shoreline Management to obtain. (EX. E1-3).

A sketch of the L-shaped dock available to Appellant is attached to a letter received from Respondents (*Id.*). This would be the only type of dock available for Lot 14 in which construction would not encroach on either neighbor's property. A limitation on the type of dock for Lot 14 is contrary to the representations made by Respondents in the Marina Bay Property Report that the Appellant relied on at the time the Lot was purchased. The capacity for a lot to have a full-size covered dock constructed on the lakefront contributed tremendously to the value of the lot. Appellant paid a premium purchase price on par with the surrounding lots, all designed for full-dock installation; aerial photos provided in the appraisal submitted to the lower court evidenced this. (Appraisal EX. F.).

Additionally, the Marina Bay Property Report, the only document in the purchase and sale transaction to provide lot specifications regarding dock construction, provided no indication of any limitation on the type of dock that could be constructed on Lakefront Lot 14. (Plaintiff's Exhibit B1-2).

As a direct consequence of this negligent misrepresentation, Appellant contracted for and purchased Lot 14 at a substantially higher purchase price than the Lot's true worth, as the appraisal submitted to the lower court set forth the value of the surrounding properties designed for construction of a swim dock only at a price point of Seventy-Five Thousand and no/100th dollars (\$75,000.00). (Appraisal Ex. F.).

As a direct result of relying on Respondents' misrepresentation, Appellant suffered a loss of approximately One Hundred and Forty-Nine Thousand Nine Hundred Dollars of the value paid for the Lot.

ARGUMENT

Standard of Review

Summary judgment is appropriate “where plain, palpable and indisputable facts exist on which reasonable minds cannot differ.” *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 610, 230 S.E.2d 447, 448 (1976). *See also* Rule 56(c), SCRCPP. Summary judgment is not appropriate, however, where further inquiry into the facts of the case is desirable to clarify the application of the law. *Carolina All. for Fair Emp’t v. South Carolina Dep’t of Labor, Licensing & Regulation*, 337 S.C. 476, 484, 523 S.E.2d 795, 799 (Ct. App. 1999). “The general rule is that questions concerning reliance and its reasonableness are factual questions for the jury.” *Unlimited Services Inc., v. Macklen Enterprises, Inc.*, 303 S.C. 384, 387, 401 S.E.2d 153, 155 (1991). “Whether reliance is justified in a given situation requires an evaluation of the circumstances involved, including the positions and relations of the parties.” *Redwend Ltd. P’ship v. Edwards*, 354 S.C. 459, 474, 581 S.E.2d 496, 504 (Ct. App. 2003). In determining whether any triable issue of fact exists as will preclude summary judgment, the evidence and all inferences reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Strother v. Lexington County Recreation Comm’n*, 332 S.C. 54, 56, 504 S.E.2d 117, 121 (1998). If triable issues exist, those issues must go to the jury. *Rothrock v. Copeland*, 305 S.C. 402, 405, 409 S.E.2d 366, 367 (1991).

- I. The lower court erred in holding the purchase and sale contract contained a valid non-reliance clause, that, in addition to a merger clause, prevented the lower court from considering other documents to the transaction, resulting in a lack of evidence for the elements of representation and reliance and consequentially defeating Appellant’s action for Negligent Misrepresentation.**

The lower court found that a non-reliance clause in the Purchase and Sale contract signed

by Appellant negated any other representations made by Respondents regarding a lakefront Lot purchased by Appellant. South Carolina case law sets forth that “a general non-reliance clause, just as a merger clause, does not prevent one from proceeding on tort theories of negligent misrepresentation...” *Slack v. James*, 364 S.C. 609, 618, 614 S.E.2d 636, 641 (2005). As in *Slack*, in this instant case, Paragraph VII of the contract is predominately a merger clause which contains a general non-reliance clause in the last sentence:

VII. I AGREE TO PURCHASE THE ABOVE DESCRIBED PROPERTY ON THE TERMS AND CONDITIONS STATED, each purchaser acknowledges receipt of a copy of this agreement and understands this is a legal and binding contract and not right to rescission period exists. Purchaser and Seller agree that this agreement, including all referenced addenda, is the only agreement between them and that no representations, oral or written, have been made or relied on, which are not set out herein. (Plaintiff’s Exhibit A1).

At the hearing Respondents’ counsel referred to *Redwend Ltd. P’ship*, 354 S.C. at 474, 581 S.E.2d at 504 (Hearing Transcript P 26:13-25; 27:1-5) in support that the above-referenced sentence was a specific reliance clause and should act to defeat the negligent misrepresentation action as there could be no other representation, outside the purchase and sale contract. Appellant argues that having the words “relied on” does not make this a specific reliance clause per *Redwend* as this sentence is a part of a larger merger clause and, as such, is merely an extension of the merger clause and not a specific non-reliance clause. *Slack*, 364 S.C. 609, 617, S.E.2d 636, 640-41. Appellant contends an action for negligent misrepresentation is appropriate, as a contract-supporting document entitled Marina Bay Property Report, accompanied the Purchase and Sale contract and was signed by the Appellant on the same date, August 27, 2016. (Plaintiff’s Exhibit A1; Plaintiff’s Exhibit B2). This Report set forth representations regarding the type of dock that could be constructed on the lot purchased by Appellant and this representation proved to be false; and as a result, Appellant suffered pecuniary damages.

South Carolina case law recognizes an action for negligent misrepresentation "where the misrepresented fact(s) induced the plaintiff to enter a contract or business transaction." *Gilliland v. Elmwood Properties*, 301 S.C. 295, 301, 391 S.E.2d 577, 580 (1990). Where the damage alleged is pecuniary loss," the plaintiff must allege and prove the following essential elements to establish liability for negligent misrepresentation: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation." *AMA Mgmt. Corp. v. Strasburger*, 309 S.C. 213, 420 S.E.2d 868; (Ct. App. 1992) *West v. Gladney*, 341 S.C. 127, 133-34, 533 S.E.2d 334, 337 (Ct. App. 2000).

A. The lower court improperly ruled that the purchase and sale contract was all encompassing, and no outside material or representation was relied on in the sale.

The lower court's conclusion that the merger clause defeated Appellant's action for Negligent Misrepresentation is based upon a confusing discourse between Respondents' counsel and the lower court, in which Respondents' counsel stated that a valid non-reliance clause defeats a claim for negligent misrepresentation. (Trans P.24 ln. 1-7). In this case, the purchase and sale contract is a very short, one page form document with the number "14" being the only specific identifying description of the lot purchased, with absolutely no mention of the fact that the purchase is for a lakefront lot designed for construction of a full-sized dock. Additionally, the deed makes no reference of the dock in the legal description. The Marina Bay Property Report, (Plaintiff's Ex. B1-B2.) signed by Appellant, along with the purchase and sale contract, lays out

more specificities regarding the allowable dock construction for Lot 14. The Marina Bay Property Report represented that Lots 7-20 and 23-31 were developed to meet the application requirements by Duke's standards to apply for a dock permit; it goes on to provide limiting language that lot 7 may be limited in dock type due to being in a cove and that lot 20 may become limited in dock type in the future due to wetlands vegetation. (Plaintiff's Ex. B1-B2.) The types of docks can include a small L-shaped dock, a swimming platform or a full U-shaped dock where passengers can exit a boat on either side. Additionally, the Report sets forth that Duke's Shoreline Management does not have a specific style requirement; in other words, the community is not beholden to a specific motif, only that the docks be under 1,000 square feet. (*Id.*).

Appellant argued that, while there is no specific language in the Marina Bay Property Report stating that Lot 14 would be able to have a full U-shaped dock installed, there was a presumption that the lots devoid of limiting language were designed for any type, style, or size of dock (under 1,000 sq feet) that the property owner may wish to construct. The considerably higher price point for the lots reflected this as well. There was no indication that there would be any limitation on the type of dock permit provided by Duke Shoreline Management to Appellant. As previously described, when the heir to Appellant applied to Duke Shoreline Management for a dock construction permit, he was denied a permit for a full U-shaped dock, based on the fact that in order to construct a full U-shaped dock, he would need permission from his neighbors to cross their property line. This denial alludes to the fact that the lot itself was negligently designed, as there was no discussion of vegetation or shoreline issues that played an unpredictable factor in some of the lots. Appellant argued that the Marina Bay Property Report was signed at the closing and gave a false representation that Lot 14 was designed for any type of

dock. This is sufficient to fulfill the first requirement of an action for Negligent Representation, in that the representation in the Marina Bay Property Report was false, as it did not include any limiting language as to the design of lot 14 with regards to the type of dock that could be constructed. Accordingly, the lower court erred in granting summary judgment in favor of the Respondents.

II. The lower court erred in finding that Respondents did not owe a duty of care to Appellant or other lot purchasers.

Respondents argued that Appellant's Negligent Representation claim failed as they did not owe Appellant any duty from any representation made in the sale of the Lot. Appellant argued that South Carolina case law does imply a duty to exercise reasonable care in giving information when the defendant has pecuniary interest in the transaction. *Gilliland*, 301 S.C. at 301, 391 S.E.2d at 580. "Proof that the statement was made in the course of the Defendant's business... is sufficient to show he has a pecuniary interest in making it..." *AMA Mgmt. Corp.*, 309 S.C. at 223, 420 S.E.2d at 874. Respondents were in the business of selling lakefront lots, and they provided Appellant with the Marina Bay Property Report as a part of the purchase and sale transaction, as evidenced by Appellant's signature, dated the same day as the purchase and sale contract. As such, Respondents had a pecuniary interest in the representations made in the Marina Bay Property Report and a duty to exercise reasonable care in the accuracy of those representations.

A. The lower court erred in its interpretation of the duty argument where Appellant argued that the Respondents had a duty to accurately represent to the Appellant the type of dock that was available for construction on the Lot 14.

The lower court looked to the purchase and sale contract and found Respondents did not owe a duty to Appellant, as the purchase and sale contract contained a non-reliance clause, stating that no other representations outside the purchase and sale contract were relied on. The lower court

erred in failing to recognize this was a general non-reliance clause as it fell within a merger clause, and as such, the clause did not preclude additional documents and representations outside the purchase and sale agreement and did not preclude an action in tort. "A breach of a duty arising independently of any contract duties between the parties, however, may support a tort action." *Tommy I. Griffin Plumbing & Heating Co. v Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 55, 463 S.E.2d 85, 88 (1995) (citing *South Carolina State Port Auth. v. Booz-Allen & Hamilton*, 289 S.C. 373, 376-77, 346 S.E.2d 324, 326 (1986)). The lower court erred by not recognizing the Marina Bay Property Report as a substantial document to the purchase and sale transaction and by not allowing the Report to serve as evidence of Respondents false representations to Appellant. The Marina Bay Report was vital to the purchase and sale transaction for Lot 14 as it was the only document that provided any specification information that Lot 14 came with the capacity to construct a full-sized dock on the lakefront, a feature which added substantial value and justification for the price point paid for the Lot. As previously explained this Report set forth which lots had no limitations on the type of dock that could be constructed and which lots had limitations on the type of dock that could be constructed. Here, the Respondents owed a duty to Appellant to exercise care that a reasonable person would to accurately report factual data that would be relied upon by the Appellant in a transaction where a special trust exists. *South Carolina State Port Auth.*, 289 S.C. at 376-77, 346 at 324 326. Appellant had to rely on the Representations of the Respondents with regards to the Lot design and its' capacity for dock construction as this information was not easily accessible to the Appellant. Appellant argues a duty of care exists because of the pecuniary interest of the Respondents in the underling purchase and sale transaction, as such, the tort of Negligent Misrepresentation is appropriate here. "A duty to exercise reasonable care in giving information

exists when the defendant has a pecuniary interest in the transaction.” *Winburn v. Ins. Co. of North America*, 287 S.C. 435, 339 S.E.2d 142 (Ct. App. 1985) (citing Restatement (Second) of Torts § 552 (Am. Law Inst. 1977)).

III. The lower court erred in finding the Appellant provided no evidence or was unable to prove the element of “justifiable reliance on the representation” in its Negligent Misrepresentation claim.

The lower court found that there was no evidence from when Appellant purchased the Lot that he justifiably relied on Respondents’ representations that he would be able to construct a full-sized dock on the Lot. In an action for Negligent Misrepresentation, the plaintiff must have justifiably relied on the representation that was false. *AMA Mgmt. Corp.*, 309 S.C. at 222, 420 S.E.2d at 874. Here, Appellant argued that the Marina Bay Property Report, not the purchase and sale contract, provided the Respondents Representations regarding Lot 14 and as Appellant was required to sign this Report in conjunction with the purchase and sale contract, Appellant acknowledged the Representations and relied on them throughout the transaction.

A. The lower court improperly concluded that the language in the signed Marina Bay Property Report, did not provide the requisite representation and reliance evidence needed to find for the Appellant on its action for Negligent Misrepresentation.

Appellant argued that the Marina Bay Property Report was signed along with the purchase and sale contract for the Lot. In *Robertson v. First Union Nat’l Bank*, 350 S.C. 339, 348, 565 S.E.2d 309, 314 (Ct. App. 2002), the Court held that appellant’s negligent misrepresentation claim failed because they could not prove reliance on an appraisal, as it was undisputed that the parties agreed to a contract price without seeing an appraisal. In contrast, here, Appellant saw the Marina Bay Property Report as evidenced by his signature on the Report and he relied on the Report, as it was the only document with the purchase and sale contract describing the dock specifications of the lakefront Lot. Further, Appellant provided the lower

court with an appraisal setting forth the extreme price differential in a lot that was designed for a full-sized dock versus a lot with a limited dock capacity and that the similarly priced lots with full U-shaped docks had retained and increased in value over the years. (See appraisal). As a result, the lower court questioned Respondents regarding the extreme price point differential in the presented appraisal between a lot designed to allow for construction of a full-sized dock versus a lot designed for construction of a limited dock, with Respondents stating that they could not believe it was such a difference.

Additionally, “it is well established that ‘there can be no liability for casual statement . . . or matters which plaintiff could ascertain on his own in the exercise of due diligence.’” *Schnellmann v. Roettger*, 368 S.C. 17, 21, 627 S.E.2d 742, 745 (Ct. App. 2006) (quoting *Robertson v. First Union Nat’l Bank*, 350 S.C. at 348, 565 S.E.2d at 314)). In *Schnellman*, the Plaintiff brought a negligent misrepresentation claim against Defendant, the listing agent on the home Plaintiff ultimately purchased, due to misrepresentations regarding the square footage of the home. 368 S.C. at 20, 627 S.E.2d at 744. The Court ultimately held that the Plaintiffs could have easily discovered the mistaken representation of the exact footage of a home, as they had multiple avenues to confirm the square footage prior to the closing. *Id.* at 21, 627 S.E.2d at 744-45.

In contrast, here, the specifications set out in the Marina Bay Property report were not casual statements nor was the information easily accessible to Appellant. A representative from Respondents explained in his deposition the complexity of designing and platting a lakefront subdivision and all the engineering and inspections needed in conjunction with meetings that had to take place with Duke Shoreline Management to confirm the eligibility of docks with the various lots. (Plaintiff’s Ex. C). While the language of the Marina Bay Property Report may be

simple, the expertise, special knowledge, and time invested to make the representation of which lots could have docks, is not simple. Also, as Appellant was unable to even apply for a dock permit until he purchased the Lot, it would have been impossible for him to ascertain on his own, through due diligence, whether or not the Lot he was purchasing was capable of having a full U-shaped dock installed on it. It is more than reasonable that Appellant justifiably relied on the representation in the Marina Bay Report that the Lot being purchased did not contain any restrictions regarding the type of dock he could construct.

B. The lower court improperly required the language of supporting sale documents to state specifically that the lot could have a full U-shaped dock instead of looking to the limiting language used to describe the lots that could not have full U-shaped docks installed.

The lower court erred in insisting that in order for there to be a false representation, there needed to be specific language in the Marina Bay Property Report explicitly stating that Appellant would be able to construct a full U-shaped dock on Lot 14. (Trans p. 17, ln. 10-12.). Appellant argued Respondents only used limiting language in the Report when describing the specifications of the lots with regards to the type of dock construction that was available. The Respondents chose to characterize the lots in this fashion. The Report set forth that lots 7-20 and 23-31 were developed to meet the application requirements by Duke Shoreline Management for a dock permit. As dock 14 is included in this set and no limitations were mentioned, it was reasonable for Appellant to assume any type of dock could be constructed on Lot 14. Lots 7 and 20 were listed as having potential dock size limitations and lots 6, 21 and 22 were sold as lots not eligible for private docks. (Plaintiff's Ex. B.). Appellant argued that there was no language specifically stating that Lot 14 was eligible for full U-shaped dock construction, however there was no indication in the Marina Bay Property Report that Lot 14 would have any type of limitation on the type of the dock that could be installed. Additionally, Appellant argued that the

price point paid for the Lot was constructive evidence of representation and reliance as it was on par with the other lots that were listed with no dock type limitations.

CONCLUSION

The court erred in allowing a general reliance clause in the simple purchase and sale agreement to preclude the Marina Bay Property Report as evidence of Respondents false representations to Appellant. The court erred in not recognizing that the Appellant acknowledged and relied on the representation in the Marina Bay Property Report as evidenced by Appellant's signature on the Report, dated the same day as the purchase and sale contract. Lastly the lower court failed to find Appellant set forth all the elements of an action for Negligent Misrepresentation. That is, the Marina Bay Property Report contained a representation that required special knowledge by the Respondents, the factual representation with regards to dock type construction available for Lot 14 was false, the representation was made in the course of Respondents' business, therefore Respondents had a duty to communicate truthful information to the Appellant, the Appellant relied on the representation in a commercial transaction and as a result suffered a pecuniary loss of approximately One Hundred and Forty Nine Thousand Nine Hundred dollars (\$149,000) as a proximate result of reliance on the representation.

For these reasons, and as set forth more fully above, we respectfully request the lower court's grant of summary judgment be reversed.

October 27, 2022

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