

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
HONORABLE JOHN HENRY WALLER, JR., JUDGE
No. 80-CP-10-3048

RUTH T. and JOHN P. HAHN,

Plaintiffs - Respondents

versus

SMENE S. HITOPOULOS,

Defendant - Appellant

NOTICE OF APPEAL

SMENE S. HITOPOULOS appeals from the verdict and judgment rendered against her on November 19, 1981.

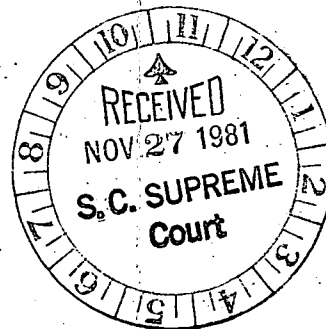
Respectfully,

Edmund H. Robinson

EDMUND H. ROBINSON
Attorney for Defendant-Appellant
P. O. Drawer D,
Charleston, S. C. 29402

Charleston, South Carolina

November 25, 1981.



OTHER COUNSEL OF RECORD ARE:

George E. Levya
P. O. Box 99
Charleston, S. C. 29402

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RUTH T. and JOHN P. HAHN,

Plaintiffs - Respondents

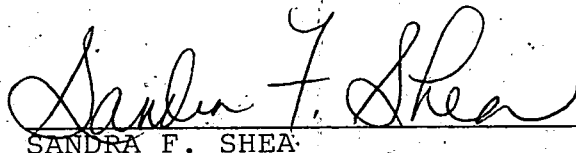
versus

SMENE S. HITOPOULOS,

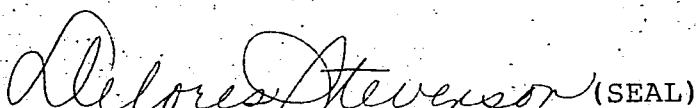
Defendant - Appellant

AFFIDAVIT OF SERVICE

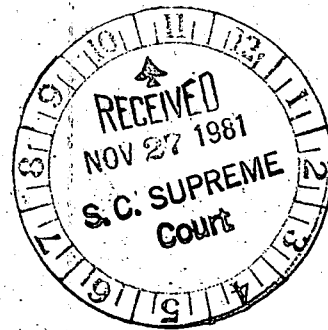
PERSONALLY appeared before me, SANDRA F. SHEA, who, having been duly sworn, deposes and says that she is employed with the firm of SHIMEL, ACKERMAN, THEOS & SPAR, and that she did serve a copy of the foregoing Notice of Appeal, by mail, postage prepaid, to George E. Levya, Esquire, at P. O. Box 99, Charleston, South Carolina 29402, on this the 25th day of November, 1981.


SANDRA F. SHEA

SWORN TO BEFORE ME this
25th day of November, 1981.


NOTARY PUBLIC FOR SOUTH CAROLINA

My commission expires: 10-13-91.



LAW OFFICES
SHIMEL, ACKERMAN, THEOS & SPAR
ONE HUNDRED TWENTY-TWO CHURCH STREET
P. O. DRAWER D

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ASSOCIATES
SUSAN KING DUNN
EDMUND HEYWARD ROBINSON
M. JERRY GARFINKLE

M. JERRY GARFINKLE

December 10, 1981

Mr. Bill Roberts
984 Nabors Drive
Charleston, S. C. 29412

Re: John P. and Ruth Hahn v. Smene Hitopoulos
80-CP-10-3048

Dear Bill:

The Defendant in the above case has appealed the verdict rendered against her in Charleston Common Pleas on November 19, 1981, after a jury trial which commenced November 18, 1981. Please prepare and furnish me with a complete transcript of the trial and all pretrial proceedings, except jury selection, which occurred on the record. I will not need opening statements of counsel, but will need the closing arguments.

Sincerely yours,

SHIMEL, ACKERMAN, THEOS & SPAR

Edmund H. Robinson

EHR:sfs

cc: George E. Levya, Esquire
Honorablc Frances H. Smith

RECEIVED

DEC 11 1981

S. C. COURTS

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RUTH T. HAHN and JOHN P. HAHN,)
)
 Plaintiffs-Respondents,)
)
 versus)
)
 SMENE S. HITOPOULOS,)
)
 Defendant-Appellant.)

AFFIDAVIT OF SERVICE

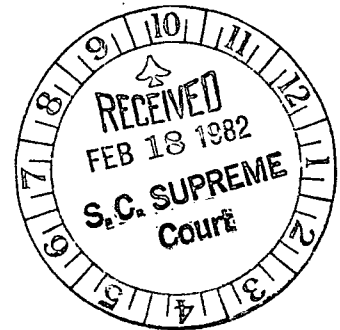
PERSONALLY appeared before me SANDRA F. SHEA, who, having been duly sworn, deposes and says that she is employed by the firm of SHIMEL, ACKERMAN, THEOS & SPAR; that on February 12, 1982, she served a copy of Proposed Case and Exceptions on George E. Levya, attorney for the Plaintiffs-Respondent, by delivering same to his office, 18 Broad Street, Charleston, South Carolina.

Sandra F. Shea
 SANDRA F. SHEA

SWORN TO BEFORE ME this
 16th day of February, 1982.

Edwin H. Robinson (SEAL)
 NOTARY PUBLIC FOR SOUTH CAROLINA

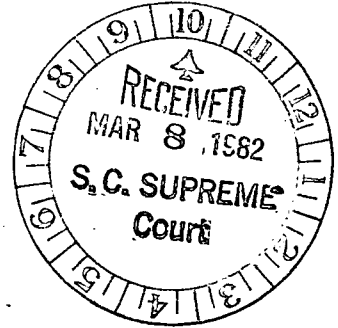
My commission expires: 3-9-88.



THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
HONORABLE JOHN H. WALLER, JR., JUDGE

RUTH T. HAHN and JOHN P. HAHN,)
)
Plaintiffs - Respondents,)
)
versus)
)
SMENE S. HITOPOULOS,)
)
Defendant - Appellant.)
)
_____)



PROPOSED CASE AND EXCEPTIONS

EDMUND H. ROBINSON
Shimel, Ackerman, Theos & Spar
P. O. Drawer D
Charleston, S. C. 29402

ATTORNEY FOR APPELLANT

GEORGE E. LEVYA
18 Broad Street
Charleston, S. C. 29401

ATTORNEY FOR RESPONDENTS

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S T A T E M E N T

1 This is an action for actual and punitive damages for
2 fraud, breach of contract, and breach of contract accompanied by a
3 fraudulent act brought by the purchasers of a residence against the
4 seller on account of termite damage. Suit was commenced on or about
5 September 4, 1980. An Answer was filed which constituted a general
6 denial as to all three causes of action, an affirmative defense to
7 the fraud action that Plaintiffs were legally obligated to buy the
8 house from Defendant, and an affirmative defense as to the second
9 and third causes of action that the contract had merged in the deed.

10 Originally, two suits were filed, one for each Plaintiff;
11 these were consolidated before trial, and the case came on for a
12 jury trial before the Honorable John H. Waller, Jr., in the Court of
13 Common Pleas for Charleston County on November 18, 1981. Motions for
14 nonsuit and directed verdict were made by Defendant at appropriate
15 points. A general verdict form was submitted to the jury, and the
16 jury found for Plaintiffs in the amount of TWELVE THOUSAND AND NO/100
17 (\$12,000.00) DOLLARS actual damages. Defendant made post trial
18 motions for judgment non obstante veredicto, for a new trial, and
19 for a new trial nisi, which were denied. Notice of intent to appeal
20 was served November 25, 1981, and this appeal followed.

AMENDED COMPLAINT (Retyped)

1 The Plaintiffs complaining of the Defendant herein, would
2 respectfully show:

3 FOR A FIRST CAUSE OF ACTION

4 FIRST: Omitted.

5 SECOND: That prior to March 9, 1979, the Defendant owned a house
6 and a lot at 1556 Inland Avenue, and attempted to sell said property
7 by listing the property with a local real estate agent for approxi-
8 mately two (2) years prior to said date.

9 THIRD: That the Plaintiffs, entered into a contract for sale with
10 the Defendant for property located at 1556 Inland Avenue, James Is-
11 land, Charleston, South Carolina, dated the 9th day of March, 1979,
12 and that on or about the 13th day of May, 1979, the Defendant, by
13 deed, transferred all of her interest in said property to the Plain-
14 tiffs.

15 FOURTH: That the Defendant represented to the Plaintiffs that the
16 property at 1556 Inland Avenue was in good condition and free of ter-
17 mite damage, and in the contract of sale, which is marked Exhibit "A"
18 and incorporated by reference herein, promised to furnish the Plain-
19 tiffs with a certification from a bonded exterminator that the pro-
20 perty was free from termite or other wood destroying insect infesta-
21 tion, and that if any infestation was found it had been corrected and
22 any damage repaired.

23 FIFTH: That a bonded exterminator, selected by the Defendant and/or
24 her agent, inspected the house and found that the house was free of

1 active termite infestation, but did not indicated (sic) whether or
2 not there was hidden infestation or damages; that the exterminator
3 personally delivered a letter to that effect to the Defendant's real
4 estate agent on April 18, 1979.

5 SIXTH: That the representations were made by the Defendant with
6 the intention of their being relied upon by the Plaintiffs and for the
7 purpose of inducing the Plaintiffs to enter into the contract for sale
8 of the property.

9 SEVENTH: That said representations were relied on by the Plaintiffs,
10 when the Plaintiffs entered into a contract with the Defendant, paying
11 about Sixty-One Thousand (\$61,000.00) Dollars for said property, about
12 Forty Thousand (\$40,000.00) Dollars of which was in cash, and for
13 which the Plaintiffs received title from Defendant for said property.

14 EIGHTH: That each and all of the representations alleged in
15 Paragraph Fourth were false and known to be false by the Defendant;
16 that the house proved to be badly damaged by termite or wood destroy-
17 ing insect infestation.

18 NINTH: That the Defendant had knowledge as to the characteris-
19 tics of the house and knowledge of the defects in the house, in that
20 certain parts of the flooring and sub flooring had been repaired, al-
21 though not repaired in a manner which would put the house in its
22 original condition, but only repaired to the extent of keeping the
23 damage from being noticeable.

24 TENTH: That the Plaintiffs were ignorant of the falsety of the
25 representations and relied on the truth of the representations in
26 contracting to purchase the property and subsequently purchasing
27 the property.

1 ELEVENTH: That the Plaintiffs had a right to rely on the repre-
2 sentations due to the assurance given to them and the fact that their
3 ability to personally inspect and recognize termite damage is quite
4 limited.

5 TWELFTH: The aforesaid acts of the Defendant constitutes
6 fraud.

7 THIRTEENTH: That the Plaintiffs have been damaged as a direct
8 and proximate result of said misrepresentations by the Defendant in
9 that they will be forced to spend great sums of money to repair th (sic)
10 house, will lose the use of much of the house while it is being re-
11 paired, will be left with a house that is greatly depreciated in value,
12 and will otherwise be greatly inconvenienced.

13 FOURTEENTH: That, by reason of the fraudulent acts on the part
14 of the Defendant, Plaintiffs are entitled to recover punitive damages
15 from the Defendant, as well as actual damages hereinabove alleged.

16 FOR A SECOND CAUSE OF ACTION

17 FIFTEENTH: That the Plaintiffs reiterate all of the allegations
18 contained in the First Cause of Action as if fully repeated herein.

19 SIXTEENTH: That the Plaintiffs and the Defendant entered into
20 an agreement to buy and sell property at 1556 Inland Avenue, James
21 Island, Charleston, South Carolina, on or about March 9, 1979, said
22 agreement being marked Exhibit "A" and incorporated by reference
23 herein.

24 SEVENTEENTH: Under Paragraph Ten, sub-section B, of said agree-
25 ment, the Defendant covenanted and agreed to furnish the Plaintiff
26 with certification that the property herein was free of infestation
27 or termintes (sic) or other wood destroying insects and/or that if

1 such infestation was present, it had been corrected and damage re-
2 paired, but that Defendant failed to supply said certificate at that
3 time, at the time of closing, or at any time hence, and that damage
4 was present in the house.

5 EIGHTEENTH: That, accompanying the breach of contract of the
6 aforementioned contract between the Plaintiffs and Defendant, the
7 Defendant committed fraudulent acts by attempting to deceive the
8 Plaintiffs, in that the Defendant concealed and covered up the ter-
9 mite damage which was present in the house.

10 NINETEENTH: That the existence of termites or wood destroying
11 infesting insect damage was in direct contravention of the agreement
12 to buy and sell, and that as a result of said damages the Plaintiffs
13 will be forced to expend great sums of money in repairing said da-
14 mage, will lose the use of much of the house while it is being re-
15 paired and will otherwise be greatly inconvenienced.

16 TWENTIETH: That the acts committed by the Defendant as herein-
17 above renumerated were done in violation of the Plaintiffs' interests
18 in the property, and were done fraudulently, intentionally and will-
19 fully for the purpose of damaging the Plaintiffs and of making it
20 impossible for the Plaintiffs to secure their rights under the afore-
21 said contract.

22 TWENTY-FIRST: That, by reason of the fraudulent acts accompanying
23 the breach of contract on the part of the Defendant, Plaintiffs are
24 entitled to recover punitive damages from the Defendant, as well as
25 actual damages hereinabove alleged.

1 FOR A THIRD CAUSE OF ACTION

2 TWENTY-SECOND: That the Plaintiffs reiterates all of the allega-
3 tions contained in the First and Second Causes of Action as if fully
4 repeated herein.

5 TWENTY-THIRD: That the Defendant, by failing to perform accord-
6 ing to the agreement as hereinbefore alleged, has breached said
7 agreement, and that as a result of said breach, the Plaintiffs were
8 forced to spend great sums of money in repairing said damage, will
9 lose much of the use of the house while it is being repaired and
10 will otherwise be greatly inconvenienced.

11 TWENTY-FOURTH: That as a result of the foregoing breach of con-
12 tract, Plaintiffs are informed and believe that they are entitled
13 to actual damages against the Defendant.

14 WHEREFORE, Plaintiffs prays (sic) for judgment
15 against the Defendant in the sum of Forty Thousand (\$40,000.00)
16 Dollars, actual and punitive damages, for the costs of this action,
17 and for such other and further relief as this Court may deem just
18 and proper.

GEORGE E. LEVYA
Attorney for Plaintiffs

Charleston, South Carolina

Dated: October 2, 1981

ANSWER TO AMENDED COMPLAINT (Retyped)

1 Defendant, answering the Amended Complaint of the Plain-
2 tiffs, would show to this Court as follows:

3 ONE: Each and every allegation of the Amended Complaint not
4 specifically admitted herein is denied.

5 FOR A FIRST DEFENSE TO THE FIRST
6 CAUSE OF ACTION

7 TWO: Defendant admits the allegations of Paragraph One of
8 the Amended Complaint.

9 THREE: Answering Paragraph Two of the Amended Complaint, Defen-
10 dant admits that she owned the said house and listed it with a real
11 estate agent.

12 FOUR: Defendant admits the allegations of Paragraph Three of
13 the Amended Complaint.

14 FIVE: Answering Paragraph Four of the Amended Complaint, Defen-
15 dant admits that the contract for sale of the house required Defen-
16 dant to:

17 "furnish the Buyer with a current certifi-
18 cation from a bonded exterminator that the
19 herein described property is free and clear
20 of all infestation by termites, or other
21 wood destroying insects and/or if any such
22 infestation was found it has been corrected,
23 and any damage has been repaired,"

24 but denies the remaining allegations of the Paragraph.

25 SIX: Defendant admits the allegations of Paragraph Five of
26 the Amended Complaint.

1 SEVEN: Defendant denies the allegations of Paragraphs Six,
2 Seven and Eight of the Amended Complaint.

3 EIGHT: Answering Paragraph Nine of the Amended Complaint, Defen-
4 dant admits that certain parts of the flooring in the house were re-
5 paired, and would show that said repairs were made years before the
6 house was offered for sale, had nothing to do with the sale or with
7 any termite damage.

8 NINE: Defendant denies the allegations of Paragraphs Ten,
9 Eleven, Twelve, Thirteen and Fourteen of the Amended Complaint.

10 FOR A FIRST DEFENSE TO THE SECOND
11 CAUSE OF ACTION

12 TEN: Answering Paragraph Fifteen of the Amended Complaint,
13 Defendant reiterates and re-alleges her answers to Paragraphs One
14 through Fourteen thereof.

15 ELEVEN: Defendant admits the allegations of Paragraph Sixteen
16 of the Amended Complaint.

17 TWELVE: Answering Paragraph Seventeen of the Amended Complaint,
18 Defendant admits a term of the contract as set forth in Paragraph
19 Five of the instant Answer, and denies the remaining allegations
20 of Paragraph Seventeen.

21 THIRTEEN: Defendant denies the allegations of Paragraphs Eighteen,
22 Nineteen, Twenty and Twenty-One of the Amended Complaint.

23 FOR A FIRST DEFENSE TO THE THIRD
24 CAUSE OF ACTION

25 FOURTEEN: Answering Paragraph Twenty-Two of the Amended Complaint,
26 Defendant reiterates and re-alleges her answers to Paragraphs One
27 through Twenty-One thereof.

1 FIFTEEN: Defendant denies the allegations of Paragraphs Twenty-
2 Three and Twenty-Four of the Amended Complaint.

3 FOR A SECOND DEFENSE TO THE FIRST
4 CAUSE OF ACTION

5 SIXTEEN: If Defendant made any material representations to
6 Plaintiffs regarding termites in the house, which is however specifi-
7 cally denied, such representations were made subsequent to the forma-
8 tion of the contract as alleged in the First Cause of Action of the
9 Amended Complaint.

10 SEVENTEEN: By the terms of such contract, Plaintiffs were legally
11 obligated to buy the house from Defendant.

12 FOR A SECOND DEFENSE TO THE SECOND
13 AND THIRD CAUSES OF ACTION

14 EIGHTEEN: The terms of any contract signed by Defendant was
15 merged in the subsequent fee simple deed and cannot form the basis
16 of an action in contract.

17 WHEREFORE, having fully answered the Amended Complaint,
18 Defendant does pray that same be dismissed with costs to Defendant
19 as permitted by law.

Respectfully submitted,

EDMUND H. ROBINSON
Attorney for Defendant

Charleston, South Carolina

Dated: Oct. 9, 1981.

SUMMARY OF TESTIMONY

PLAINTIFFS' WITNESSES:

1 Wayne John Hahn. Mr. Hahn, the adult son of the Plaintiffs,
2 authenticated certain photographs that he had taken of the condition
3 of the livingroom and front hall floor of the house at 1556 Inland
4 Drive, James Island, which was occupied by his parents. The pictures
5 were taken shortly after the carpet was removed by his parents. The
6 photographs were admitted into evidence without objection as Plain-
7 tiffs' exhibits One through Five.

8 John P. Hahn. Mr. Hahn, the Plaintiff, is a fifty-two (52)
9 year old machinist at the Charleston Naval Shipyard. He said he and
10 wife began looking for a house around April of 1979 and located Ms.
11 Hitopoulos's house through a real estate agent. Prior to entering
12 the sale contract, the witness visited the house one or two times
13 and his wife, a couple of times. On one of those occasions, he
14 went without the real estate agent accompanying him. These visits
15 lasted approximately one half hour each time. The house suited the
16 Hahns' requirements, and they signed a sale contract which was in-
17 troduced into evidence as Plaintiffs' exhibit number seven. The
18 asking price for the house had been Sixty Five Thousand (\$65,000.00)
19 Dollars, but the Defendant finally agreed on a figure of Sixty One
20 Thousand (\$61,000.00) Dollars, of which Forty Thousand Six Hundred
21 (\$40,600.00) Dollars would be cash.

22 After signing the contract, Plaintiff visited the house two
23 times, and then "did a bunch of work". He obtained the keys from

1 Defendant and spent a week inside of the house, painting the entire
2 inside, consisting of all the walls in all the rooms and revarnish-
3 ing the den and the den floor. He did not visit the outside of the
4 premises during this time.

(Here print Transcript pages 23 through 30)

1 At the closing on the house, the agent representing the Plain-
2 tiffs asked for the termite letter, and the agent representing Ms.
3 Hitopoulos said that she had forgotten the thing and she would drop
4 it off. Plaintiffs never received the letter until after the suit
5 was filed. Plaintiffs were represented by counsel at the closing
6 and counsel asked Defendant's agent where the letter was and Defen-
7 dant's agent said she had it at the office. Based on this representa-
8 tion, and the advice of counsel, Plaintiffs went ahead and closed.^o
9 Plaintiff testified that Defendant did not make any representations
10 personally at the closing.

11 The Thanksgiving after the closing, Mrs. Hahn decided to re-
12 place the worn carpet in the livingroom. When the carpetman pulled
13 out the old carpet, he would not put down a new one because of da-
14 mage to the flooring. When Plaintiff returned home and saw the
15 flooring where the carpet had been removed, he saw holes and saw
16 that, in the foyer, several boards had been replaced. After the
17 holidays, Plaintiffs had a man come in and put down some boards to
18 "semi-repair" the area there, spending around Two Hundred (\$200.00)
19 Dollars to replace it. The replacement material was pressboard in-
20 stead of hardwood, because hardwood would have cost Seven Hundred
21 (\$700.00) Dollars and Plaintiff could not afford that at the time.

22 After finding the damaged flooring, Plaintiff began checking
23 other parts of the house and found that the front door frame was
24 eaten up and that one of the main beams of support under the house
25 was in very bad shape. Three boards, identified by Plaintiff as
26 coming respectively from the front door sill, the front door frame,
27 and the livingroom floor were introduced into evidence as Plaintiffs'

1 eight, nine and ten without objection. Another damaged area was the
2 siding on the front of the house, which "looked like someone had
3 taken wood putty and filled a bunch of holes in." Plaintiff also
4 identified putty in a hole in the Exhibit number Eight, the door
5 sill.

6 Plaintiff testified that he had replaced the door sill him-
7 self. Testifying from worksheets he prepared, he gave the following
8 evidence.

(Here Print Pages 49 and 50 of Trial Transcript)

1 On cross-examination, Plaintiff, John P. Hahn, testified that
2 the contract was signed on the 9th day of March. He identified the
3 closing statement and, his recollection refreshed, testified that
4 May 14th was the date of closing. He reiterated that he had been in
5 the house for one week prior to closing, denied that it could have
6 been as long as three weeks, and denied that he was living in the
7 house for a week before the closing. He admitted that Ms. Hitopoulos
8 had not been there the whole time he had been painting and there was
9 nothing to prevent him from looking around the house or from going
10 under the house at that point. He testified that he did not notice
11 any structural infirmities in the floor other than creaking in the
12 period while he was painting. He testified that the carpets were re-
13 moved and the damage first discovered approximately eight months after
14 the closing.

(Here Print Transcript pages 59 through 62)

1 Plaintiff Hahn, on cross-examination was then shown the copy
2 of the real estate contract which had previously been introduced in-
3 to evidence. In discussing paragraph ten, he admitted that, while
4 part A expressed a definite time for performance, part B requiring
5 the certification from a bonded exterminator did not express a defi-
6 nite time for performance. Plaintiff then identified Defendant's
7 Exhibit B, the pest control letter, dated April 18, 1979. He admit-
8 ted that the letter had been eventually furnished to his lawyer long
9 after the closing. He admitted that he had no evidence that the let-
10 ter was not prepared before closing, but he had no evidence that it
11 was so prepared either. He reiterated that he had closed based on
12 his lawyer's advice.

(Here print Transcript pages 83 through 85)

1 On redirect examination, Plaintiff did not recall what repre-
2 sentations the real estate agent for Defendant may have made about the
3 termite letter. On re-cross examination, Plaintiff denied that there
4 was any phone calls from the closing by his lawyer or either of the
5 agents to Jim Hayes of Hayes Exterminating Company.

6 Carl Henry Simmons. Mr. Simmons was a director of building
7 inspection services for the County of Charleston and had previously
8 worked for about four years as vice president and general manager of
9 Southern Pest Control Company of South Carolina, Inc. Defendant chal-
10 lenged the witness' qualifications as an expert in the field of pest
11 control, but after a voir dire examination, the Court allowed him to
12 testify as an expert. Mr. Simmons then testified that he made an
13 inspection of 1556 Inland Drive, at the request of the Plaintiffs'
14 counsel. He testified that his normal method of inspection was to
15 go under the house and probe various wooden members with a pick and
16 look for tunnels. He testified that in viewing the Plaintiffs' house,
17 he found damage in the front part of the building adjacent to where
18 the foyer was at the front door and a number of tubes, some of which
19 had been knocked down. These tubes led to the structural areas of
20 the house and also into the floor area. On the other side of the
21 building, he also found some evidence of damage. Going outside the
22 building, he noticed signs of tunnels that had been on the siding in
23 the front portion of the building.

24 The witness then discussed the various boards that had been
25 introduced into evidence and said that the damage found therein was
26 definitely termite damage. On one member he said that there was two
27 types of damage, termite damage and a grain separation. On one

1 exhibit, he said it looked like someone had stuffed caulking in the
2 crack where the termite damage had been. He said that there was no
3 way to define how extensive the damage was to the house.

4 The witness testified that in his opinion the damage that he
5 found could not have been done in a seven month period of time, but
6 would have taken at least two or three years. He said that a pur-
7 chaser would not have been able to find this damage unless he was
8 familiar with the characteristics of termite colony life. He said
9 that the damage would be evident to anyone who had experience with
10 termites.

11 On cross-examination, the witness admitted that a homeowner
12 could live with a condition such as this for many years without know-
13 ing about the damage. He further said that when he made his inspec-
14 tion in the winter of 1979, there was no active infestation by ter-
15 mites. He further said that he would not have signed a letter certi-
16 fying that the house was free from visible active infestation of
17 termites because the State law requires that the inspector "add on
18 to your statement the condition of the building when you inspect it"
19 as well as a notation of any damage that exists.

20 On redirect examination, the witness was asked to read Defen-
21 dant's Exhibit B, the letter furnished by the termite inspector in
22 this case. He testified that he would not consider that to be an
23 adequate termite letter. Counsel then showed him another form which
24 he identified as the format that is recommended by the South Carolina
25 Pest Control Association as proper reporting of the findings of an
26 inspection for termite damage. He testified that the second form
27 would have met the standards for FHA and VA and if properly filled

1 out would have set forth the damage. He further testified that the
2 letter from Hayes, Defendant's Exhibit B would not have met FHA or
3 VA standards. On recross-examination the witness testified that he
4 had no opinion about whether the letter from Hayes fulfill the require-
5 ments of the contract, only that it did not fulfill the requirements
6 of State law.

7 Charles Clayton Lybrand. Mr. Lybrand is a general contractor
8 who owned Precision Builders, Inc. At the request of Plaintiffs' coun-
9 sel, he viewed the premises at 1556 Inland Drive, to estimate the cost
10 to repair. Counsel tendered a letter to the witness and he identified
11 it as his own. Defense counsel and the Court then had a colloquy about
12 the witness staying within his field of expertise. Following which,
13 Plaintiffs' counsel offered the letter as Plaintiffs' Exhibit number
14 Eleven. Defense counsel objected to its admission as follows: "Your
15 Honor, he's going to testify on this. I object on the basis it would
16 be duplicative of his testimony. The witness is on the stand. He can
17 use that to refresh his recollection, but I would object to it going
18 into evidence." The Court then admitted the letter as Plaintiffs'
19 Exhibit number Eleven, over objection.

20 The witness then testified that he had observed damage to the
21 "shoe", the part of the house that sits on the foundation and had
22 seen tunnels. He further testified that his estimate of the cost to
23 repair would be Seven Thousand Five Hundred (\$7,500.00) Dollars, but
24 that he would rather repair the damage on a cost plus basis because
25 of the unknown factors involved.

26 On cross-examination, defense counsel first reserved his ob-
27 jection to the admission of the letter. The witness admitted that
28 much of the damage to the exterior siding could be due to rot rather

1 than termites. He further testified that the damage that he had found
2 would have been obvious to the average homeowner. He said that if he
3 were buying a house, he would have noticed right away the borings at
4 the baseboards. He testified that the cost to replace a door frame
5 would be in the range of "couple of hundred dollars". On redirect,
6 the witness testified that it was possible to differentiate between
7 damage from termites and damage from rot. He then examined Plaintiffs'
8 Exhibits numbers Eight and Nine and testified that the damage thereon
9 was due to termites, not rot. He also testified that on Plaintiffs'
10 Exhibit number Eight, someone had painted it and used a painter's
11 calking. The area in which the calking was inserted was identified
12 as having been caused by termite damage. The calking material was
13 not a latex but an expensive calking. He said that if this were the
14 only area and the rest of boards were in good shape, he might have
15 used such calking to fill it in. On recross-examination, the witness
16 was asked to estimate the age of the calking, but could only say "it's
17 not new." He also verified that acid substances on certain types of
18 hardwood floor finish could cause the floor to discolor.

19 Floyd Edward Becker. Mr. Becker is a neighbor of the Plaintiffs
20 who has lived at 1553 Inland Drive for over fifteen years and was
21 acquainted with both Plaintiffs and the Defendant. He had had occa-
22 sion to do some electrical work for the Defendant, namely changing
23 an element in the hot water heater under the house. In the course
24 of this work, he noticed damage and called Mr. Hitopoulos' attention
25 to "what I called termites, and there was a pile of residue that re-
26 sembled sawdust." This occasion was "at least twelve years ago."
27 The witness did not know whether any repairs had been done since that
28 occasion, although he had seen various trucks arriving at the house.

1 On cross-examination, the witness said that he had told Mrs.
2 Hitopoulos as well as Mr. Hitopoulos about the damage. Only Mr.
3 Hitopoulos was down in the basement with the witness, and the witness
4 pointed to him the "trails and also the little white termites," which
5 were in the vicinity of the hot water heater. He further said that
6 after the Plaintiffs had purchased the property, he had gone back
7 under the house again with Mr. Hahn about two months before the trial
8 and did not see any live insects at that time. On redirect, the wit-
9 ness stated that there was no doubt whatsoever in his mind that Ms.
10 Hitopoulos personally knew of the termite problem.

11 On recross-examination, the witness explained that after he
12 told Mr. Hitopoulos about the damage, they were all three sitting up
13 in the kitchen and he told her about the damage. He admitted having
14 one or more cans of beer on that occasion with Ms. Hitopoulos and that
15 it was a habit of his to come over and visit with the Hitopoulos' and
16 have several cans of beer. He could not remember what the time of
17 day was or any of the details of the conversation. He testified to a
18 recent conversation he had had with the Defendant which had sharpened
19 his memory of what year the incident had occurred.

20 Ruth Hahn. Mrs. Hahn, the wife of John P. Hahn, and a Plaintiff
21 in the case, testified that she had been through the house at 1556
22 Inland Drive, three times before they signed the contract. She did
23 not recall going back to the house after signing the contract except
24 while her husband was painting she did go on several occasions to take
25 him something to eat or drink. On those occasions, she did not walk
26 around the outside of the house.

27 At the closing, both agents and all the documents were pre-
28 sent, but "we wasn't represented with a termite letter at this time,

1 but we were supposed to have got one the next week, but we did not
2 ever receive one." She further believed that "it was mentioned that
3 we wouldn't have anything to worry about, that it was a good termite
4 letter. I think that was mentioned there at that one." Plaintiff
5 testified that she did not talk to Ms. Hitopoulos at the closing about
6 the house or "anything like that." She had moved some of their tools
7 and possibly furniture into the house before the closing. She decided
8 to remove the carpet after they had gotten settled and called Mr. Car-
9 pet to come do the job. After the carpet was removed she found damage
10 to the floor and baseboard. On cross-examination, Plaintiff said that
11 they had been in the house for six or seven months before pulling up
12 the carpet. She had noticed squeaking and shaking of the floor before
13 this but didn't think anything about it. The witness was asked if she
14 could point to "anything which would have put a reasonable homeowner on
15 notice that there was damage, an average homeowner without expertise in
16 the field of termite damage, before this house was sold." The witness
17 replied "I can't answer that." The witness was asked whether she
18 could "point to any specific lie that Ms. Hitopoulos told you about
19 the condition of the house," to which the witness replied "I don't
20 recall."

AT THIS POINT THE PLAINTIFF RESTED. WHEREUPON THE FOLLOWING
COLLOQUY TOOK PLACE:

(Here print Transcript page 167)

DEFENDANT'S WITNESSES:

1 James P. Hayes. Mr. Hayes is an exterminator who in the Spring
2 of 1979 was operating under the name of Hayes Exterminating. He was
3 subpoenaed by both sides in the instant action to be a witness. He
4 identified defense Exhibit B as a termite report which he prepared
5 for the real estate closing at 1556 Inland Drive. At the time that
6 the termite inspection was prepared, there were three different types
7 of inspections that the witness would normally do: FHA, VA and general.
8 The witness did not recall the exact requirements of an FHA inspection,
9 but "there was a form at that time. Since, they've all come together
10 on one form, put out by Clemson, which is State law." FHA and VA re-
11 quired separate forms pursuant to Federal law, but a general inspection
12 was governed by the terms of the real estate contract. The inspection
13 carried out for the house at 1556 Inland Drive was a general inspection.

14 Although the witness performed six hundred to a thousand in-
15 spections per year, he had independent recollection of a few specific
16 details of this particular inspection. He said that he got a call on
17 the morning of the 18th that this was a rush job for O'Shaughnessy
18 Realty in cooperation with Two Rivers Realty. He performed the in-
19 spection and, feeling pressed for time, gave the word to his wife who
20 served also as his secretary to pass on to the realtors or the closing
21 attorney that the house was ok and the letter would be forthcoming.
22 In the course of the inspection, he went under the house and used a
23 screw driver to probe the wood. He did not notice any substantial
24 decree of termite damage at that time or active infestation. He could
25 not remember whether he noticed any kind of traces of termites in the

1 premises. He said if there was superficial damage, he wouldn't worry
2 about it because "a place twenty something years old can have minor
3 things." He would not disclose such damage in a report.

4 The witness was then asked whether he had any direct contact
5 with Ms. Hitopoulos during the course of the inspection to which he
6 answered "I'm not sure. I talked to either Mr. or Mrs. Hitopoulos
7 during that inspection. Now which one it was, I don't recall. But
8 one of the members of the family seeing the house was there."

9 The witness said that he had no hesitation about issuing the
10 kind of letter that he did and would still stand by the letter to-
11 day. He acknowledged that the letter that he issued would not have
12 been appropriate if the house had been financed by FHA; testified
13 that the letter was accepted in the legal profession and that it had
14 been introduced to the area by Terminix about a year before that and
15 was in use by at least fifteen companies in the area.

16 The witness testified that he had been called back to the house
17 some months after the first inspection by Mr. or Mrs. Hahn but spoke
18 to one of their parents. He discussed giving a termite bond on the
19 house and discussed what exclusions would exist in the repair guarantee
20 of such a bond. The person that he talked to was not interested in
21 entering into such a bond.

22 On cross-examination the following occurred:

(Here print Transcript Pages 176 through 179)

1 Kitty Latorre. Mrs. Latorre is a licensed real estate broker,
2 having been such for seven years and having served as a real estate
3 agent for seven years before that. She was employed as the listing
4 agent for the Defendant several months before the Hahns expressed an
5 interest in the house. Defendant's house was a large one for the
6 neighborhood and the witness told Defendant that it would not be a
7 quick sale because they had "overbuilt".

8 The witness could not remember the details of how many offers
9 and counteroffers had been made, but was clear that the contract would
10 have been drawn up by Twin Rivers Realty, the selling agent. By the
11 terms of the contract it would have been an equity sale and she ex-
12 plained that term. An equity sale is different from an FHA or VA sale,
13 both of which latter sales would involve an inspection from a govern-
14 ment agency. Since it was an equity sale, the contract was very im-
15 portant "because on an equity sale, you go by what's on the contract."
16 In regard to the contract provision on condition of the house and
17 those calling for the termite letter, the witness testified the langu-
18 age used was normal for a real estate contract in 1979.

19 With regard to the closing, the witness testified that the
20 date of the closing on Defendant's house was dependent on the Plain-
21 tiffs' closing on one or two other properties that they were selling,
22 the proceeds of which would make up the purchase price for the Defen-
23 dant's house. The closing on the Defendant's house had initially been
24 set for the first or second of May but the Hahns' other house wasn't
25 going to take place so the closing on Defendant's house had to be
26 postponed. Normally the witness used Hayes Exterminating and nor-
27 mally would call for a termite inspection, give the address and the

1 vicinity and then Hayes would drop the letter off at the witness'
2 office, the witness would pick it up and take it to the closing. At
3 the time that she called Hayes on this closing, she thought that the
4 closing was going to be the first of May so she told him to make sure
5 he could do it right away.

6 The transaction did not close and shortly thereafter the wit-
7 ness went to the property and a man answered the door, but she did
8 not recall whether it was Plaintiff Hahn or his father. The witness
9 identified herself and said that she was not aware that anyone was
10 living there and the man said yes we have moved into the home. The
11 witness then left and called the Defendant, being very upset because
12 the purchasers were living in the house before the closing. Prior to
13 this, the witness had agreed with the selling agent to allow the Plain-
14 tiffs into the house to do some painting but had not been aware that
15 they were going to be living in the house. One of the reasons the
16 witness was so concerned was that if the purchasers were going to be
17 living in the house before closing, a rental agreement should be drawn
18 up. She informed the Defendant that it was very dangerous to have
19 people living in the house before closing, but the Defendant said,
20 "it's alright." At that point, the witness got married and left town
21 for a honeymoon in Hawaii. The closing was rescheduled to the day
22 when she would return to Charleston. She arrived in town the morning
23 of the closing and went to her real estate office in the North area,
24 where she picked up the closing package. The closing was at the
25 office of Mike Burkett, the Plaintiffs' attorney. Present at the
26 closing was Burkett, the two Plaintiffs, the Defendant and her now
27 deceased husband, the witness and the listing agent, Fran Wells from
28 Two Rivers Realty. The witness has had experience with Burkett be-
29 fore and has the opinion that he is a very good attorney.

1 Of the details of the closing, the witness remembered a com-
2 plaint from the Plaintiffs about a leak under the sink and the Defen-
3 dants agreed to settle with them a sum for the leaks. She felt that
4 the Defendants were not required to do this under the contract, but
5 they did pay the Plaintiffs for repairs that the Plaintiffs had made
6 to the sink. She also remembers there being a dicussion about a
7 rental and the Hitopoulos' did not press for payment of rental for the
8 occupancy before closing.

9 As to the termite letter, the witness testified that it had been
10 delivered by Hayes to her company's office on James Island. She had
11 not had an opportunity to go by that office prior to the closing and
12 therefore did not bring it to closing. It had not been in the closing
13 envelope which she had picked up from her Otranto office in the North
14 area.

15 The witness said that Burkett told her that they had to have
16 the termite letter. She told him that it was over on James Island and
17 offered to call Mrs. Hayes to verify the date the termite inspection
18 was made. The closing attorney agreed and the witness called and got
19 Mrs. Hayes on the telephone. Burkett got on the phone and Mrs. Hayes
20 told him that the termite letter had been made. Burkett asked her
21 what date and she told him. After the call, Burkett told the Plain-
22 tiffs he knew there was a good clear termite letter. The witness
23 further stated at closing that there was nothing wrong with the ter-
24 mite letter. She had seen the termite letter prior to closing at the
25 James Island office and was aware that the inspection had been done.

26 The witness was then shown Defendant's Exhibit B, the termite
27 letter. She stated that that was the kind of letter that was accept-
28 able for an equity closing in 1979. On a FHA and VA they had to have

1 a different form. And since 1979 they have changed all that and gone
2 to the "Clemson form" a standard single form. The witness further
3 testified that the seller always pays the cost of the termite letter,
4 but if the purchaser wants a particular bond or something, he can pay
5 extra for that. In this particular instance, the seller paid \$25.00
6 for the letter. As best the witness could remember, in 1979 the cost
7 of a termite letter was \$25.00 and a bond was \$50.00. The difference
8 between a letter and a bond was that a letter says "it's free and clear
9 from infestation at that time;" under a bond, "the exterminating com-
10 pany that issues the bond, is responsible for the house for, I think,
11 the bonds are for a period of one year."

12 After the closing was over, the selling agent came up to the
13 witness and asked where the letter was and the witness told her that
14 it was at the Harborview Road office. The selling agent said that she
15 was going to pick it up. However, she never did.

16 The witness said that if a termite letter is not a "clean let-
17 ter" that is, it had disclosed infestation damage, she could not have
18 closed on the transaction, "because I could have been liable if there
19 was a problem on that letter." Numerous times in the past, she has
20 gotten letters and had been unable to close and then "we have to go
21 to the purchasers and tell them that there is a problem with the
22 termite letters and then it's up to them whether they'll accept the
23 property or not. Usually we have to have it fixed and it is fixed
24 at the expense of the seller." If the purchasers close after that
25 has been explained to them, then it is their problem.

26 The witness further said that Burkett explained to the Plain-
27 tiffs that they did not have to close but he told them that he knew

1 it was a clear letter.

2 The witness was clear that the letter as drafted fulfilled the
3 terms of the contract. The witness denied making any representation
4 to the Plaintiffs about whether the property had termites or didn't
5 have termites other than what was contained in the letter.

6 On cross-examination, the witness admitted that if the closings
7 don't go through, the listing agent does not receive a commission. In
8 the instant case, she did not know the exact amount of time the pro-
9 perty had been on the market, but thought that it was toward the end
10 of the six month's listing period that the contract was formed. She
11 said that in her initial evaluation of the property, she had listed
12 it as being in good condition. This evaluation would have been given
13 after a walk through every room in the house and after careful obser-
14 vation of many aspects thereof. Some of the witness' information in
15 evaluating the house came from the answers to questions she put to
16 the Defendant. She never asked the Defendant if the house had ter-
17 mites because she would not have asked unless there were signs such
18 as boards misplaced, rot, floor giving in, etc. None of these signs
19 was apparent when she made her inspection.

20 The witness could not recall how she had filled out her initial
21 evaluation form with respect to the question of what type of financing
22 the seller would accept. She felt that she would have urged Ms. Hito-
23 poulos to accept any type of financing since it would have been unlikely
24 to find a purchaser with the substantial assets need to make an equity
25 sale. If the sale had gone FHA or VA there would have been an inspec-
26 tion of the premises.

27 She testified that the commission was split between the selling
28 agent and the listing agent, with each agent getting three (3%) per

1 cent. She agreed that if the closing doesn't go through, all the
2 real estate agents don't get paid.

3 Martin Franklin Shorb. Mr. Shorb is a fifty-seven (57) year
4 old carpenter who has been acquainted with Ms. Hitopoulos and her late
5 husband for around thirty years. He worked for a contractor that
6 built the Hitopoulos' house in 1956 or 1957. The house was built
7 mostly of yellow pine. He was social friends with the Hitopoulos' and
8 had occasion from time to time to work on the house after it was con-
9 structed. About seventeen or eighteen years ago, Ms. Hitopoulos asked
10 him to replace some floorboards in the front hall. She had had a
11 little dog who had urinated on the floor and it had soaked into the
12 original floor and "all kinds of black spots leaked through." He
13 took up the floorboards and replaced it with oak, but never finished
14 the oak. Once he had it put down, the Hitopoulos' decided to put
15 carpet so he told them that it was no sense to finish the wood.

16 The witness said that his replacement of those boards had
17 nothing whatsoever to do with termite damage. He said that he had
18 never noticed any kind of termite damage in the house, "but I wasn't
19 looking for any either." At the same time, he had replaced floorboards
20 in the livingroom for the same reason as those in the hallway. Sub-
21 sequently, both livingroom and hallway floors were covered by carpet.
22 He had taken a few steps toward pest control in the house by putting
23 burnt motor oil around the piers.

24 On cross-examination, the witness said that he never painted
25 the house. He examined the three boards which were in evidence and
26 affirmed that each had had termite damage in it. As to the board
27 from the door sill, he testified that if he was fixing that wood, he
28 would have taken it out and put another one in, but that a homeowner

1 might have covered it up, "make it last like they could." The damage
2 on the door sill, if it was painted over, would not be obvious to a
3 an untrained eye.

4 George Hitopoulos. Mr. Hitopoulos, the thirty-six (36) year
5 old son of the Defendant, testified that he did all the painting and
6 puttying in the house since he had moved in when he was eleven years
7 old. He estimated that he had painted the house seven or eight times
8 over the last sixteen years. His procedure in painting it would be
9 to wash it down, then scrape it, then putty it, calk it and whatever
10 it needed and then paint it. He would use latex putty and calking
11 around the windows. He had worked for a paint company about seven or
12 eight months.

13 The last time he painted the house was in January of 1979, and
14 his purpose was to beautify the house for sale. He remembers his
15 mother replacing flooring in the front hall and subsequently putting
16 down carpeting and believes that the carpeting was put down in 1964.
17 A photograph of his sister's wedding showing the carpeting in the
18 background and bearing the date of December of 1965 was offered into
19 evidence, without objection.

20 The witness testified he had never noticed any termite damage
21 around the house. He testified that he had never noticed any give
22 to the floor while painting although he weighs 280 pounds.

23 On cross-examination, the witness testified that he would
24 normally use about one small can of putty every time he would paint.
25 The witness further testified that he did not believe that the board
26 which Plaintiffs had introduced as the door sill had come from the
27 house at 1556 Inland Drive.

1 Smene S. Hitopoulos. Defendant testified that she formerly owned
2 1556 Inland Drive and built the house in 1956 with her late husband
3 who died October 24, 1980. She had no special knowledge of construc-
4 tion techniques or house maintenance or repair and the house repair
5 at Inland Drive had been performed by her husband, her son, George,
6 and Mr. Shorb.

7 The house originally had hardwood flooring throughout which
8 were bare for about seven or eight years and she decided to put carpet-
9 ing down sometime before 1965. Before putting down the carpeting, she
10 had had Mr. Shorb replace boards in the front hall after her little
11 Chihuahua had wet on them, turning them black. After they had re-
12 placed the flooring, they decided to put carpeting in and that was the
13 same carpeting that was in place at the time they sold the house. She
14 said that the dog subsequently messed up the carpet and that they were
15 never completely satisfied with the carpet. She showed the carpet to
16 the Hahns when she showed the house. She had had it all dry cleaned
17 but it still had spots where it was faded.

18 She said that she knew Mr. Becker but denied that she had had
19 any conversation with him in 1968 regarding termites. She remembers
20 him changing the element in the water heater and she knows where the
21 water heater is, although she has never actually been in the crawl
22 space underneath the house because "I'm scared to death to go under-
23 neath a house." She testified that the area that the Plaintiffs
24 found all the damage in was some distance from the hot water heater
25 where Mr. Becker had been working.

26 She had put the house on the market several times but she and
27 her husband had changed their minds several times and taken it off.

1 They were selling the house because they were getting up in age and
2 both of their children had gotten married and moved on. She went
3 through the house with Kitty Latorre and answered every question Ms.
4 Latorre asked her. No one had ever told her about a termite problem
5 in the house. Most of the time the house was painted by her son but
6 one time her husband did hire two young boys to paint it.

7 Ms. Hitopoulos denied having any discussion with the Hahns
8 about anything having to do with termites before the closing. She
9 does recall talking to Mr. Hahn, and said "You won't find a bug in
10 this house. I meant a roach or anything like that. And he said,
11 Well, if I find anything, I'm going to put it in a bottle and mail
12 it to you." She didn't recall whether she told him that it was a
13 good sound house, but she thought it was, "because I lived in it
14 for twenty-three years."

15 After signing the sales contract, Defendant testified that she
16 allowed the Plaintiffs to come in and paint the house, giving them
17 "almost a month" before the closing. After the Hahns had moved in for
18 two or three days, she went and asked them to have the electricity
19 turned on to their names because she knew that they were running her
20 airconditioning and using her lights. Whereupon the power company
21 turned the power off in her name and turned it on in their names.
22 By this time, the Defendant had moved into her new house. This move
23 would have taken place before the original closing on May 1st.

24 Prior to closing, Defendant had never had any personal contact
25 with Jim Hayes. She did not talk to Mr. Hayes at the time he was
26 making his inspection. At the closing, the Plaintiffs discussed some
27 leaks and Defendant and her husband paid them for that. The termite
28 letter was not delivered at closing because Ms. Latorre did not have

1 time to go back to James Island to get it on coming back from her
2 honeymoon. She straightened it out with Mr. Burkett.

3 The witness recalls a discussion about getting rental from
4 the Hahns for the time that they had occupied the house but her late
5 husband told her to forget about it. She said she had received rent
6 for two apartments in the back, and so she refunded to the Hahns the
7 last half of the month's rent.

8 On cross-examination, the Defendant said that she had hired
9 O'Shaughnessy and O'Shaughnessy had hired Hayes Exterminating Company.
10 She said Hayes' fee was deducted from her proceeds.

11 She said that the last time that the house was painted was
12 about six months before the sale, the job being done by her son,
13 assisted by her husband. She did not know whether they had puttied
14 anything or painted anything. She could not identify the pieces of
15 boards as having come from her house or not.

16 As to the terms of the sale, Defendant testified that she told
17 Ms. Latorre that she insisted on an equity arrangement rather than FHA
18 or VA because "I just never did like FHA or VA to do business with."
19 She did not know anything about the inspections that go along with
20 FAH or VA.

21 Croskeys Welch. Mr. Welch, the director of customer relations
22 with South Carolina Electric & Gas Company, testified that his re-
23 cords reflected that the account at 1556 Inland Drive was switched on
24 in the name of John Hahn on April 26, 1979.

DEFENDANT RESTS.

PLAINTIFFS OFFER NOTHING IN REPLY.

At this point the following Colloquy occurred:

(Here print Transcript Page 279 to 284)

CHARGE TO THE JURY

(Here Print Transcript pages 305 through 324)

COLLOQUY, VERDICT AND POST VERDICT MOTIONS

(Here print Transcript pages 324 through 327; 330 through 340)

PLAINTIFFS' REQUEST TO CHARGE

(Here print Plaintiffs' Request to Charge)

EXCERPT FROM SALES CONTRACT

AGREEMENT TO BUY AND SELL
(Equity Sale)

THE STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

This agreement made this 9th day of March, 19 79, between SMENE S. HITOPOULOS, hereinafter referred to as the Seller and JOHN P. AND RUTH T. HAHN, hereinafter referred to as the Buyer. Subject to all the terms and conditions hereof, the Seller agrees to sell and the Buyer agrees to buy:

* * *

ADDITIONAL TERMS and CONDITIONS set forth on the reverse side hereof are a part of this agreement and this written contract expresses the entire agreement between the parties and may not be changed orally, but can be changed only by an instrument in writing signed by both Buyer and Seller.

* * *

(Reverse Side)

10. CONDITION OF THE PROPERTY. The Buyer acknowledges that the Broker/s and Agent/s in this transaction give no guarantee or warranty of any kind, either expressed or implied as to the physical condition of the property. The Buyer agrees to accept the herein described property in its present condition, except for the following:

(a) The Seller warrants that the heating, air conditioning, plumbing and electrical systems as well as all appliances to be in operative condition on the day of closing, or the day possession is given, whichever occurs first. It shall be the Buyer's responsibility to have these systems and appliances inspected prior to said date, and the Seller shall nor be responsible for their condition after closing or possession is given.

(b) The Seller shall furnish the Buyer with a current certification from a bonded exterminator that the herein described property is free and clean of infestation by termites or other wood-destroying insects and/or if any such infestation is found, it has been corrected and any damage has been repaired.

DEFENDANT'S EXHIBIT B

(here print Defendant's exhibit B, letter from
Hayes Exterminating Company)

PLAINTIFFS' EXHIBIT 11

(Here print Plaintiffs' Exhibit 11, letter
from Charles Lybrand)

E X C E P T I O N S

- 1 I. The trial court erred in admitting into evidence, over ob-
2 jection, Respondents' Exhibit No. 11, a repair estimate
3 prepared by a contractor at the request of Respondent's
4 attorney, the error being that, once the contractor-witness
5 had refreshed his recollection with the document and testi-
6 fied as to its contents, the introduction of the document
7 itself was prejudicial to the Appellant in that it unduly
8 emphasized the witness' testimony.
- 9 II. The trial court erred in charging the jury, over objection,
10 Respondents' Request to Charge:
11 "Where there exists in the property which is the
12 subject of a sale latent defects or hidden condi-
13 tions not discoverable on a reasonable examina-
14 tion of the property, the seller, if he has know-
15 ledge thereof, is bound to disclose such latent
16 defects or conditions to the buyer, and his fail-
17 ure to do so constitutes fraud,"
18 the error being that the charge was on an issue not raised
19 by the pleadings which were formed on affirmative misrepres-
20 sentation rather than failure to disclose.
- 21 III. The trial court erred in denying Appellant's counsel an
22 opportunity to state his grounds for a Directed Verdict
23 at the close of all the evidence.
- 24 IV. The trial court erred in denying Appellant's motions for
25 nonsuit, directed verdict and judgment non obstante vere-
26 dicto, as to the first cause of action, fraud, in that
27 there was no evidence of an actionable representation.
- 28 V. The trial court erred in denying Appellant's motions for
29 nonsuit, directed verdict and judgment non obstante vere-
30 dicto, as to the first cause of action, fraud, in that
31 there was no evidence of the falsity of any of the state-
32 ments allegedly made by Appellant or her alleged agents.
- 33 VI. The trial court erred in denying Appellant's motions for
34 nonsuit, directed verdict and judgment non obstante vere-
35 dicto, as to the first cause of action, fraud, in that
36 there was no evidence of reliance by the Respondents on
37 any actionable misrepresentation by Appellant or her
38 alleged agents.
- 39 VII. The trial court erred in denying Appellant's motions for
40 nonsuit, directed verdict and judgment non obstante vere-
41 dicto, as to the first cause of action, fraud, in that

- 1 Respondents had no right to rely on any alleged misrepresentations by Appellant because Respondents had ample opportunity to inspect the condition of the premises prior to closing.
- 2
3
4
- 5 VIII. The trial court erred in denying Appellant's motions for nonsuit, directed verdict and judgment non obstante veredicto, as to the second cause of action, breach of contract accompanied by a fraudulent act, in that there was no evidence of an actionable breach of contract.
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- 10 IX. The trial court erred in denying Appellant's motions for nonsuit, directed verdict and judgment non obstante veredicto, as to the third cause of action, breach of contract, in that there was no evidence of an actionable breach of contract.
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- 15 X. The trial court erred in denying Appellant's motion for a new trial nisi, the error being that the verdict of TWELVE THOUSAND AND NO/100 (\$12,000.00) DOLLARS damages was the result of caprice, passion and prejudice in that it had no evidentiary support in the record.
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- 20 XI. The trial court erred in allowing the witness Jim Hayes to testify, over objection, to a conversation he had with either Appellant or her deceased husband, the error being that such statement was hearsay, not within any exception.
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- 24 XII. The trial court erred in failing to instruct the jury, upon request that if they found that the parties intended to merge a particular contractual provision in the deed, there could be no recovery for the breach of that provision.
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- 29 XIII. The trial court abused its discretion in denying Appellant's motion for a severance of the causes of action, in that evidence which would have been admissible in one cause of action was inadmissible in the other.
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- 33 XIV. The trial court erred in refusing Appellant's request for a limiting instruction that the parol representations allegedly made by Appellant after formation of the sales contract were only admissible on the Fraud cause of action.
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AGREEMENT OF COUNSEL AND CERTIFICATE

Counsel agree that the foregoing Record, when printed, is a true and correct copy of the agreed case and exceptions in said cause. Furthermore, the undersigned counsel hereby certify that all irrelevant matter has been deleted, and that the requirements of Rule 4 of the Rules of the Supreme Court have been satisfied.



EDMUND H. ROBINSON
Attorney for Appellant

GEORGE E. LEVYA
Attorney for Respondents

Charleston, South Carolina

Dated: _____, 1982.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
HONORABLE JOHN H. WALLER, JR., JUDGE

RUTH T. HAHN and JOHN P. HAHN,)
)
 Plaintiffs - Respondents,)
)
 -versus-)
)
 SMENE S. HITOPOULOS,)
)
 Defendant - Appellant.)
)
)
)
)
)

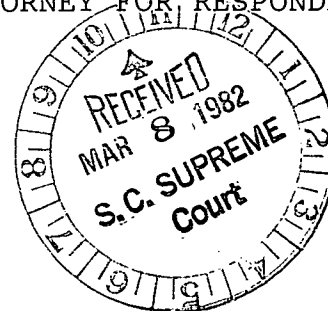
AMENDMENTS TO PROPOSED CASE AND EXCEPTIONS

EDMUND H. ROBINSON
Shimel, Ackerman Theos & Spar
P. O. Drawer D
Charleston, S.C. 29402

ATTORNEY FOR APPELLANT

GEORGE E. LEVYA
18 Broad Street
P. O. Box 99
Charleston, S.C. 29402

ATTORNEY FOR RESPONDENTS



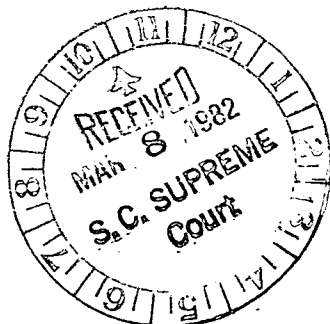
Respondents Ruth T. Hahn and John P. Hahn would amend the Case and Exceptions proposed by the Appellant Smene S. Hitopoulos in the following particulars:

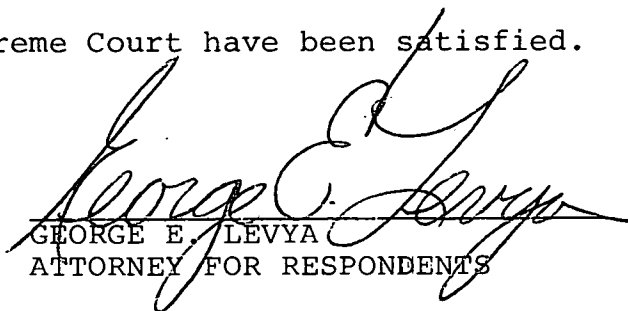
STATEMENT OF THE CASE

Delete from Appellant's proposed Statement of the Case all of the material from page 10, Summary of Testimony and Excerpts From the Trial Transcript to the Appellant's Exceptions, to wit: delete Summary of Testimony and Excerpts From the Trail Transcript; Charge to the Jury; Verdict and Post-Verdict Motions; Plaintiff's Request to Charge; Excerpt from Sales Contract, Defendant's Exhibit B, Plaintiffs' Exhibit 11; and substitute in lieu thereof the following:

The Transcript of Record from page 9, line 18 to the End of the Transcript along with Plaintiffs' Exhibits one through eleven and Defendant's Exhibits "A" through "C".

The undersigned counsel hereby certifies that all irrelevant matter has been deleted, and that the requirements of Rule 4 of the Rules of the Supreme Court have been satisfied.




GEORGE E. LEVYA
ATTORNEY FOR RESPONDENTS

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
HONORABLE JOHN H. WALLER, JR., JUDGE

RUTH T. HAHN and JOHN P. HAHN,)
)
Plaintiffs - Respondents,)
)
-versus-)
)
SMENE S. HITOPOULOS,)
)
Defendant - Appellant.)
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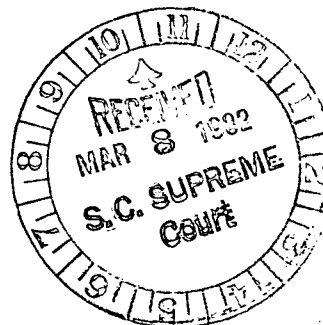
I, Edmund H. Robinson, Attorney for the Defendant - Appellant in the above captioned action, hereby acknowledge receipt and acceptance of a copy of the Amendments to Proposed Case and Exceptions in the above captioned matter this 4th day of March, 1982.

Edmund H. Robinson
FOR EDMUND H. ROBINSON

SWORN to before me this 4th
day of March, 1982.

Melores Stevenson
NOTARY PUBLIC FOR SOUTH CAROLINA

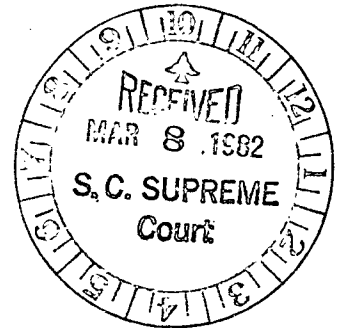
My Commission Expires: 10-13-91



THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
HONORABLE JOHN H. WALLER, JR., JUDGE

RUTH T. HAHN and JOHN P. HAHN,)
)
Plaintiffs - Respondents,)
)
versus)
)
SMENE S. HITOPOULOS,)
)
Defendant - Appellant.)



NOTICE OF MOTION AND MOTION TO STRIKE AMENDMENTS, OR IN
THE ALTERNATIVE FOR SETTLEMENT OF THE RECORD ON APPEAL

TO: GEORGE E. LEVYA, Attorney for Respondents

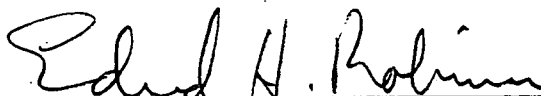
PLEASE TAKE NOTICE that Appellant will move this Court at a time and place to be set by it for an Order striking Respondents' Amendments to the Proposed Case and Exceptions and accepting Appellant's Proposed Case and Exceptions as the case on appeal, or, in the alternative, for settlement of the record. As grounds for this motion, Appellant would show to this Court:

1. This is an appeal from a civil trial which lasted two days. The trial transcript is 340 pages long and requires approximately 2½ hours to read.
2. Appellant's Proposed Case and Exceptions would print 55 pages of the trial transcript and summarizes all of the remaining testimony in the trial, thereby reducing the entire case on appeal to a document 106 pages in length whose reading time is approximately 25 minutes.
3. Respondents' amendments propose simply to print the entire trial transcript, which is unnecessary in that the trial testimony is fairly summarized in Appellant's Proposed Case and Exceptions.

4. Respondents' amendments fail to comply with Rule 4 of the Rules of this Court in that unnecessary matter has been included.

In the event that the Court should not see fit to grant Appellant the relief of striking Respondents' Amendment, Appellant would respectfully pray that this Court settle the record on appeal as provided in its rules.

Respectfully submitted,



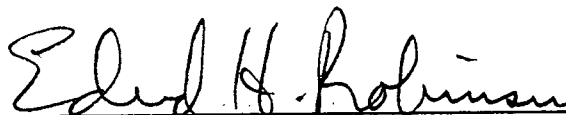
EDMUND H. ROBINSON
Attorney for Appellant

Charleston, South Carolina

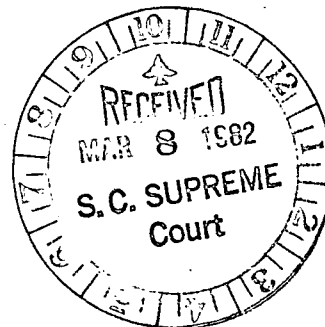
March 5, 1982

CERTIFICATION OF COUNSEL

I hereby certify that all irrelevant matters in the Proposed Case and Exceptions has been deleted.



EDMUND H. ROBINSON
Attorney for Appellant



THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
HONORABLE JOHN H. WALLER, JR., JUDGE

RUTH T. HAHN and JOHN P. HAHN,)
)
 Plaintiffs - Respondents,)
)
 versus)
)
 SMENE S. HITOPOULOS,)
)
 Defendant - Appellant.)

AFFIDAVIT OF SERVICE

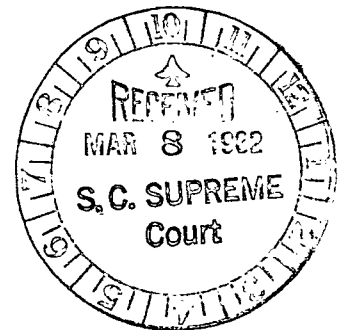
PERSONALLY appeared before me SANDRA F. SHEA, who, having been duly sworn, deposes and says that she served a copy of the within Notice of Motion and Motion to Strike Amendments, Or In the Alternative For Settlement Of The Record On Appeal, by mail, on George E. Levya, attorney for Respondents, at 18 Broad Street, Charleston, South Carolina, on this the 5th day of March, 1982.

Sandra F. Shea
SANDRA F. SHEA

SWORN TO BEFORE ME this
5th day of March, 1982.

Edw. H. Robinson (SEAL)
NOTARY PUBLIC FOR SOUTH CAROLINA

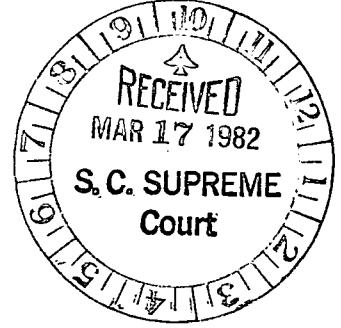
My commission expires: 3-9-88.



THE STATE OF SOUTH CAROLINA
 IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
 HONORABLE JOHN H. WALLER, JR., JUDGE

RUTH T. HAHN and JOHN P. HAHN,
 Plaintiffs - Respondents,
 -versus-
 SMENE S. HITOPOULOS,
 Defendant - Appellant.



RETURN TO APPELLANT'S MOTION TO STRIKE AMENDMENTS, OR IN
 THE ALTERNATIVE FOR SETTLEMENT OF THE RECORD ON APPEAL

TO: EDMUND H. ROBINSON, ESQUIRE, Attorney for Appellants

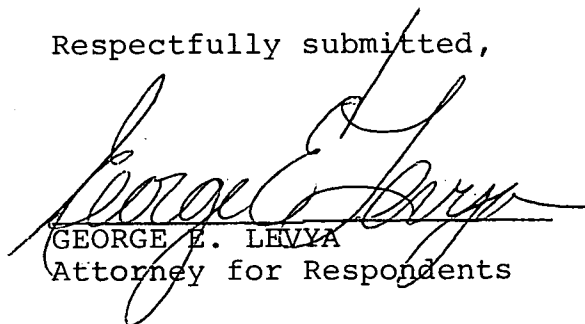
PLEASE TAKE NOTICE that the Respondents are opposed to so much of the Appellant's Motion that seeks an Order striking Respondents' Amendments to the Proposed Case and Exceptions and accepting Appellant's Proposed Case and Exceptions as the case on appeal. As grounds for this Return, Respondents would show unto this Honorable Court the following:

1. That Appellant in her Exceptions IV, V, VI, VIII and IX, stated that there was no evidence introduced on certain key elements of Respondents' case presented at trial court; Respondents would respectfully submit that this complex case must be considered on appeal in toto because the legal theories are complex and all of the evidence is required in order to understand the web and the pattern of the Fraud of the Appellant and her agents perpetrated.

2. That Appellant's Proposed Case and Exceptions does not fairly summarize the testimony presented to the trial court in that the tone and the character of the witness for the Appellant can not be ascertained without a complete and thorough review of the testimony.
3. That Respondents' Proposed Amendments and Exceptions meet the criteria of Rule 4 of the Rules of the Supreme Court and the undersigned would again certify that all irrelevant matter was deleted.

Respondents would respectfully pray that the Motion of the Appellant be dismissed or in the alternative the Respondents would respectfully pray that this Court refer the matter to the Trial Court for settlement of the record.

Respectfully submitted,

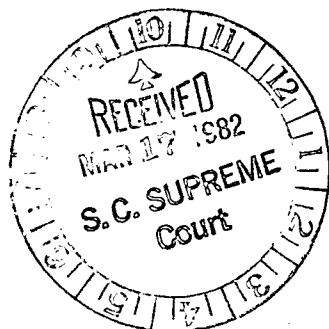

GEORGE E. LEVYA
Attorney for Respondents

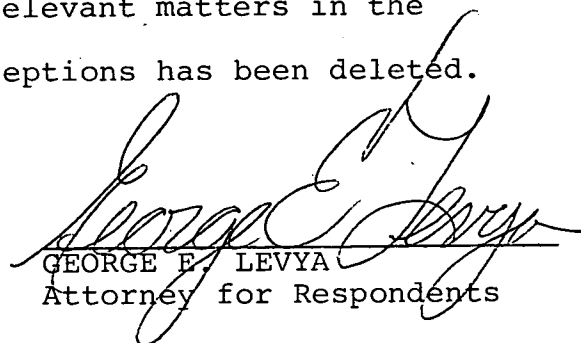
Charleston, South Carolina

March 16, 1982

CERTIFICATION OF COUNSEL

I hereby certify that all irrelevant matters in the Amendments to the Proposed Case and Exceptions has been deleted.

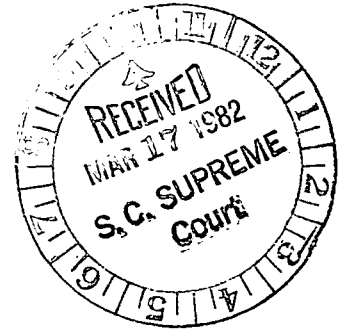



GEORGE E. LEVYA
Attorney for Respondents

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
HONORABLE JOHN H. WALLER, JR., JUDGE

RUTH T. HAHN and JOHN P. HAHN,)
)
Plaintiffs - Respondents,)
)
-versus-)
)
SMENE S. HITOPOULOS,)
)
Defendant - Appellant.)
)
_____)

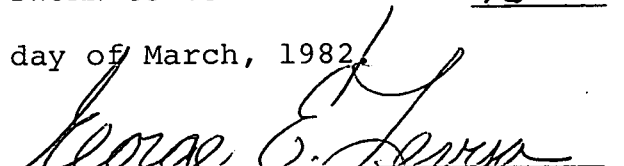


AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, SUSAN L. JENKINS, who, having been duly sworn, deposes and says that she served a copy of the within Return To Appellant's Motion To Strike Amendments, Or In The Alternative For Settlement Of The Record On Appeal, by mail, on Edmund H. Robinson, Esquire, Attorney for Appellant, at Post Office Drawer D, Charleston, South Carolina 29402, on this the 16th day of March, 1982.


SUSAN L. JENKINS

SWORN to before me this 16th
day of March, 1982.


NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: 4/9/85



The Supreme Court of South Carolina

FRANCES H. SMITH
CLERK

P. O. BOX 11330
COLUMBIA, S. C. 29211

March 25, 1982

Edmund H. Robinson, Esquire
P. O. Drawer D
Charleston, South Carolina 29402

Re: Ruth T. and John P. Hahn v. Smene S. Hitopoulos

Dear Mr. Robinson:

Pursuant to the provisions of Section 3F of Rule 1 of the Rules of Practice, I enclose herewith certified copy of Order of Chief Justice Lewis remanding the above case to trial judge for the purpose of settling the record on appeal. By copy of this letter, all interested parties are notified of the Court's action. It is incumbent upon attorney for appellant to immediately contact Judge John Henry Waller, Jr. for the purpose of setting a hearing in this matter.

Very truly yours,

A handwritten signature in cursive script that reads "Frances H. Smith".

CLERK

FHS/chh

Enclosure

cc: George E. Levya, Esquire
The Honorable John Henry Waller, Jr.,
The Honorable Howard A. Taylor

The Supreme Court of South Carolina

Ruth T. Hahn and John P. Hahn,

Plaintiffs-Respondents,

v.

Smene S. Hitopoulos,

Defendant-Appellant.

O R D E R

This matter comes before the Court by way of a Motion to Settle the Record on appeal. It appears that the nature of the points disputed by the parties concerning the contents of the record on appeal will require factual findings and findings concerning the relevancy of certain matter sought to be included which should be made by the lower court.

IT IS THEREFORE ORDERED that this motion be remanded to the lower court for the purpose of settling the record pursuant to Rule 1, Section 3 F of the Rules of Practice in this Court.

IT IS FURTHER ORDERED that the lower court should hold a hearing and report its findings to this Court on or before April 26, 1982. Copies of the Order settling the record should be sent by the lower court judge to all attorneys of record.

J. WOODROW LEWIS C.J.

Columbia, South Carolina

March 25, 1982

By Francis K Smith
CLERK

LAW OFFICES
SHIMEL, ACKERMAN, THEOS & SPAR
ONE HUNDRED TWENTY-TWO CHURCH STREET
P. O. DRAWER D

LOUIS M. SHIMEL (1914-1969)
WILLIAM ACKERMAN
GREGORY O. THEOS
HARVEY M. SPAR

CHARLESTON, SOUTH CAROLINA 29402
TELEPHONE (803) 723-6491

NORTH CHARLESTON OFFICE
EVANSTON PLAZA
5241 DORCHESTER ROAD
CHARLESTON HEIGHTS, S. C. 29405
TELEPHONE (803) 552-9896

ASSOCIATES
SUBAN KING DUNN
EDMUND HEYWARD ROBINSON
M. JERRY GARFINKLE

March 26, 1982

M. JERRY GARFINKLE

Honorable John Henry Waller, Jr.
Marion County Courthouse
Marion, SC 29571

RE: Hahn vs Hitopoulos

Dear Judge Waller:

Pursuant to order of Chief Justice Lewis, a copy of which is enclosed, I would respectfully request that you set a hearing on the Motion to Settle the Record at your earliest convenience. Enclosed for your reference are Appellant's Motion and Respondent's Return thereto. If you did not get a copy of Appellant's Proposed Case and Exceptions from the Supreme Court and desire to review same in advance of the hearing, please notify me and I will run off a copy for you.

With kindest personal regards, I am,

Very truly yours,

EDMUND H. ROBINSON

EHR/ds

encl.

cc: George E. Levya
✓ Honorable Frances H. Smith

RECEIVED

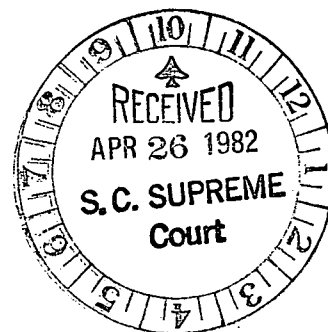
MAR 29 1982

S. C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
HONORABLE JOHN H. WALLER, JR., JUDGE

RUTH T. HAHN and JOHN P. HAHN,)
)
 Plaintiffs - Respondents,)
)
 versus)
)
 SMENE S. HITOPOULOS,)
)
 Defendant - Appellant.)
 _____)



ORDER OF SETTLEMENT

THIS MATTER having come before me on motion of Appellant to settle the record on appeal, a hearing was conducted on April 5, 1982 with counsel for both parties in attendance. After hearing arguments of counsel, I have concluded that it is not necessary to print the entire trial transcript on appeal, but that the proposed case and exceptions submitted by Appellant should be enlarged somewhat. It is therefore

ORDERED, ADJUDGED and DECREED that the record on appeal shall include, in addition to those trial exhibits already in the Proposed Case and Exceptions, the following exhibits: Plaintiffs numbers one through six, being photographs; plaintiffs numbers eight through ten, being pieces of wood; defendant's exhibit A, a closing statement; and defendant's exhibit C, a photograph. Appellant shall cause all photographs and the pieces of wood to be supplied to the Clerk of the Supreme Court together with a list, in duplicate, of such exhibits, at the time of docketing the case. It is

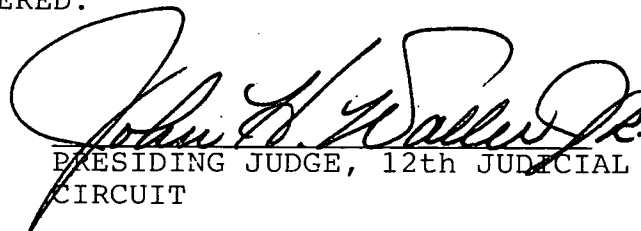
J. Waller, Jr.
#1

further

ORDERED, ADJUDGED and DECREED that the Summary of Testimony in the Proposed Case and Exceptions be changed in the manner agreed by counsel, and as to the two items on which counsel disagree, it is hereby

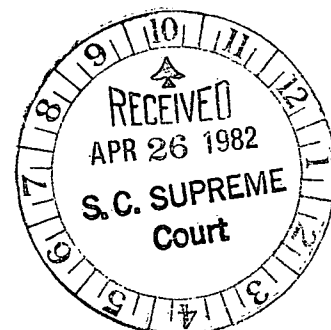
ORDERED, ADJUDGED and DECREED that the entire transcript of the cross-examination of George Hitopoulos be printed, but that the transcript of the cross-examination of Martin Shorb not be printed.

AND IT IS SO ORDERED.


PRESIDING JUDGE, 12th JUDICIAL
CIRCUIT

Marion, S. C.

Dated: April 23, 1982



#2

Original

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
APPEAL FROM CHARLESTON COUNTY
HONORABLE JOHN H. WALLER, JR., JUDGE

RUTH T. HAHN and
JOHN P. HAHN

Plaintiffs-Respondents

versus

SMENE S. HITOPOULOS

Defendant-Appellant

RECEIVED
MAY 23 1984

MOTION FOR LEAVE TO ARGUE
AGAINST PRECEDENT

S. C. Court of Appeals

APPELLANT, SMENE S. HITOPOULOS, through undersigned counsel hereby moves this Court, pursuant to Rule 8, §10 of the Rules of the Supreme Court of South Carolina, as made applicable to this Court, for permission to argue against the "two issue rule" first stated in Anderson v. West, 270 S.C. 184, 188, 241 S. E.2d, 551, 553 (1978), which was recently followed by the Supreme Court in Smoak, Executor of the Estate of Hudson, et al v. Liebherr-American, Inc., et al, ___ S.C. ___, ___ S. E.2d ___ (Op. No. 22085, April 23, 1984), and by this Court in Gasque v. Heublein, Inc., et al, ___ S.C. ___, ___ S.E.2d ___ (Op. No. 0143, April 9, 1984). This rule, holds that "where a jury returns a general verdict involving two or more issues and its verdict is supported as to at least one issue, the verdict will not be reversed . . ." Anderson, supra. Appellant submits that the last two decisions should be modified for the following reasons:

Appellant's opening Brief argues that the "two issue

rule" of Anderson v. West, supra, should not be applied to the instant case because it and the precedents on which it is based were general verdicts on negligence where the "issues" were one or more specifications of negligence. The rule announced in Anderson v. West was therefore consistent with the rule that proof of one specification of negligence warrants a verdict, Deason v. Southern Rwy Co., 142 S.C. 328, 140 S.E. 575 (1927). Thus, instead of arguing directly against the precedential effect of Anderson v. West, Appellant was able to argue in its opening Brief that the rules stated therein should not apply to the instant case, which involves an appeal of a general verdict rendered on a complaint alleging three causes of action: fraud and deceit, breach of contract, and breach of contract accompanied by a fraudulent act.

Since Appellant's opening Brief was filed, however, the Supreme Court had extended the Anderson rule to cover a general verdict on a complaint alleging negligence and breach of express and implied warranties, Smoak, supra. It is thus necessary to file this petition to urge that this Court reconsider the wisdom and justice of applying the Anderson rule to cases where vastly different causes of action are asserted.

In the instant case, the three causes of action asserted, while arising out of a common set of facts, have vastly different connotations among lawyers and in the community at large. Appellant moved, early in the trial, to sever the different causes of action for trial, a motion which was denied. A general verdict was rendered for Plaintiff and Appellant here

attacks the sufficiency of the evidence to support any one of the three causes of action.

To appreciate Appellant's present situation, consider what the consequences would be to her reputation if someone said of her "the jury found that she defrauded the purchasers of her home." This would clearly be a detrimental statement, and would be much more serious allegations than that she had breached her sales contract. But would it be true or false? In the present state of the record, it is impossible to tell.

The Anderson approach to this problem is simply to ignore it by applying a legal fiction: if any of the counts are legally sufficient, it must have been that count that the jury used at arriving at its verdict. While this approach may have much to recommend it in terms of preserving judicial time at the appellate level, it does not fulfill the function of the appellate court of correcting errors of the lower court which may lead to a different result below. Assume, for the sake of this argument, that this Court decides that one or more but not all of the causes of action should not have been submitted to the jury. It cannot be said with any certainty in this particular case that, if the trial judge had correctly withheld the defective counts from the jury, the jury would have come out with the same verdict. In fact, since the amount of damages awarded by the jury bears no relation whatever to any amounts proven at trial, it is entirely possible that the jury may have improperly added actual damages from different causes of action.

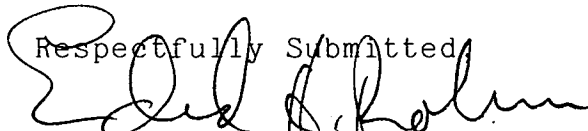
Finally, as expressed in Appellant's opening Brief, the Anderson case did not consider, and is squarely out of step with, a line of precedent in South Carolina which holds that where a general verdict is rendered on two or more causes of action, a finding that one cause of action should not have been submitted to the jury necessitates a new trial as to all. In Fisher v. J. H. Sheridan, Co., Inc., 182 S. C. 347, 189 S. E. 356 (1936), for example, the court stated:

"If the verdict is a general one, so that it is impossible to ascertain in what manner the verdict should be apportioned or what were its component parts, an order granting a new trial as to one cause of action necessarily has the effect of granting a new trial as to the other causes of action" 189 S.E. at 359 (citations omitted.)

See also other cases cited in Appellant's opening brief at p. 7.

Appellant is sympathetic to this Court's doubts, expressed in Gasque, supra, of its authority to carve out an exception to decisions of the Supreme Court. However, if in fact Anderson was wrongly decided or should be limited so as not to apply to the instant case, it would be a denial of this Appellant's right to meaningful appellate review of her cause for this Court to rest on such lack of authority. It may be that the better course of action would be to certify this question, or the entire appeal, to the Supreme Court of South Carolina for their reconsideration.

Respectfully Submitted



EDMUND H. ROBINSON
14 N. Adgers Wharf
Charleston, SC 29401
Attorney for Appellant

Charleston, South Carolina
May 21, 1984

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
APPEAL FROM CHARLESTON COUNTY
HONORABLE JOHN H. WALLER, JR., JUDGE

RUTH T. HAHN and
JOHN P. HAHN

Plaintiffs-Respondents

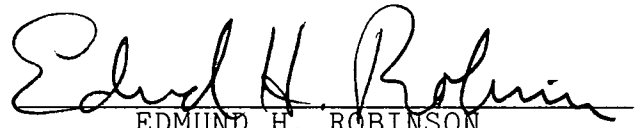
versus

SMENE S. HITOPOULOS

Defendant-Appellant

CERTIFICATE OF SERVICE

I, EDMUND H. ROBINSON, attorney for Appellant, do hereby certify that I have served copies of the foregoing Motion for Leave to Argue Against Precedent, upon William L. Runyon, Jr., Esquire, Peoples Building, Suite 606, 18 Broad Street, Charleston, SC 29401, Attorney for Respondents, by mailing copies of same, postage pre-paid, this 21st day of May, 1984.


EDMUND H. ROBINSON
Attorney for Appellants

Charleston, South Carolina

RECEIVED
MAY 23 1984
S. C. Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM CHARLESTON COUNTY
HONORABLE JOHN H. WALLER, JR., JUDGE

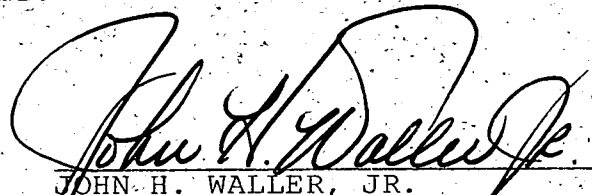
RUTH T. HAHN and JOHN P. HAHN,)
)
Plaintiffs - Respondents,)
) Case No: 80-CP-10-3048
versus)
)
SMENE S. HITOPOULOS,)
)
Defendant - Appellant.)

ORDER

UPON MOTION of George E. Levya, Esquire, attorney
for the Respondents, by and with the consent of William L. Runyon,
Jr., Esquire, and A. Bruce Strauch, Esquire, it is

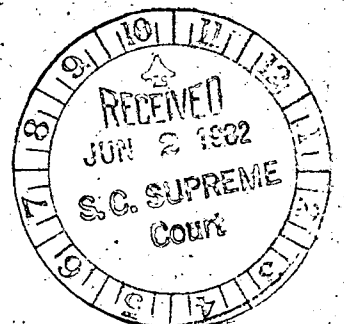
ORDERED, ADJUDGED AND DECREED that William L.
Runyon, Jr., Esquire and A. Bruce Strauch, Esquire are added
as co-counsel for the Respondents.

AND IT IS SO ORDERED.


JOHN H. WALLER, JR.
JUDGE OF THE 12th JUDICIAL
CIRCUIT

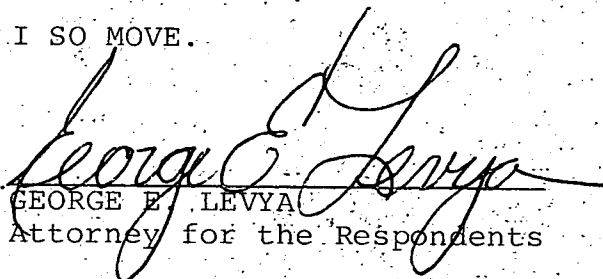
Marion, South Carolina

Dated: May 31, 1982




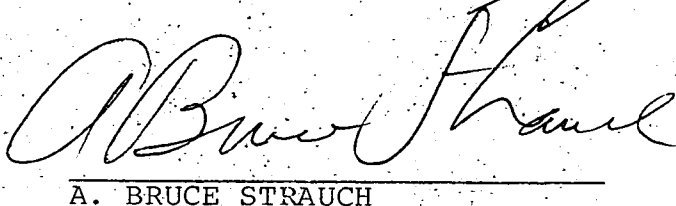
#1 of 2

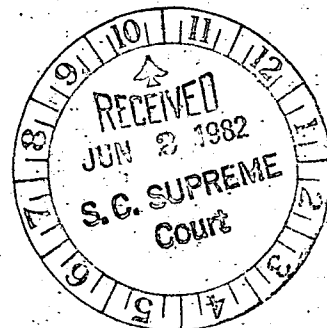
I SO MOVE.


GEORGE E. LEVYA
Attorney for the Respondents

WE CONSENT.


WILLIAM L. RUNYON, JR.


A. BRUCE STRAUCH



Handwritten note:
J. Lee Jr.
#2 of 2

The South Carolina Court of Appeals

Ruth T. Hahn and John P. Hahn,

Respondents,

v.

Smene S. Hitopoulos,

Appellant.

Docket No. 82-359
Lower Court Case No. 82-CP-10-3048

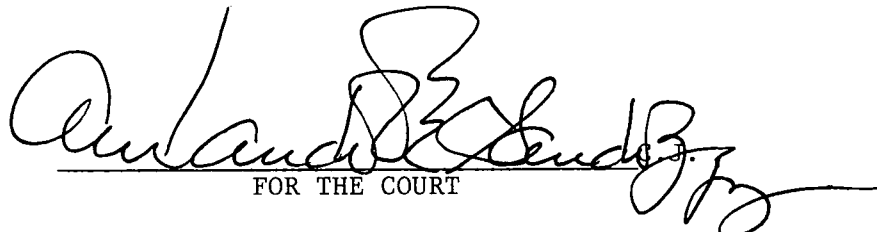
O R D E R

Appellant seeks leave to argue against certain decisions set out in his Petition filed in the above case.

Counsel for respondents did not file a Reply to this Petition.

This Court grants the relief sought. However, Counsel is advised that there is question as to whether this Court can overrule a decision of The Supreme Court. Counsel is also cautioned that, in granting the Petition, the times allowed for oral argument in this case are not extended and counsel should be prepared to address fully the other issues presented, and

IT IS SO ORDERED.


FOR THE COURT

Columbia, South Carolina

June 12, 1984

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ruth T. Hahn and John P. Hahn, Respondents,
v.
Smene S. Hitopoulos, Appellant.

Appeal From Charleston County
John H. Waller, Jr., Judge

Memorandum Opinion No. 84-MO-032
Heard June 28, 1984 Filed September 11, 1984

REVERSED

Edmund H. Robinson, of Charleston, for appellant.

George E. Levya, of Woodbridge, Va., and William L. Runyon,
Jr., and A. Bruce Strauch, both of Charleston, for
respondents.

SANDERS, C.J.: Ruth T. and John P. Hahn initiated this action against Smene S. Hitopoulos based upon fraud and deceit, breach of contract, and breach of contract accompanied by a fraudulent act in the sale of a house damaged by termites. They were awarded a general jury verdict for \$12,000 actual damages. Mrs. Hitopoulos appeals. We reverse.

In deciding this case on appeal, we are bound by the scope of review repeatedly prescribed by our Supreme Court in interpreting Article V, Section 5 of the South Carolina Constitution. This is most succinctly stated in the landmark decision of Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976):

In an action at law, on appeal of a case tried by a jury, the jurisdiction of this Court extends merely to the correction of errors of law, and a factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings. Odom v. Weathersbee, 225 S.C. 253, 81 S.E.2d 788 (1954).

Although we accord great deference to the jury pursuant to this principle, it remains our duty to reverse as a matter of law where the only reasonable inference which can be drawn from the evidence is contrary to the factual findings implicit in its verdict. See Willis v. Floyd Brace Co., Inc. 279 S.C. 359, 309 S.E.2d 295 (S.C. App. 1983). The evidence here may be summarized as follows:

In March 1979, the Hahns entered into a contract to buy a house from Mrs. Hitopoulos. The contract provided the Hahns were to accept the house "in its present condition" subject only to two provisos. Mrs. Hitopoulos agreed to have the heating, air conditioning, plumbing and electrical systems, and

HAHN, ET AL. v. HITOPOULOS

all appliances inspected prior to closing and to warrant these systems and appliances "to be in operative condition on the day of closing or the day possession is given whichever occurs first." Mrs. Hitopoulos also agreed to furnish the Hahns with a current certification from a bonded exterminator (commonly known as a termite letter) that the house was "free and clean of infestation by termites or other wood-destroying insects and/or if any such infestation is found, it has been corrected and any damage has been repaired."

Mr. Hahn testified that after entering into the contract, but before closing, he spent a week inside the house painting. He also testified that during this time he had a conversation with Mrs. Hitopoulos in which she told him that he would never find a bug in the house, the house was soundly built, and he would never have any trouble with it.

Mr. Hahn further testified the termite letter required by the contract was not presented at the May 1979 closing, but he chose to proceed with the closing without the letter upon advice of his lawyer and the representation of Mrs. Hitopoulos' real estate agent that it was at her office. Mr. Hahn went on to testify he did not receive the letter until he initiated this action against Mrs. Hitopoulos. The pertinent language of this letter certified the house was "found to be free of any visible subterranean termite active infestation." Although this language did not conform exactly with the language required by the contract, Mr. Hahn testified they would have proceeded with the closing if this letter had been presented.

Approximately 6-8 months then elapsed after closing, when according to Mr. Hahn, they were preparing to replace the carpet in the house and discovered termite damage to the living room and foyer floors. Mr. Hahn testified he spent \$200 on a semi-repair job because he didn't have the necessary \$700. He also testified he then found damage to the front door frame, main support beam and picture window frame to the rear apartment of the house. In addition, he said a portion of the front siding was bad and had been filled with wood putty in places. Hahn testified he spent over \$2,000 on materials for the repairs he made with his own labor, but some still remained to be done.

The Hahns also presented an expert in the field of pest control who inspected the house at their request after the damage was discovered. He testified he found no active infestation but did find considerable evidence of termite damage underneath the front and back sides of the house (floors, siding and sills) and evidence that a number of repairs had been made. He went on to testify that, in his opinion, the damage would not necessarily be apparent to an average home owner but would be evident to anyone experienced with termites.

The Hahns also presented a general contractor who inspected the house for them in March 1980 and prepared an estimate of the cost of remaining repairs. He testified his estimate was \$7,500, but he would rather do the job on a cost-plus basis because unknown factors were involved. He further testified the calking in the wood was "not new."

A resident of the same neighborhood where the house is located testified he had worked on the water heater under the house and had told Mrs. Hitopoulos and her husband (now deceased) that he had seen termites and

HAHN, ET AL. v. HITOPOULOS

termite damage. According to other testimony in the record, this witness's observations were allegedly made in 1968.

The exterminator who was retained by Mrs. Hitopoulos' real estate agent and who issued the termite letter testified his was a general inspection governed by the terms of the parties' contract. He testified he did not find any substantial degree of termite damage or active infestation, but said he could not remember whether there were traces of termites on the premises. He did not inspect the interior of the house because, in answer to his standard question, either Mr. or Mrs. Hitopoulos told him there had been no previous termite infestation or damage. The exterminator stood by his letter as being acceptable at the time of his inspection, although he acknowledged it would not have been appropriate if FHA financing had been involved. He said the letter was "accepted in the legal profession" and had been in use for about a year by at least fifteen companies in the area.

The contractor, who had replaced boards in the front hall and living room floors 17-18 years previously due to damage by the Hitopoulos' dog, testified he did not notice any termite damage but was not looking for any at the time. He also testified he put burnt motor oil around the piers of the house as a method of pest control.

Mrs. Hitopoulos' son testified he had done all the painting, puttying and calking to the house while living there the past twenty-five years. He also testified he had painted the house seven or eight times during the past sixteen years. He painted it for the last time, with his father's assistance, in January 1979 in preparation for putting it on the market. He further stated he had never noticed any termite damage around the house or damage to the wood. In addition, he denied having puttied and painted the door sill, saying he would have known something was wrong and would have looked under the house.

Mrs. Hitopoulos, a retired florist, denied having a conversation with her former neighbor, or anyone else, about termites under her house. She did recall telling Mr. Hahn he would not find a bug in the house, but testified she was referring to roaches. She further testified she had never seen a termite and believed the house was soundly built, having lived there for 23 years. She agreed that most of the painting was done by her son, although her husband on one occasion hired two young boys to paint it.

After carefully reviewing this evidence, we must conclude that it does not support the jury verdict on any of the three causes of action plead. We will address each separately, giving the reasons for our conclusions.

I

According to the Hahns' complaint, their cause of action for fraud and deceit is based on alleged misrepresentations by Mrs. Hitopoulos or her agents in "inducing (them) to enter into the contract for sale of their property." The complaint alleges three such misrepresentations: (1) the statement by Mrs. Hitopoulos that the house "was in good condition and soundly built," (2) the statement by the exterminator in the termite letter furnished by Mrs. Hitopoulos that the house was "found to be free of any visible subterranean active termite infestation" and (3) the statement by Mrs. Hitopoulos in

the contract that she would furnish a termite letter as provided by the contract.

In oral argument before us, counsel for the Hahns conceded the evidence does not support this cause of action due to the following considerations.

As evidence of the alleged misrepresentation as to the house being in good condition and soundly built, the Hahns initially relied on the conversation in which Mrs. Hitopoulos told Mr. Hahn he would never find a bug in the house, the house was soundly built and he would never have any trouble with it. Even if we were to assume that a cause of action for fraud and deceit could be predicated on these alleged statements (which is doubtful), it is apparent they did not induce the Hahns to enter into this contract. According to Mr. Hahn's own uncontradicted testimony, the conversation he had with Mrs. Hitopoulos in which she told him these things took place after they had entered into the contract.

For the same reason, the statement contained in the termite letter, which the Hahns received after entering into the contract, could not have induced them to enter into it.

Likewise, the statement of Mrs. Hitopoulos in the contract that she would furnish the termite letter cannot form the basis of the cause of action for fraud and deceit because it was promissory in nature. Fraud must relate to a present or pre-existing fact, and cannot be predicated on an unfulfilled promise or a statement of future events unless it appears from the evidence that the person making the promise had no intention of keeping it. Moye v. Wilson Motors, Inc., 254 S.C. 471, 176 S.E.2d 147 (1970).

II

In support of their cause of action for breach of contract, the Hahns initially relied on the evidence that Mrs. Hitopoulos did not deliver the termite letter at closing, and when it was eventually delivered, its language was not exactly as required by the contract.¹

In oral argument before us, counsel for the Hahns also conceded that the verdict could not be sustained on this cause of action in light of Mr. Hahn's uncontradicted testimony that they agreed to close without actually having the letter at closing and his further testimony that they would have been satisfied to close if the letter they eventually received had been presented at closing.

¹It should be noted that the contract did not require Mrs. Hitopoulos to warrant the property to be free from infestation by termites or other wood-boring insects. Neither did she represent this in the contract which provides, instead, that the Hahns agreed to buy the property in its "present condition," subject only to Mrs. Hitopoulos' furnishing the required "certification from a bonded exterminator."

III

As to their cause of action for breach of contract accompanied by a fraudulent act, the Hahns' complaint alleges Mrs. Hitopoulos "concealed and covered up the termite damage which was present in the house." They argue her prior knowledge of the damage, and hence her cover up and concealment of it, can be inferred from the evidence. Even if this is so, the verdict cannot be sustained on this cause of action.

An action for breach of contract accompanied by a fraudulent act is an action in contract, not tort. Peeples v. Orkin Exterminating Company, 244 S.C. 173, 135 S.E.2d 845 (1964). Being an action in contract, it necessarily follows that a breach of contract as well as a fraudulent act must be proved. Peeples. As previously discussed, no breach of contract was proved here.

For these reasons the judgment for respondents is

REVERSED.

GARDNER and GOOLSBY, JJ., concur.

No. 0353

Judgment REVERSED

The State of South Carolina

IN THE COURT OF APPEALS

JUNE

Term, 19 84

CHARLESTON

County

Ruth T. Hahn, et al.,

Respondents,

vs.

Smene S. Hitopoulos,

Appellant.

Opinion By

Richard B. Byrd

We Concur:

John T. [Signature] J.
[Signature] J.

We Dissent:

J.

J.

South Carolina Court of Appeals
Clerk's Office, Columbia, S. C.

FILED September 11, 1984

John P. Mims

Clerk

October 12, 1984

The Honorable Howard A. Taylor
Clerk of Court, Charleston County
P. O. Box 293
Charleston, South Carolina 29401

Dear Mr. Taylor:

Enclosed is remittitur in the case of Ruth T. Hahn, et al.
v. Smene S. Hitopoulos.

Very truly yours,

Reba D. Mims
Clerk

RDM/irc

Enclosure