THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

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Court of Appeals Unpublished Opinion No. 2011-UP-291

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

v.

DLI Properties, LLC, Allen Tate Co., Inc., Melia C. Faile and Allen L. Cauthen,

of whom

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

BRIEF OF RESPONDENTS ALLEN TATE CO., INC. AND MELIA C. FAILE

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STATEMENT OF THE CASE

1. Procedural History

Petitioners Larius and Maurissa Woodson (collectively, the "Woodsons") filed their Complaint on October 27, 2006, primarily requesting an order for specific performance compelling Defendant DLI Properties, LLC ("DLI") to perform an alleged contract for DLI to sell real property to the Woodsons and requesting a declaratory judgment as to the rights and duties of Woodsons and DLI with regards to the alleged contract. (Appx. pp. 5-9).[1] The Woodsons' Complaint also contains alternative claims for fraud and negligent misrepresentation against DLI and against DLI's real estate agents, Defendants Melia C. Faile ("Faile") and Allen Tate Co., Inc. ("Allen Tate"), to the extent that Faile and Allen Tate acted outside of the scope of their authority from their client, DLI. (Appx. pp. 9-17).

On July 17, 2008, the Honorable Brooks P. Goldsmith entered an Order granting summary judgment in favor of Faile and Allen Tate and dismissing the Woodsons' claims against Faile and Allen Tate. (Appx. p. 3). The Woodsons filed a Motion to Alter or Amend Judgment on July 28, 2008 (Appx. pp. 129-132), which Judge Goldsmith denied on June 11, 2009. (Appx. p. 4). The Woodsons served their Amended Notice of Appeal on August 17, 2009. (Appx. p. 150).

The Court of Appeals issued its decision on June 14, 2011, affirming the trial court's decision to grant summary judgment. (Appx. pp. 199-200). The Court of Appeals affirmed the trial court's decision, noting that although the trial court's order granting summary judgment does not contain the trial court's reasons for granting summary

[1] Although these causes of action appear to be primarily directed at DLI, the Woodsons' complaint seeks relief against all of the Defendants for these causes of action. (Appx. pp. 6-9)

judgment, the Woodsons failed to include a transcript of the summary judgment hearing in the Record on Appeal and it is possible that the trial court articulated its decision during the hearing. The Woodsons petitioned the Court of Appeals for rehearing (Appx. pp. 201-203), which was denied by the Court of Appeals on August 4, 2011. (Appx. p. 208). The Woodsons then a filed a petition for certiorari, which was granted by this Court on October 3, 2012.

2. Factual Summary

In 2006, DLI engaged Allen Tate and Faile, a real estate agent with Allen Tate, to act as its agent in the sale of certain real property it owned in Lancaster, South Carolina (the "Property"). (Appx. p. 68) (Faile Dep., p. 10, lines 16-23). On August 1, 2006, at Petitioner Larius Woodson's ("Woodson") request, Faile sent the Woodsons a draft of an Agreement to Buy and Sell Real Estate (the "Woodson Offer") in which Faile had filled out many of the blanks required for an offer by the Woodsons to purchase the Property from DLI for $88,900.00. (Appx. pp. 48-49) (Woodson Dep., p. 12, line 25-p.13, line 16; p. 15, lines 7-14). Although Woodson was a licensed real estate broker in North Carolina, he and his wife used Sharon Davis and Davis Integrity Realty, Inc. as their South Carolina real estate broker for the offer to purchase the Property. (Appx. pp. 58-59) (Woodson Dep., p. 50, lines 12-19; p. 53, lines 4-13; p. 54, lines 6-8). However, some communications regarding this transaction were directly between Faile and the Woodsons because Sharon Davis was out of town. (Appx. p. 75) (Faile Dep., p. 39, lines 6-8).

The Woodsons changed several material terms on the Woodson Offer, initialed the changes, signed the Woodson Offer and sent it back to Faile on August 3, 2006 for consideration by DLI. (Appx. p. 49-50) (Woodson Dep., p. 16, line 7 - p. 17, line 21).

Faile then discussed the Woodson Offer with DLI. DLI made additional material changes to the Woodson Offer, initialed those changes, signed it and Faile sent it back to the Woodsons for consideration and final approval of DLI's changes. (Appx. p. 69) (Faile Dep., p. 13, lines 13-20).

On August 4, 2006, Woodson called Faile to say that he had forgotten to include a $4,300 limit on the cost of tapping into the existing water or sewer system. (Appx. p. 69) (Faile Dep., p. 13, line 22 - p. 14, line 4). Faile told Woodson that she did not know if DLI would agree to that additional term, but she agreed to contact DLI to discuss the term. (Appx. p. 69) (Faile Dep., p. 14, lines 8-15). Faile and DLI discussed the additional $4,300 limit on the tap fee and the DLI representative frustratingly told Faile that DLI would agree to the limitation. (Appx. p. 69) (Faile Dep., p. 14, lines 16-24). Faile then contacted Woodson and left a voicemail message at 5:00 pm on Friday, August 4, 2006 stating that DLI would agree to the change and directing Woodson to make the change to the Woodson Offer, initial the change and deliver it to her. (Appx. p. 70) (Faile Dep., p. 19, line 11 - p. 20, line 1).

The Woodsons initialed the prior changes to the Woodson Offer made by DLI, wrote into the contract the proposal for the new $4,300 limit on the tap fee and initialed that change as well. (Appx. p. 70) (Faile Dep., p. 20, lines 6-15). On Saturday, August 5, 2006, the Woodsons delivered the Woodson Offer with the $4,300 tap fee limitation initialed by them to Faile's office along with a check for the $1,000 earnest money deposit. (Appx. pp. 70-71) (Faile Dep., p. 20, line 16-p. 21, line 19). The terms of the Woodson Offer provided that Defendant Allen Tate would hold the $1,000 earnest

money deposit as "Escrow Agent."[2] (Appx. pp. 88-92) (Woodson Dep., Ex. 1, § 5). Faile then contacted DLI to obtain final signatures on the Woodson Offer. (Appx. p. 71) (Faile Dep., p. 22, line 6-p. 23, line 4). One of the partners of DLI was out of town, so Faile planned to have DLI execute the Woodson Offer to approve the final change on Monday, August 7, 2006. (Appx. p. 71) (Faile Dep., p. 22, lines 22-25).

On Sunday, August 6, 2006, Defendant Alan L. Cauthen ("Cauthen") contacted Faile through his real estate agent about making an offer on the Property. (Appx. p. 71) (Faile Dep., p. 23, line 6-p. 24, line 16). Before Cauthen submitted a formal written offer, he wanted to investigate the possibility of installing a septic system on the property. (Appx. p. 71) (Faile Dep., p. 24, lines 12-16). Faile notified DLI about the inquiry from Cauthen on Monday, August 7, 2006. (Appx. p. 72) (Faile Dep., p. 28, lines 3-17). On the same day, Faile asked DLI if it wanted her to tell the Woodsons about Cauthen's interest in the Property and possible offer to purchase the Property. DLI instructed Faile not to tell the Woodsons about Cauthen's interest in the Property. (Appx. p. 73) (Faile Dep., p. 29, lines 1-22, p. 30, lines 8-13).

Cauthen visited the Property on Tuesday, August 8, 2006 with an expert to evaluate the suitability of the Property to support a septic system. (Appx. p. 72) (Faile Dep., p. 25, line 11-p. 26, line 15). Cauthen then delivered a formal written offer ("Cauthen Offer") to purchase the Property on Wednesday, August 9, 2006. (Appx. pp. 72, 73) (Faile Dep., p. 26, lines 17-25; p. 31, lines 6-25). The Cauthen Offer was for the same amount as the Woodson Offer, but contained no contingencies and provided for an

[2] In fact, the express terms of the Woodson Offer make it clear that Allen Tate cannot release the funds until both the Woodsons and DLI "have executed an agreement authorizing the disbursement or until a court of competent jurisdiction has directed a disbursement." (R. pp. 86-90) (Woodson Dep., Ex. 1, § 5). Defendant Allen Tate still has possession of the funds and has never received an agreement executed by DLI and the Woodsons directing the release of the funds.

earlier closing date. (Appx. pp. 71, 74) (Faile Dep., p. 24, lines 9-11; p. 33, lines 17-20). DLI signed and accepted the Cauthen Offer on Wednesday, August 9, 2006 at approximately 2:20 p.m. (Appx. p. 73) (Faile Dep., p. 32, lines 1-7). Once DLI signed and accepted the Cauthen Offer, Faile notified the Woodsons' broker, Sharon Davis, the same afternoon that DLI did not accept the Woodson Offer and instead decided to sell the Property to Cauthen that same day. (Appx. p. 75) (Faile Dep., p. 37, line 20-p. 38, line 19).

Only four days passed between the time that Failed received the Woodson Offer on Saturday, August 4, 2006 and the time that Faile notified the Woodsons that DLI had accepted the Cauthen Offer on Wednesday, August 9, 2006. During that time, Woodson says that he contacted a soil engineer, met with a lender, reviewed architectural plans and met with a builder. (Appx. pp. 56-57) (Woodson Dep., p. 44, line 1-p. 45, line 24). Woodson testified at his deposition that he did not incur any out-of-pocket costs during that time, other than "gas and time," although he was unable to identify the amount of gas he used or the time that he spent. (Appx. pp. 56-57, 61-62) (Woodson Dep., p. 44, line 1-p. 46, line 14; p. 64, line 12-p. 66, line 2). With respect to how much he spent on gas, Woodson testified at his deposition, "I have no clue" and with respect to how much time he spent, he replied, "Honestly, I can't tell you . . . ." (Appx. pp. 61-62) (Woodson Dep., p. 64, line23-p 65, line 7).

ARGUMENT

I. THE DECISION OF THE TRIAL COURT SHOULD BE AFFIRMED BECAUSE THE PETITIONERS FAILED TO PROVIDE A SUFFICIENT RECORD ON APPEAL

The Court of Appeals affirmed the trial court's granting of summary judgment because it determined that the Woodsons failed to satisfy their burden of providing a

sufficient record on appeal. (Appx. p. 200). Because of this procedural defect in the appeal, the decision of the trial court should not be disturbed. Should this Court determine that the Woodsons did provide a sufficient Record on Appeal, the Court should affirm the trial court's granting of summary judgment because the trial court's order sets out the basis for its decision. With regards to the procedural defect, Respondents respond to the specific questions raised by the Woodsons in their brief below.

A. The Woodsons failed to provide a complete Record on Appeal necessary for appellate review. Also, there is no evidence in the Record on Appeal of any discrepancy between the Trial Court's Written Order and Any Oral Ruling of the Court (Question I)

In its opinion affirming the trial court's grant of summary judgment in favor of Allen Tate and Faile, the Court of Appeals notes "we cannot determine whether summary judgment was appropriate because the trial court's order fails to articulate its reasons for granting summary judgment." The Court of Appeals goes on to say:

> [h]owever, we do not vacate and remand this case because the trial court might have articulated its decision during the summary judgment hearing and the Woodsons failed to provide a hearing transcript. Because the Woodsons failed to satisfy their burden of providing a sufficient record, therefore, we affirm the appeal. See Rule 210(h), SCACR ("[T]he appellate court will not consider any fact which does not appear in the Record on Appeal.")

Rather than address the Court of Appeal's position that there is a procedural defect in the appeal because the Woodsons failed to provide a sufficient record on appeal, the Woodsons argue that the trial court's written order supersedes any comments or ruling that may have been made during the hearing. The Woodsons' argument focuses on Rule 58, SCRCP and cases that provide that a trial court's decision is not final until the trial court enters a written order. However, the Woodsons seem to miss the Court of

Appeals' point that it could not adequately review the trial court's basis for the ruling because the Woodsons failed to include the hearing transcript in the Record.

Additionally, unlike many of the cases cited by the Woodsons, there is no evidence in the record of a conflict between any oral ruling of the trial court and the trial court's written final order. Rather, the Court of Appeals determined that the Woodsons failed to meet their burden to provide a sufficient record on appeal to allow the Court of Appeals to review the trial court's decision. Since the Woodsons did not provide the Court of Appeals with a complete Record on Appeal that included the transcript of the hearing before the trial court, the Court of Appeals affirmed the trial court's decision. See, Dennis v. South Carolina Nat'l Bank, 299 S.C. 34, 41, 382 S.E.2d 237, 240 (Ct.App. 1988) ("It is the burden of the appellant . . . to furnish a sufficient record on appeal from which this Court can make an intelligent review."). Because the Woodsons created the procedural defect in the appeal, the trial court's order granting summary judgment should not be disturbed.

B. The Trial Court's Orders Do Not Set Out Facts or Legal Analysis. However, the Lack of a More Specific Order Does Not Require This Court Remand For Clarification (Question II)

Should this Court determine that there is no procedural defect in the appeal that supports the Court of Appeals' decision, it still should affirm the trial court's decision because the summary judgment order and the order denying the motion to alter or amend the judgment sufficiently set forth the trial court's reasons for granting summary judgment.

In their brief, the Woodsons appear to argue that the trial court set out its reasons for granting the motion for summary judgment in its order denying the Woodsons' motion to alter or amend the judgment. Petitioners' Brief, p. 5. Although neither the

original order granting summary judgment or the order on the motion to alter or amend the judgment contain specific facts or legal analysis on which the trial court based its decision, as the Court of Appeals says is required by Bowen v. Lee Process Sys. Co., 342 S.C. 232, 536 S.E.2d 86, (Ct.App.2000), the South Carolina Rules of Civil Procedure do not require findings of fact and conclusions of law in summary judgment orders. See, Rule 52(a) SCRCP ("Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 . . . ."). Rather, both orders from which the Woodsons appeal describe the documents and arguments the trial court considered and relied on in making its decision. (Appx. pp. 3, 4)

The Court of Appeals' decision in this matter references Bowen, in which it held that a trial court's order on summary judgment "must set out facts and accompanying legal analysis sufficient to permit meaningful appellate review." 342 S.C. at 237, 536 S.E.2d at 88 (emphasis added).[3] However, since deciding Bowen, the Court of Appeals has inconsistently applied the Bowen standard to its review of orders granting summary judgment. See, B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 603 S.E.2d 629 (Ct.App.2004) (vacating a form order granting summary judgment to B&B and remanding case to trial court for entry of a written order identifying the facts and legal analysis upon which it relied in granting summary judgment); Doe v. Howe, 367 S.C. 432, 626 S.E.2d 25 (Ct.App.2005) (vacating a summary order dismissing breach of fiduciary cause of action and remanding case to trial court for entry of an order identifying the facts and legal analysis upon which it relied.); But see, Inglese v. Beal,

[3] In requiring that a trial court set out in its order granting summary judgment facts and legal analysis "sufficient to permit meaningful appellate review," the Court of Appeals appears to dance around Rule 52(a) SCRCP, which does not require findings of fact and conclusions of law in summary judgment orders.

Op. No. 5123, 2013 S.C. App. LEXIS 137, *27 (S.C.Ct.App. filed May 1, 2013) (Dissent notes that majority affirmed trial court's order granting summary judgment despite trial court order being a Form 4 order that simply stated "Defendant Carl H. Beal's motion for summary judgment is granted."); cf. Porter v. Labor Depot, 372 S.C. 560, 568, 643 S.E.2d 96, 100 (Ct.App.2007) (affirming Form 4 order entered by trial court that affirmed decision of South Carolina Workers' Compensation Commission, stating that "not all situations require a detailed order and the trial court's form order may be sufficient if the appellate court can ascertain the basis for the trial court's ruling from the record." (citations omitted)).

Here, the trial court did more than enter a form order only stating that summary judgment was granted in favor of Faile and Allen Tate. Instead, the trial court sets forth the reasons and basis on which it granted summary judgment. That Order entered on July 17, 2008 states, "[b]ased upon the arguments of counsel, and upon consideration of the motion for summary judgment, the pleadings, affidavits, deposition transcripts, discovery response and other documents on file and the briefs filed by the parties, the Court determines there are no genuine issues of material fact . . . ." (Appx. P. 3). As argued by the Woodsons, the June 11, 2009 Order denying the motion to reconsider also says,

> Upon receiving the notice for the motion to reconsider, the Court elected to make a decision on this motion by receiving each party's memorandum of law.
>
> After careful consideration of said motion and memorandums submitted by the parties, the Court finds there is no basis for granting the motion and, therefore, Plaintiff's Motion to Alter or Amend Judgment is hereby denied.

Allen Tate and Faile concede that the orders at issue in this matter do not set out facts and legal analysis, as contemplated by the Court of Appeals in Bowen. However,

the orders identify the documents containing the facts and legal arguments on which the trial court's decision is based. Those documents are contained in the Record on Appeal (and the Appendix) and should have given the Court of Appeals sufficient information to permit meaningful appellate review.

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS

A. The Woodson Offer Does Not Satisfy the Statute Of Frauds' Requirement for a Writing for the Sale of Land (Question III).

The trial court properly granted summary judgment in favor of Faile and Allen Tate because the Woodsons' claims are barred by the Statute of Frauds. The South Carolina Statute of Frauds states "(n)o action shall be brought whereby . . . (t)o charge any person upon any contract or sale of lands . . . (u)nless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith. . . . ." S.C. Code Ann. § 32-3-10(4) (2007). The Woodson Offer did not satisfy the Statute of Frauds because DLI did not initial the Woodsons' new $4,300 limit to the tap fee, which constituted a material change to the prior offer. Because the Woodsons' final material change was not signed by DLI, the Woodson Offer was not a valid contract for the sale of property.

Instead of demonstrating compliance with the Statute of Frauds, the Woodsons argue that Faile and Allen Tate are equitably estopped from raising a Statute of Frauds defense to the Woodson Offer. Petitioners' Brief, pp. 6-7. In so doing, the Woodsons cite the general requirements for promissory estoppel in support of their argument.[4]

[4] The Woodsons' reliance on the general elements of promissory estoppel set out in Powers Constr. Co., v. Salem Carpets, 283 S.C. 302, 322 S.E.2d 30 (Ct.App.1984), is misplaced. Powers Constr. Co. does not involve a contract governed by the Statute of Frauds and does not discuss the requirements for removing a contract from the Statute of Frauds.

However, the standards required to use estoppel to remove a contract for the conveyance of real estate from the requirements of the Statute of Frauds are more stringent than those required to establish promissory estoppel generally. In order to remove an oral contract to convey real estate from the Statute of Frauds, "[a party] must show part performance of the oral contract." Bradshaw v. Eurig, 297 S.C. 242, 245, 376 S.E.2d 264, 266 (1989) (citations omitted). "Performance may be proved by evidence of the following: (1) improvements to the real estate; (2) possession of the real estate; (3) payment of the purchase price." Id. Of these three ways, improvements to the real estate and possession of the real estate are the strongest evidence of part performance. Id. Payment of the purchase price is not only the weakest evidence but will not suffice on its own to remove a contract from the Statute of Frauds. Id. The Woodsons do not allege that they performed any improvements to the property, took possession of the real estate and or paid the purchase price to DLI. Instead, they allege that in the four days between the time they delivered the Woodson Offer to Faile and the time they were notified that DLI had accepted the Cauthen Offer, they spent time speaking with a soil engineer, a lender and a builder, for which they incurred no costs. (Appx. pp. 56-57, 61-62) These actions are not sufficient to remove the Woodson Offer from the requirements of the Statute of Frauds and, therefore, the trial court properly granted summary judgment in favor of Allen Tate and Faile.

B. The Woodsons Cannot Establish Fraud or any other Tort by Faile and Allen Tate as a Defense to the Statute Of Frauds (Question IV).

The Woodsons further argue that Faile and Allen Tate are tortfeasors who cannot use the Statute of Frauds as a defense to a wrongful act, but do not cite any South Carolina authority in support of this position. Petitioners' Brief, pp. 7-8. Even if the

Woodsons are correct that the Statute of Frauds does not apply where there is fraud or other torts involved, the Woodsons cannot establish the necessary elements for fraud or any other tort as against Faile and Allen Tate.

The Woodsons argue that Faile's failure to inform the Woodsons of Cauthen's offer and DLI's intent to the treat the Woodsons Offer as contingent constitutes fraud and negligent misrepresentation. See, Petitioners' Brief, p. 8. To prevail on their claim of fraud, the Woodsons must show the following:

> (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; (9) the hearer's consequent and proximate injury.

M.B. Kahn Constr. Co. v. S.C. Nat'l Bank of Charleston, 275 S.C. 381, 384, 271 S.E.2d 414, 415 (1980) (citations omitted). To prevail on a claim for negligent misrepresentation, the Woodsons must show:

> (1) a false representation made by the defendant to the plaintiff; (2) a pecuniary interest by the defendant in making the statement; (3) a duty of care owed by the defendant to see that truthful information was communicated to the plaintiff; (4) the defendant breached the duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as a direct and proximate result of reliance on the representation.

Ama Mgmt. Corp. v. Strasburger, 309 S.C. 213, 222, 420 S.E.2d 868, 874 (Ct.App.1992). "The failure to prove any element of fraud or misrepresentation is fatal to the claim." Schnellmann v. Roettger, 373 S.C. 379, 382, 645 S.E.2d 239, 240 (2007).

The Woodsons cannot establish that Faile and Allen Tate made any express fraudulent or negligent misrepresentations because they cannot show that any statements made by Faile were false. At the time Faile left the message for Woodson that DLI

would agree to the $4,300 limit on the tap fee, Faile believed that the statements were true based on her conversations with DLI. (Appx. p. 69) (Faile Dep., p.15, lines 1-6). Additionally, at the time she left the message, Faile was not even aware of Cauthen's interest in the property, as she was not first contacted by Cauthen's agent until two days later. (Appx. p. 71) (Faile Dep., p. 23, line 6-p. 24, line 25). Faile also did not act recklessly in leaving the message because DLI had told her that they would agree to the limit on the tap fee. (Appx. p. 69) (Faile Dep., p. 14, lines 8-24). Because the Woodsons cannot establish the elements of fraud or negligent misrepresentation, or any other tort, the trial court properly granted summary judgment in favor of Faile and Allen Tate.

C. Faile And Allen Tate Had No Duty to Disclose Cauthen's Interest in the Property to the Woodsons and S.C. Code Ann. § 40-57-137 Does Not Create Such a Duty. (Question V)

Since the Woodsons cannot establish that Faile made a false representation to the Woodsons, they resort to arguing that Faile's non-disclosure of Cauthen's interest in the Property and Cauthen's eventual offer to purchase the property constitutes fraud or negligent misrepresentation. Petitioners' Brief, p. 8-10. The Woodsons ignore the fact that DLI specifically instructed Faile, its agent, not to tell the Woodsons about Cauthen's interest in the Property. (Appx. p. 73) (Faile Dep., p. 29, lines 1-22). Instead, the Woodsons argue that Faile had a legal obligation to them to disclose Cauthen's interest in the Property, despite the fact that Faile did not represent them and they had their own real estate agent, and Faile should have completely disregarded the instructions from DLI to not disclose that information to the Woodsons.[5]

[5] As to any claim relating to the disclosure of the Cauthen Offer itself (as opposed to disclosing Cauthen's interest in the Property), DLI both received the Cauthen Offer and signed the Cauthen Offer on Wednesday, August 9, 2006. That same afternoon, Faile informed the Woodsons' real estate agent that DLI did not accept the Woodson Offer and instead decided to sell the Property to Cauthen. (Appx. pp.

The Woodsons claim that that they reposed "trust and confidence" in Faile and Allen Tate such that Faile had a legal duty under S.C. Code Ann. § 40-57-137 to notify them about Cauthen's interest in the property. Petitioners' Brief, pp. 9-10. The Woodsons claim that S.C. Code Ann. § 40-57-137 created a relationship of "trust and confidence" between Faile, the agent representing the seller of the property, and the Woodsons, the buyers of the property, who were independently represented by their own agent in this transaction. S.C. Code Ann. § 40-57-137 simply does not create such an obligation, as the Woodsons were not Faile's "customers" under that statute.

S.C. Code Ann. § 40-57-137 establishes the types of relationships that may be established between a real estate licensee and his or her client. The statute defines the four types of formal agency relationships between licensees and clients: 1) seller agency; 2) buyer agency; 3) disclosed dual agency or 4) subagency. S.C. Code Ann. § 40-57-137(a). The statute also sets out the formal legal obligations a real estate licensee has to clients who have executed a formal agency agreement, including, but not limited to, the obligations to: 1) present in a timely manner all offers and counteroffers, 2) disclose all relevant facts concerning the transaction known to the licensee, 3) advise the client to obtain expert advice on matters beyond the expertise of the licensee, 4) comply with laws, rules and regulations, and 5) preserve confidential information. S.C. Code Ann. §§ 40-57-137(C) and 40-57-137(H).

The portion of the statute that the Woodsons claim created a duty for Faile to disclose Cauthen's interest in the Property to the Woodsons defines a prospective seller or purchaser of *unlisted* real property who chooses not to establish a formal agency

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73,75) (Faile Dep., p. 32, line 20-p. 33, line 10, p. 37, line 20-p. 38, line 19). Therefore, even if Faile and Allen Tate had a duty to notify the Woodsons once the Cauthen Offer was accepted by DLI, they timely did so.

relationships with a real estate licensee, but who still uses the services of a licensee, as a "customer" of the real estate licensee. S.C. Code Ann. § 40-57-137(O)(1). Under this section of the statute, a licensee has fewer legal obligations to a customer than they have to a client who has entered into a formal agency relationship with the licensee under S.C. Code Ann. §§ 40-57-137(C) and 40-57-137(H). For example, a real estate licensee does not have a legal obligation to advise the seller of unlisted real property to obtain expert advice on matters beyond the expertise of the licensee; disclose all relevant facts concerning the transaction known to the licensee; or even preserve confidential information provided by the customer.

The Woodsons could not be customers of Faile and Allen Tate because the Woodsons had chosen to establish a formal agency relationship with Sharon Davis and Davis Integrity Realty, Inc., a licensee, for this transaction. (Appx. pp. 58) (Woodson Dep., p. 50, lines 12-19). Further, in this transaction, Faile and Allen Tate had a formal agency agreement with DLI to sell the Property and the Property was listed. Although the Woodsons communicated directly with Faile during the times Sharon Davis was out of town, the Woodsons had their own licensee serving as their agent in this transaction. Because the Woodsons were in a buyers' agency relationship with Sharon Davis and Davis Integrity Realty, Inc., pursuant to S.C. Code Ann. § 40-57-137(H), the Woodsons were not and could not have simultaneously been "customers" of Allen Tate and Faile under S.C. Code Ann. § 40-57-137(O). Therefore, the portion of the statute cited by the Woodsons in support of their claim that Faile and Allen Tate had a duty to disclose Cauthen's interest in the property simply does not apply.

Even if Faile and Allen Tate could somehow be in a sellers' agency relationship with DLI, while simultaneously advising the Woodsons as customers, Faile would only have an obligation to provide accurate information to the Woodsons and to not provide false information. The statute says that a licensee that provides services to a customer must not "*knowingly* give a party in a real estate transaction false information." S.C. Code Ann. § 40-57-137(O)(4) (emphasis added). In fact, the statute also provides that "*the licensee is not liable to a party for providing false information to the party if the real estate licensee did not have actual knowledge that the information was false and discloses to the party the source of the information.*" Id. (emphasis added). As stated above, at no time did Faile provide false information to the Woodsons. When Faile left the message on Woodson's voice mail on Friday, August 4, 2006 saying that DLI would agree to the addition of the tap fee limit, she had not been contacted by Cauthen's real estate agent and was not aware of Cauthen's interest in the property. Cauthen did not even present a formal written offer to DLI until August 9, 2009. Faile notified Sharon Davis that DLI had accepted the Cauthen Offer the same day DLI received the offer. At all times in her dealings with the Woodsons, Faile provided accurate, truthful information to the Woodsons. Therefore, the Woodsons' claims that Faile and Allen Tate somehow violated S.C. Code Ann. § 40-57-137 are without merit and the Trial Court properly granted summary judgment in favor of Faile and Allen Tate.

D. The Woodsons Have Not Demonstrated any Duty for Allen Tate or Faile to Speak. (Question VI).

At all times, Allen Tate and Faile were acting as the agent for DLI, the seller of the property. The Woodsons argue that that agency law does not insulate Allen Tate and Faile from acts of fraud or misrepresentation. Petitioners' Brief, p. 10-11. However, as

discussed above, the Woodsons cannot establish the necessary elements for independent claims against Faile and Allen Tate for fraud or negligent misrepresentation that might have created a duty to speak. The Woodsons simply cannot show that Faile made a false statement concerning Cauthen's interest in the Property, nor can they establish that Faile had a duty to disclose Cauthen's interest in the property to the Woodsons under S.C. Code § 40-57-137. Therefore, the Trial Court properly granted summary judgment in favor of Faile and Allen Tate.

E. The Woodsons Cannot Establish The Necessary Elements For A Claim Of Unfair And Deceptive Trade Practices. (Question VII)

To recover in a private action under the South Carolina Unfair Trade Practices Act (UTPA), S.C. Code Ann. § 39-5-10 (2007), "the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive acts." Wright v. Craft, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct.App.2006). Because the Woodsons cannot establish any of the elements of this cause of action, summary judgment in favor of Allen Tate and Faile was proper.

The Woodsons cannot establish that Faile or Allen Tate engaged in an unfair or deceptive act, the first element for a cause of action under the UTPA, because they cannot establish Faile or Allen Tate made any false representation to the Woodsons. Additionally, as discussed above, DLI instructed Faile to not disclose Cauthen's interest in the Property and Faile did not have any independent obligation to disclose Cauthen's interest in the Property to the Woodsons.

Similarly, the Woodsons cannot satisfy the second element of an unfair trade practices claim, that the alleged unfair or deceptive act affected the public interest. In Noack Enter., Inc. v. Country Corners Interiors, Inc., 290 S.C. 475, 351 S.E.2d 347 (Ct.App.1986), the South Carolina Court of Appeals held, "An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the act's embrace . . . ." Id. at 479, 351 S.E.2d at 349-350 (citations omitted). The Court in Noack Enter., Inc., cited a Georgia case, Zeeman v. Black, 273 S.E.2d 910 (Ga. App. 1980), which held that purchasers of a home from a private homeowner did not have a cause of action under the Georgia Fair Business Practice Act "because the sale was an isolated act of an individual and not a transaction potentially harmful to the consumer public." Noack Enter., Inc., 290 S.C. at 479, 351 S.E.2d at 349-350. "The act is not available to redress a private wrong where the public interest in unaffected." Id.

Any harm the Woodsons allege would be, at best, a private harm, not one capable of repetition and not a threat to the consuming public. As the Court said in Noack, ". . . the complaint nowhere alleges any facts demonstrating that these acts or practices adversely affect the public." Noack Enter., Inc, 290 S.C. at 480, 351 S.E.2d at 350. This dispute results from a private transaction involving the sale of real property, and this is not the type of transaction that is potentially harmful to the consumer public or is even capable of repetition under Daisy Outdoor Advertising v. Abbott, 322 S.C. 489, 473 S.E.2d 47 (1996).

For the reasons discussed below, the Woodsons also cannot establish the third element, that they suffered monetary or property loss as a result of the actions of Allen

Tate and Faile. Therefore the Trial Court properly granted summary judgment in favor of Faile and the Woodsons on this cause of action.

F. The Woodsons Did Not Suffer Any Damages Recoverable from Allen Tate and Faile (Question VIII).

Allen Tate and Faile argued to the trial court that deposition testimony demonstrates that the Woodsons have not suffered any damages recoverable from Allen Tate and Faile, not that the Woodsons have failed to properly plead damages. (Appx. p. 125). At his deposition, Woodson simply could not identify any monetary or property loss resulting from the Allen Tate and Faile's actions. See (Appx. pp. 61-62) (Woodson Dep., p. 64, line 12-p. 66, line 2). To the extent that the Woodsons argue that they have suffered damages because Allen Tate has failed to return the $1,000 earnest money deposit to the Woodsons, the Woodsons are ignoring the express language of the Woodson Offer (which they signed), which provides that "the broker holding the earnest money deposit will not disburse it to either party until both parties have executed an agreement authorizing the disbursement or until a court of competent jurisdiction has directed a disbursement." (Appx. pp. 88-92) (Woodson Dep., Ex. 1, § 5). The Woodsons have not produced any evidence that there was a signed agreement to return the earnest money deposit, nor has there been an court order requiring the earnest money deposit to be returned to the Woodsons.

Since the Woodsons cannot establish any damages recoverable from Allen Tate and Faile, the Trial Court properly granted summary judgment in favor of Allen Tate and Faile.

CONCLUSION

For the foregoing reasons, Respondents Allen Tate and Faile respectfully request that this Court affirm the decision of the Court of Appeals.

Respectfully Submitted,

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July 16, 2013.
Charlotte, North Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case No. 06-CP-29-1354

Court of Appeals Unpublished Opinion No. 2011-UP-291

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

v.

DLI Properties, LLC, Allen Tate Co., Inc., Melia C. Faile and Allen L. Cauthen,

of whom

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

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that copies of the *Brief Of Respondents Allen Tate Co., Inc. and Melia C. Faile* in the above-referenced case have been served upon opposing counsel by depositing in the United States mail addressed to the parties below on this 16th day of July, 2013.

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