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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Edgar W. Dickson

Civil Action No.: 2020-CP-32-00005
Appellate Case No. 2021-000597

R. Kent Porth and Panorama Point, LLC.....Appellants,

v.

Robert P. Wilkins, Jr., RPW Development, Inc.,
Southern Visions Realty, Inc., and
Consolidated Multiple Listing Service,
Inc.,.....Respondents.

APPELLANTS PETITION FOR REHEARING

The Appellants petition the Court for a rehearing pursuant to S.C. App. Ct. Rule 221 with respect to its opinion in this case which was issued on February 14, 2024 (the “Opinion”). This petition for rehearing is appropriate under Rule 221(c) as the Opinion had the effect of dismissing and/or finally deciding the Appellants’ appeal in this matter. The points which the Appellants assert were overlooked or misapprehended by the Court in the Opinion are set forth herein. References to the Appellants’ prior legal arguments and supporting authorities as set forth in the Initial Brief of the Appellants (the “Initial Brief”) and the Reply Brief of the Appellants (the “Reply Brief”)(collectively the “Appellants’ Briefs”) are included with respect to the various points set forth herein.

The Appellants first assert that the Opinion failed to apply the appropriate standard of review with respect to this **pre-answer** Motion to Dismiss pursuant to Rule 12(b)(6). As reflected in the Record on Appeal and in the Procedural History set forth in the Appellants' Initial Brief, the Respondents elected to file a pre-answer motion to dismiss instead of answering the Complaint and then filing a motion for summary judgment. In a post-answer motion for summary judgment, a circuit court may make any and all appropriate findings of fact with respect to issues raised in the motion for summary judgment. Both the Appellants and the Respondents would have the opportunity to establish an appropriate record through discovery and otherwise to support their arguments with respect to any motion for summary judgment. The Respondents elected to file their motion to dismiss based on the fact based defenses of the statute of limitations and laches at this pre-answer stage of this case with full knowledge of the appropriate standard of review under South Carolina law discussed below.

As discussed herein, the Appellants also assert that the Appellants' Briefs set forth multiple legal theories based on controlling South Carolina precedent, all of which was cited in the Appellants' Briefs, and which were not properly addressed in the Opinion. The various points and legal arguments which the Appellants assert the Court overlooked and/or misapprehended are identified below. Many of these legal issues and arguments overlap due to the complexity of this case.

I. The Opinion Incorrectly Addresses the Various Claims as if All Claims are based on Identical Facts and Improperly Decides Questions of Fact

As fully briefed at Issues II and XI and elsewhere in the Appellants Briefs, the allegations of the Complaint must be taken as true and must be "viewed in the light most favorable" to the Appellants at this pre-answer stage of this case, and the determination of when the Appellants had

actual or constructive notice of each and every separate and distinct claim for purposes of the application of any applicable statute of limitations is inherently factual. See Appellants' statement of the Standard of Review at page 11 of their Initial Brief. **At this point in this case, the Respondents have not filed an answer or otherwise denied** the factual allegations of the Complaint which support the Appellants' various and distinct causes of action including **but not limited to**: (i) that the Respondents failed to make the availability of the Property known to competing members of the CMLS in accordance with its rules, (ii) that the Respondents failed to obtain written "dual agency agreements" where the Respondents represented the purchasers of the Property, (iii) that the Respondents failed to effectively market the Property to the full real estate market, (iv) that the Respondents marketing of the Property was designed to assure that the Respondents could represent both the seller and the purchaser in the highest number of transactions possible, (v) that the marketing techniques of the Respondents resulted in below fair market sales prices and a slower than appropriate rate of sales, (vi) that Respondents failed to disclose conflicts of interest with respect to certain purchasers, (vii) that Respondents had created fraudulent documents to "paper the files" to conceal their various fiduciary breaches and associated illegal conduct, (viii) that the failure to comply with the rules of the CMLS and the statutory provisions of Title 40, Chapter 57 were "knowing" and "willful", and (ix) that the Appellants were unaware of any of these facts prior to January 10, 2017. **At this stage of the case**, these allegations must be taken as true as specifically alleged in the Complaint.

In Section 1 of the Opinion, all of the various and diverse causes of action, even though they are clearly based on separate and distinct factual foundations, are discussed as if the "discovery" aspect of the various statutes of limitations all turned on the same factual determination with no distinction or specificity. This is error as there are no factual allegations in

the Complaint or elsewhere in the Record sufficient to support this position. This case is extremely complex and diverse as it seeks to address a multitude of **different and distinct** alleged breaches of fiduciary duty, acts of fraud, and incidents of statutorily prohibited conduct by three different Respondents; all of which are based on a multitude of separate, distinct and, in many incidents, completely unrelated factual events. The Appellants assert that failure to identify the specific allegations in the Complaint which would irrefutably establish (i.e. the only possible inference from the factual allegation) that the Appellants were on actual or inquiry notice **of each and every separate and distinct claim** set forth in the Complaint is error. As examples, the Opinion does not specifically and separately address the various distinct causes of action such as the failure to disclose hidden conflicts of interest with certain purchasers by Respondent Wilkins and Anne Brooks (a licensed agent with Southern Visions Realty) as opposed to the failure of Southern Visions Realty to provide all competing real estate agents with the availability of the Property through the CMLS database in violation of the CMLS rules. The factual allegations which would be necessary to irrefutably establish actual or inquiry notice of these two examples are completely different and are not present anywhere in the Complaint or the Record. As a **limited and nonexclusive set of examples**, the Opinion fails to identify any factual allegation in the Complaint **which when taken in the light most favorable to the Appellants** would **irrefutably** establish that Appellants were on actual or constructive notice of (i) the Respondents' violations of the rules of the CMLS by which the availability of the Property was concealed from competing real estate agents and potential purchasers, (ii) the Respondents' self-dealing scheme of marketing primarily to potential purchasers whom they could represent in a dual agency capacity, (iii) the Respondents' creation of fraudulent documents and the intentional concealment of those fraudulent documents since at least May 16, 2011 (see Initial Brief at p. 10 and at Issue I), (iv) the Respondents' failure

in their fiduciary roles to disclose all conflicts of interest and business relationships with potential purchasers, and (v) the Respondents' disclosure of confidential information to potential purchasers in violation of their fiduciary duties of loyalty and confidentiality. The Complaint, which must be taken as true at this pre-answer stage of this case, expressly alleges that the Appellants were unaware of these facts until after January 10, 2017.

As an example, the Appellants point to the fact that the 3 year statute of limitations applicable to an action for fraud runs from the “discovery by the aggrieved party of the facts constituting the fraud” (emphasis added). S.C. Code Ann. §15-3-530(7). The “facts constituting the fraud” in this case were the various acts of intentional and knowing fiduciary nondisclosure by the Respondents. The Opinion fails to address the Appellants' prior argument in the Initial Brief that “the recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an investigation.” Reid v. Harbison Development Corp., 285 S.C. 557, 560, 330 S.E.2d 532 (S.C.Ct.App. 1985), *aff'd in part and remanded* 289 S.C. 319, 345 S.E.2d 492 (S.C. 1986). In Epstein v. Howell, 308 S.C. 528, 531, 419 S.E.2d 379 (S.C.Ct.App. 1992), the court cited the “often-cited case” of Halsell v. First National Bank, 48 Okla. 535, 150 P. 489 (1915) for the proposition that one in a fiduciary position cannot “practice fraud” and then successfully defend on the ground that the victim of the fraud is “charged with knowledge” of the misrepresented facts. The Appellants further argued in the Appellants' Briefs at Issue VI that an individual or entity in a fiduciary relationship with a licensed professional is justified in relying on the licensed professional even if reliance would not be justified in a non-fiduciary relationship. Epstein at 531.

As a specific and representative example, the Appellants first learned of a **material** undisclosed conflict of interest by a licensed agent of Southern Vision Realty which directly

resulted in a reduced sales price **when reviewing the documents first made available to the Appellants in August of 2018** (within any applicable 3 year statute of limitations) by the Respondents' prior law firm. Those documents contained a previously undisclosed email evidencing the Southern Visions Realty agent disclosing to a purchaser **who was the agent's personal banker** the Appellants' "bottom line" in violation of her fiduciary duties of confidentiality and loyalty to the Appellant. There are no facts in the Complaint or elsewhere in the Record of this case which could have possibly put the Appellants on actual or constructive notice of this type of fiduciary breach **as well as a voluminous number of other similar breaches of fiduciary duty by the various Respondents.**

The Opinion does not address the Respondents' knowing and willful violations of the rules of the CMLS which are an independent and primary basis of the Appellants' claims. (See Complaint ¶¶84-86, 129-141, 221-222, 359, 386-387, 409-411, 437, 449-473, 452-454, and 464-465). The Opinion did not identify a single allegation in the Complaint to demonstrate that the Appellants had knowledge, or could have had knowledge, of the CMLS rule violations, and the injuries arising from those violations, prior to January 10, 2017. As clearly alleged in the Complaint, the Appellants were not members of the CMLS and did not have access to the CMLS database.

The Opinion by failing to apply the correct standard of review to this pre-answer motion to dismiss effectively holds that the Appellants had an affirmative duty to assume, with no specific reason to do so, the Respondents had violated the various laws and rules governing their conduct as licensed professionals and violated their various fiduciary duties; thereby placing a greater burden on the Appellants to investigate the fiduciary conduct of the Respondents, than the burden

placed on the Respondents to satisfy their fiduciary duties and legal disclosure obligations to the Appellants.

The Lower Court's Order from which this appeal arose focused on two allegations of prior misconduct by Respondent Wilkins alone in his role as the developer and principal of Respondent RPW Development, Inc, **and which did not involve the Respondent Southern Visions Realty.** Those two factual incidents were completely unrelated to the conduct of Respondent Southern Visions Realty which is the subject of a multitude of claims in this lawsuit.

The Appellants assert that any factual findings with respect to the Appellants being on actual or inquiry notice of the various claims brought in this case is inappropriate at this pre-answer stage of this case under the standard of review mandated by Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 180, 826 S.E.2d 585, 587 (S.C. 2019). The Opinion simply states that the Appellants "were heavily involved in the sale and development of the Property" and that the Complaint "outlines events that occurred more than three years prior to the Appellants filing their complaint that would put them on inquiry notice, if not actual notice, that they may have a cause of action against the Respondents." The Opinion does identify the "events" and does not articulate the rationale for the determination that being "heavily involved" in the sale and development of the Property raised a sufficient red flags as to: (i) each and every separate and distinct breach of fiduciary duty, (ii) each and every separate and distinct alleged act of fraud, and (iii) each and every separate and distinct incident of illegal conduct by **each** of the three separate and distinct Respondents; **all of which are alleged to have been knowingly and intentionally concealed from the Appellants by the Respondents.** This allegation must be taken as true at this pre-answer stage of this case, and all inferences must be drawn in the light most favorable to the Appellants.

The Opinion does not address the controlling authorities cited by the Appellants at Issue II of the Appellants' Briefs that clearly hold that knowledge of a prior breach of fiduciary duty and/or an unrelated breach of fiduciary duty does not constitute notice of a subsequent or different breach of fiduciary duty by the same fiduciary. See Initial Brief at p. 18. The Opinion does not cite and the Appellants are unaware of any controlling authority which holds that knowledge of a fiduciary breach by one fiduciary (i.e. Respondent Wilkins) constitutes notice (actual, constructive or inquiry) of a separate and unrelated fiduciary breach by a **different** fiduciary (i.e. Southern Visions Realty).

As an illustrative example, the Opinion does not address the allegations of the Complaint that the Appellants did not have access to the rules of the CMLS, and would have had no way of knowing that the availability of the Property was being improperly and fraudulently hidden from other real agents and brokers in violation of the rules of the CMLS. This intentionally concealed act of self-dealing by Respondent Southern Visions Realty was a violation of the various fiduciary duties owed to the Appellants. The factual allegations in the Complaint with respect to the improper marketing of the Property and the self-dealing by the Respondents independently support the Appellants' breach of fiduciary duty claims and unfair trade practice claims against Respondent Southern Visions Realty at a minimum. See Initial Brief at p. 15-16.

The Appellants further assert that if the allegations of the Complaint provided an irrefutable basis for the dismissal of one or more specific claims against one or more specific Respondent, the balance of the claims must be allowed to proceed and may not be dismissed.

II. Negative Inferences Drawn from the Allegations in the Complaint

The Appellants assert that the Opinion fails to properly apply the law of South Carolina that a motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it

does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses” Skydive at 180. “If the facts and inferences drawn from the facts alleged in the complaint, **viewed in the light most favorable to the Appellant**, would entitle the Appellant to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper.”(emphasis added) Spence v. Spence, 368 S.C. 106, 116-117, 628 S.E.2d 869 (S.C. 2006). As discussed in Section I above, the Opinion states that the Appellants “were heavily involved in the sale and development of the Property” and that the Complaint “outlines events that occurred more than three years prior to the Appellants filing their complaint that would put them on inquiry notice, if not actual notice, that they may have a cause of action against the Respondents.” These two statements are indicative of the drawing of negative inferences from the allegations of the Complaint, and by ignoring the express and specific allegations of the Complaint that the Appellants did not know of any facts prior to January 10, 2017 which would have constituted actual, constructive or inquiry notice of the potential claims brought in this case.

An example of an improper negative inference is that the Opinion states that the “Appellants benefited from Respondents’ services, gaining over \$6 million in profit.” This **demonstrably false** negative inference has no foundation in the Record and is a prohibited finding of fact at this pre-answer stage of this case. The clear allegations of the Complaint (which have not been denied by the Respondents at this stage of the case) are that the Respondents engaged in illegal self-dealing in breach of their fiduciary duties to the Appellants, **and that the Respondents’ self-dealing resulted in below fair market sales prices**. If taken as true and viewed in the light most favorable to the Appellants, the Court may not make the factual finding that the Appellants “benefited” from the Respondents’ services.

Furthermore, the Opinion’s reference to the Appellants “gaining over \$6 million in profit” is incorrect as the Complaint and the Record on Appeal reflects just over \$6 million in **gross proceeds**. The Opinion fails to consider that the Record on Appeal also reflects that the Appellants spent approximately \$1,000,000 on infrastructure from those gross proceeds, paid over several hundred thousand dollars in development fees and real estate commissions from those gross proceeds, and additionally paid interest on construction loans and other costs from those gross proceeds. The Complaint and the Record reflect that the Property had been in the Appellants family for decades and much of the \$6 million in gross proceeds reflected the inherent value of the Property prior to it being developed into residential lots. The Complaint expressly alleges that the \$6 million in gross proceeds **was lower than it should have been as a direct result of the various fiduciary breaches and self-dealing of the Respondents**, and the Court is obligated to accept those allegations of the Complaint as true at this pre-answer stage of the case.

III. The Opinion Fails to Address the Effect of Respondents’ Fiduciary Status on the Application of the Statutes of Limitations.

The Opinion does not address the Appellants’ primary arguments and authorities fully set forth in Issue VI of the Appellants’ Briefs that the Respondents’ common law and statutory **fiduciary status as licensed real estate professionals** justified the Appellants’ reliance that the Respondents were carrying out their various duties and obligations in accordance with the requirements of applicable law, and were not breaching their various fiduciary duties in carrying out those duties and obligations. These arguments and authorities directly impact the application of any “discovery” statute of limitations and were not addressed in any manner in the Opinion. The Opinion does not address the Appellants’ legal arguments in Issue VI of the Appellants’ Briefs and

the controlling authorities cited therein with respect to reliance on a fiduciary being reasonable even when such reliance may have been inappropriate outside of the fiduciary context.

The Opinion also misstates the Appellants' arguments on this issue by stating in Section 1 that "Appellants argue the circuit court erred by ...; and (3) failing to find that Appellants' reliance on Respondent Wilkin's **status as an attorney** was a reasonable basis to not perform due diligence" (emphasis added). This misstates the Appellants' actual argument at Issue VI of the Appellants' Briefs which is that the Appellants' "**reliance on the fiduciary status of the Respondents, and** on Respondent Wilkins' status as a licensed attorney" (emphasis added) was a reasonable basis under applicable South Carolina common law for not performing due diligence on the fiduciary conduct of the Respondents prior to January 10, 2017 when the first "red flag" appeared with respect to the claims set forth in the Complaint. Respondent Wilkins' status as a licensed attorney was a **secondary but valid additional** basis for fiduciary reliance under the holding of True v. Monteith, 327 S.C. 116, 489 S.E.2d 615 (1997). The Complaint at ¶ 51 specifically alleges that Respondent Wilkins provided legal services to the Appellants. This allegation must be taken as true.

The Appellants also call the Court's attention to the correlation between the Respondents' fiduciary status as real estate professionals and the allegations of fraud discussed below in Section V below.

IV. Knowledge of the Law

As fully briefed in Issue V of the Appellants' Briefs, the Appellants assert that the Opinion incorrectly holds that the Appellants were charged with knowledge of the real estate brokerage laws contained in Title 40, Chapter 57 of the S.C. Code Annotated in direct contradiction of the specific statutory provisions of S.C. Code Ann. §§40-57-139, and in direct contradiction of the

statutorily enacted public policy of South Carolina as set forth in those specific statutory provisions. The clear language of S.C. Code Ann. §40-57-139 mandates that licensed real estate professionals must provide a detailed and accurate description of the law which governs a licensed real estate professional's relationship with a client. In a related section, S.C. Code Ann. §40-57-137(Q) expressly and unequivocally states that any common law concept that was inconsistent with the express provisions of Title 40, Chapter 57 were expressly superseded. The Appellants assert that in light of S.C. Code Ann. §40-57-137(Q) and §40-57-139, the Appellants were not charged with knowledge of the real estate brokerage laws **applicable only to the Respondents conduct and not applicable in any manner to the conduct of the Appellants**. The Opinion does not address the Appellants' argument and authorities on this issue as set forth at Issue V of the Appellants' Briefs.

The Appellants assert that the Opinion's reliance on Justice Kittridge's dissent in City of Newberry v. Newberry Electric Cooperative, 387 S.C. 254, 692 S.E.2d 510 (S.C. 2010) is misplaced as the law at issue in Newberry clearly applied to the conduct of all parties involved in that case. Additionally, Newberry did not involve a factual scenario where a party was in a fiduciary relationship operating under a clear and unambiguous statutory duty to disclose and explain the law which governed their fiduciary conduct as the Respondents were in this case.

The Appellants assert that even if they were charged with knowledge of the real estate brokerage laws of Title 40, Chapter 57 this imputed knowledge of the law would in no way affect trigger the start of any applicable statute of limitations with respect to the breach of fiduciary duty claims and unfair trade practice claims which are based on separate and distinct facts.

V. Effect of Allegations of Fraud, Illegal Conduct and the “Unclean Hands” Doctrine

In Issues I and III of the Appellants’ Briefs, the Appellants argued that the numerous and specific allegations of fraud under multiple provisions of South Carolina law constitute “unclean hands” on the part of the Respondents and provide multiple grounds for delaying the start of any applicable statute of limitations. Issue I of the Appellants’ Briefs specifically addresses two fraudulent listing agreements which irrefutably prove many of the Appellants’ various fraud claims under South Carolina law as alleged in the Complaint. The Appellants assert that the Respondents chose to file a pre-answer motion to dismiss instead of answering the Complaint in an attempt to avoid court sanctioned discovery into these various allegations of fraud and statutorily prohibited conduct as alleged in the Complaint. At this pre-answer stage of this case, **the factual allegations supporting the fraud claims must be taken as true** and viewed in the light most favorable to the Appellants. The Opinion does not address any of the Appellants’ legal arguments and cited authorities with respect to the legal impact the Complaint’s multitude of allegations of intentional fraud by the three fiduciaries has on the application of any applicable statute of limitations defense.

The Opinion also does not address the effect of the alleged illegality of the Respondents’ conduct under Title 40, Chapter 57 as fully briefed in the Appellants’ Briefs. In Issue III of the Appellants’ Briefs the Appellant argued with supporting authorities that the illegal and prohibited nature of the Respondents’ conduct either equitably barred the Respondents’ assertion of a statute of limitations defense, or effectively tolled the start of any applicable statute of limitations. The Supreme Court has stated that “the Court will not lend its assistance to carry out the terms of a contract that violates statutory law or public policy” (emphasis added). Ward v. West Oil Co., Inc., 387 S.C. 268, 274, 692 S.E.2d 516, 519 (S.C. 2010). The Appellants assert that the effect of the

Opinion is to assist the Respondents in their intentional and knowing fraudulent conduct which “violates statutory law or public policy” as discussed in Ward.

The Appellants assert that the doctrine of “unclean hands” applies to equitable defenses raised by defendants and does not only apply to plaintiffs, and that the Opinion improperly distinguishes Vicary v. Town of Awendaw, 427 S.C. 48, 828 S.E.2d 229 (Ct. App. 2019). The Appellants assert that the Respondents’ alleged fraudulent conduct, their alleged knowing and willful concealment of their conflicts of interest and self-dealing, their concealment of their violations of the CMLS rules, and their alleged illegal activity in violation of clear and unambiguous statutory provisions of South Carolina constitute “unclean hands” under South Carolina law. The Appellants assert that the Opinion’s limiting the “unclean hands” theory of Vicary to a fact situation involving “an annexation” by a governmental entity is error. The court in Vicary specifically discussed the town’s false statements and deception with reference to the **general equitable principles** of South Carolina law. Vicary at 55-56 (affirming that statutes of limitations are “affirmative defenses that may be waived and are subject to equitable doctrines, including estoppel and tolling”). The Vicary opinion contains no language indicating that the equitable doctrine of “unclean hands” doctrine it applied which would have been limited to the annexation context. Furthermore the Respondents in this case, just as in Vicary, are alleged to have violated statutorily mandated disclosure requirements.

VI. Equitable Nature of Claims and Application of Laches

The Opinion does not make a final determination of whether the Appellants’ claims (or some of them) are equitable claims. As set fully argued at Issue IV of the Appellants Briefs, the Appellants assert that Thomerson v. Devito, 430 S.C. 246, 844 S.E.2d 378 (2020) controls many of the Appellants’ claims, and that those claims are not subject to any applicable statute of

limitations defense. Instead, the Opinion simply states in section 3 that “if the claims are equitable, they are barred by laches” (emphasis added). The finding that laches would apply “if” the claims are equitable **is an improper factual finding at this pre-answer stage of this case.** Since the equitable defense of laches is inherently **factual** and would require specific findings of fact as to the **reasonableness** of any delay in filing a lawsuit in light of the allegations of intentional fraud by a fiduciary, it is improper to dismiss those causes of action on the factual basis of laches at this pre-answer stage of this case. **In light of the credible allegations of fraud and fiduciary reliance set forth in the Complaint,** the question of the reasonableness or unreasonableness of any delay is a fact question to be determined at trial. The Appellants’ arguments and authority with respect to the issue of laches are fully briefed at Issue VIII of the Appellants’ Briefs and the Court does not address any of those arguments in the Opinion.

Further, the Appellants assert that if the allegations of the Complaint are taken as true and viewed in the light most favorable to the Appellants, there can be no finding of prejudice to the Respondents due to their own intentional acts and conduct. It will be proven irrefutably at trial that the Respondents actually still had all of the documents created in the development of the Property in 2017 when the Appellants requested copies of all documents as part of their appropriate and timely due diligence. If proven, there would be no prejudice to the Respondents. Appellants will prove this fact at trial with written emails and letters from the Respondents’ prior law firm which delivered copies of all of those documents in August of 2018 as a result of the Appellants’ demands connected with their due diligence into the discoveries of January 10, 2017. The question of whether laches applies is a question of fact to be determined at trial.

The Opinion fails to address the significance of the Fraudulent Documents discussed in Issue I of the Appellants’ Briefs which indicate that the Respondents were taking intentional and

knowing actions to cover up their fraudulent and illegal conduct, and that those Fraudulent Documents were affirmatively hidden from the Appellants since at least May 16, 2011. See Initial Brief p. 18. The Complaint clearly alleges that the Appellants requested copies of the relevant documents during the 5 year document retention period. The inference from the Complaint which must be drawn at this pre-answer stage of this case is that the Respondents still had the documents produced in the development of the Property and therefore no prejudice could exist. **The Respondents have not filed an answer to the Complaint asserting that they destroyed documents under the 5-year document retention rule referenced in the Opinion**, and no grounds for such a factual finding of prejudice exists in the allegations of the Complaint.

The requirements for the application of the equitable doctrine of laches are not met in this case and are certainly not met by the allegations of the Complaint since the Respondents cannot be prejudiced by the success of their own illegal, fraudulent and deceptive scheme of self-dealing which was undertaken knowingly and willfully. In Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (S.C.Ct.App. 1999), the court held that the party asserting laches must show it has been materially prejudiced by the other parties delay. Id. at 297. In the present case, the purpose of creating the Fraudulent Documents (see Issue I of the Appellants' Briefs) was to assure that the Respondents' scheme of self-dealing was never discovered.

VII. The Opinion fails to Correctly apply the holding of Darby v. Furman

The Opinion improperly distinguishes Darby v. Furman, 334 S.C. 343, 513 S.E.2d 848 (1999) and fails to correctly apply the common law of fiduciary duty as set forth therein. While the facts of Darby dealt with a situation involving a real estate agent being a participant in a purchasing entity, the holding in Darby clearly applied to the totality of the fiduciary duties and obligations of a licensed real estate agent or broker in South Carolina. The court in Darby expressly

referred to the fact that the fiduciary duties and obligations of real estate professionals were codified in Title 40, Chapter 57 after the filing of the original complaint in Darby. The holding in Darby was not limited to situations involving a real estate agent's failure to disclose their participation as a purchaser of the subject property, but clearly addressed (on the facts of that case) the importance and seriousness of all of a licensed real estate agent's fiduciary obligations to the client. Darby at 347 ("The duty of an agent to make full disclosure to his principal of all material facts relevant to the agency is fundamental to the fiduciary relationship of principal and agent.").

In Darby, the Supreme Court specifically addressed one of the specific allegations of the Appellants' Complaint by discussing the statutory obligation for a real estate broker to obtain a "dual agency agreement" under S.C. Code Ann. §40-57-137(M) which states that a real estate broker "may act as a disclosed dual agent only with the prior informed and written consent of all parties." Darby at 348. In the accompanying footnote 3, the Court stated that this statutory provision "governs real estate brokers acting as a 'dual agent' in transactions." Id. The Appellants assert that the Darby court's statement as clearly stating that failure to obtain a written dual agency agreement would render the Respondents' conduct as prohibited under South Carolina statutory law. The Respondents have not denied the allegation of the Complaint that they did not obtain written dual agency agreements with "prior informed and written consent of all parties [both seller and purchaser]" by filing an answer. The Appellants are prepared to prove at trial that no such written dual agency agreements were ever obtained through the use of sworn testimony of purchasers of the Property.

VIII. Private Cause of Action for Breach of Fiduciary Duty

The Appellants assert that the Opinion is incorrect in holding that a common law breach of fiduciary duty claim, such as the one brought by the Appellants in this case, cannot be based in

whole or part on alleged violations of the enumerated fiduciary duty provisions of Title 40, Chapter 57. The Appellants addressed this issue in Issue VI of the Appellants' Briefs, and the Opinion failed to address the specific provisions of S.C. Code Ann. §40-57-137(Q) which expressly authorize such common law fiduciary breach causes of action. At Issue VI of the Appellants' Briefs additional statutory provisions and controlling authorities are set forth in support of this argument. The Opinion does not properly address those additional legal authorities.

The Appellants further assert that even if violations of the statutorily enumerated fiduciary duty provisions of Title 40, Chapter 57 could not be the basis of a common law breach of fiduciary duty cause of action, the Opinion fails to address the other separate and distinct factual foundations for the Appellants' various and distinct breach of fiduciary duty claims. The Complaint contains a multitude of allegations of breaches of fiduciary duty **other than** the alleged violations of the statutory provisions of Title 40, Chapter 57. These allegations include but are not limited to the allegations of the CMLS rule violations, self-dealing, failure to disclose conflicts of interest with purchasers, all of the allegations of fraud, and the creation of fraudulent documents.

As more fully set forth at Issue VI of the Appellants' Briefs, South Carolina common law clearly and unequivocally provides that an injured party may bring a common law breach of fiduciary duty action for breaches of any applicable fiduciary duty. Under the rationale of the Opinion, the fact that the South Carolina Legislature chose to specifically enumerate many of the obligations of a real estate professional with respect to disclosure, that statutory enumeration eliminated a client's ability to bring an action for the violation of those specific fiduciary disclosure obligations. The fiduciary violation addressed in Darby was specifically codified in S.C. Code Ann. §40-57-135(D) after the filing of the Darby complaint. Under the rationale of the Opinion, the plaintiff in Darby would now be precluded from bringing a breach of fiduciary duty claim for

that very same breach of duty because the conduct in Darby is now expressly enumerated in Title 40, Chapter 57.

IX. Appellants' Request for Relief Not Limited to Disgorgement

The Opinion incorrectly suggests that the Complaint only sought disgorgement of the commissions and fees paid to the Respondents and makes the determination that disgorgement would not be appropriate on the facts of this case. The Opinion does not address the specific allegations of the Complaint that seek damages for below market sales prices, increased interest and other costs, and damages under the Unfair Trade Practice Act.

The Appellants assert that in section 5 of the Opinion, the court misapplies the law of Darby with respect to the remedy of disgorgement by stating that Darby would not support disgorgement in this case. The Opinion does not address the legal authorities cited in Issue IV of the Appellants' Brief where the Appellants argue that disgorgement or restitution is an appropriate remedy for fiduciary breaches under applicable South Carolina law. The determination of whether restitution or disgorgement is the appropriate equitable remedy for a particular breach of fiduciary duty is an inherently factual determination which may not be made at this pre-answer stage of this case. The Darby court expressly stated that the real estate agent in that case must have "satisfied all of his fiduciary duties and earned the commission" thereby clearly indicating that breaches of fiduciary duty such as loyalty and disclosure may be grounds for the forfeiture of a commission by a real estate agent.

X. Other Arguments and Issues Not Addressed Pursuant to Section 6 of the Opinion

The Appellants reassert all other arguments contained the Appellants' Briefs which were not addressed pursuant to Section 6 of the Opinion due to the Opinion's holding that the resolution of the statute of limitations and laches issues are dispositive of these arguments.

CONCLUSION

For the reasons set forth above, the Appellants request that the Court reconsider its Opinion. The Appellants request that for the reasons argued in the Appellants' Briefs, and supplemented and clarified herein, the Court reverse the Lower Court's Order thereby requiring the Respondents to file an answer to the Complaint so that an appropriate factual record can be developed in this case.

Respectfully submitted,

s/ Clarence Davis
Clarence Davis (SC Bar I.D. #1581)
GRIFFIN | DAVIS LLC
4408 Forest Drive, Suite 300 (29206)
Post Office Box 999
Columbia, SC 29202
(803) 744-0800
cdavis@griffindavislaw.com

Attorney for Appellants

February 28, 2024

THE STATE OF SOUTH CAROLINA
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APPEAL FROM LEXINGTON COUNTY
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PROOF OF SERVICE

I hereby certify that I have served the Appellants Petition for Rehearing by emailing it to
counsel for other parties at the email addresses below this 28th day of February 2024:

Eric S. Bland
Bland Richter, LLP
105 West Main Street, Suite D
Lexington, SC 29072
ericbland@blandrichter.com

Ronald L. Richter, Jr.
Scott M. Mongillo
18 Broad Street, Mezzanine
Charleston, South Carolina 29401
ronnie@blandrichter.com
scott@blandrichter.com

Steven R. Kropski
David W. Overstreet
Earhart Overstreet LLC
P.O. Box 22528
Charleston, SC 29413
steve.kropski@earhartoverstreet.com
david@earhartoverstreet.com

s/ Clarence Davis
Clarence Davis (SC Bar I.D. #1581)
GRIFFIN | DAVIS LLC
4408 Forest Drive, Suite 300 (29206)
Post Office Box 999
Columbia, SC 29202
(803) 744-0800
cdavis@griffindavislaw.com

Attorney for Appellants