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**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

Edgar W. Dickson

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Civil Action No.: 2020-CP-32-00005

Appellate Case No. 2021-000597

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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.

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**PETITION FOR WRIT OF CERTIORARI  
TO THE SUPREME COURT**

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This Petition for a Writ of Certiorari is filed pursuant to Rule 242 based on the fact that the opinion of the Court of Appeals applied an incorrect standard of review with respect to this pre-answer motion to dismiss, and the opinion is in direct conflict with prior decisions of the Supreme Court on multiple controlling issues. Furthermore, the opinion of the Court of Appeals raises two novel questions of law and effectively negates the statutorily enumerated fiduciary duty provisions applicable to real estate brokers and real estate agents set forth in S.C. Code §40-57-10 *et. seq.*

### **I. OVERVIEW OF THE CASE**

The Appellants filed this multi-faceted and complex civil action for breach of fiduciary duty, violations of the South Carolina Unfair Trade Practices Act (the “UTPA”), fraud, and other related causes of action on January 2, 2020 in the Court of Common Pleas for Lexington County (the “Complaint”) against Robert P. Wilkins, Jr. (“Wilkins”), RPW Development, Inc. (“RPW”), and Southern Visions Realty, Inc. (“SVR”)(collectively the “Respondents”).<sup>1</sup> This case arose from the development and sale of prime waterfront real estate on Lake Murray and involves 23 separate transactions totaling over \$6 million in gross proceeds. As specifically alleged in the Complaint, the three separate and distinct Respondents failed to fulfill their separate and distinct fiduciary duties, including primarily their fiduciary duties of loyalty and disclosure, in a manner so as to obtain the maximum economic return to the Appellants as their clients.

The Respondents breached their various fiduciary duties (i) by engaging in intentional and knowing acts of self-dealing designed to hide the availability of the property from competing real estate agents and their clients in order to only sell to purchasers who could also be represented by SVR in a statutorily prohibited “dual agency” scenario, and (ii) by engaging in devious acts of

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<sup>1</sup> The Consolidated Multiple Listing Service (the “CMLS”) was named in the Complaint, but the Appellants did not serve the CMLS, and are not pursuing any claims against the CMLS.

concealment and fraud, including but not limited to the failure to comply with the specific and unambiguous fiduciary disclosure and consent requirements of Title 40, Chapter 57. The Respondents intentional acts of concealment included the creation of a fake and fraudulent set of documents to conceal their unfair trade practices from potential audit by the Consolidated Multiple Listing Service (the “CMLS”). The Respondent’s conduct involved separate and distinct, but coordinated, actions by two separate corporations and by multiple licensed real estate agents, all of which worked in a coordinated manner to put the financial interests of the Respondents above the financial interests of the Appellants with whom they had a fiduciary relationship. The Complaint alleges a substantial number of (i) separate and distinct fiduciary breaches, (ii) separate and distinct acts of extrinsic and intrinsic fraud, (iii) separate and distinct violations of statutory law, and (iv) separate and distinct instances of unfair and deceptive trade practices which negatively impacted several thousand competing real estate brokers and agents who were members of the CMLS; all of which damaged the Appellants by generating below fair market value sales prices and by producing other substantial negative economic consequences.

The Complaint alleges with specificity the factual events of January 10, 2017 which for the first time put the Appellants on **inquiry notice** of the separate and distinct claims brought in this case. The Complaint further alleges with specificity the due diligence with respect to those claims which was immediately initiated as a result of the events of January 10, 2017. The Complaint was filed on January 2, 2020 which was **within 3 years of the events which first put the Appellants on notice inquiry** of the particular claims set forth in the Complaint.

## **II. PROCEDURAL HISTORY**

The Complaint was filed on January 2, 2017. The Respondents did not file an answer to the Complaint pursuant to Rule 8(b); instead on May 6, 2020, the Respondents filed a pre-answer

Motion to Dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure seeking to dismiss the Complaint based on the assertion that all causes of action were barred by a statute of limitations. On October 9, 2020, the Respondents filed an Amended Motion to Dismiss reasserting the statute of limitations defense and moving to “dismiss the Complaint on the grounds that the facts as stated do not give rise to a cause of action.” A hearing was held in front of Judge Edgar W. Dickson on December 16, 2020, and on February 16, 2021, Judge Dickson entered an Order Granting Motion to Dismiss (the “Order”). On February 26, 2021, the Appellants filed a timely Motion to Reconsider under Rule 59(e). On May 5, 2021 the Lower Court denied Appellants’ Motion to Reconsider and issued an order leaving the Order in effect. On June 4, 2021, the Appellants filed a timely Notice of Intent to Appeal pursuant to Rule 203 of the South Carolina Appellate Court Rules. The Court of Appeals heard oral arguments on December 5, 2023, and issued its opinion affirming the dismissal of the case on February 14, 2024. The Appellants filed a timely Petition for Rehearing on February 28, 2024. The Court of Appeals denied the Petition for Rehearing on March 8, 2024.

### **III. SUMMARY OF KEY FACTS OF THE CASE**

This case is a complex and voluminous compilation of a large number of separate and distinct causes of action against three separate and distinct Respondents. All three Respondents were operating in separate and distinct fiduciary capacities with respect to all matters which are the subject of this case. This case involves claims under the UTPA which are separate and distinct from the other causes of action, although they arise from many of the same facts. The Complaint alleges that the Respondents engaged in a knowing and intentional scheme of “unfair or deceptive” trade practices that were designed to hide available properties from several thousand competing real estate brokers and agents who were dues paying members of the CMLS by intentionally and

knowingly violating the clear and unambiguous rules of the CMLS, and the CMLS membership agreement which required all of the Respondents' available properties to be posted in the CMLS database within 48 hours and remain in the database at all relevant times. The Appellants discovered through their exhaustive due diligence initiated immediately after the “discovery” event on January 10, 2017, that the available properties had been improperly hidden from competing real estate brokers and agents for approximately 83% of the time the properties were being “marketed” by the Respondents.

As alleged in the Complaint, the Respondents intentionally and knowingly failed to comply with substantially all of the separate and distinct fiduciary disclosure provisions of Title 40, Chapter 57 as an integral step in concealing the Respondents' various acts of self-dealing. **Evidence of extrinsic fraud related to the breaches of the statutorily mandated fiduciary disclosure requirements was discovered by the Appellants a mere 42 days prior to the filing of the Complaint on January 2, 2020,** when attorneys for the Respondents finally provided two examples of fake and fraudulent “listing agreements” (dated May 16, 2011 and November 11, 2012) which were mandated under S.C. Code Ann. §40-57-135(C)(4).

As stated earlier, the Respondents made a pre-answer motion to dismiss under Rule 12(b)(6) and have not filed an answer to the Complaint pursuant to Rule 8(b). As such, the Respondents have never denied any of the allegations of the Complaint, including but not limited to (i) that they violated the rules of CMLS by hiding listings from competing brokers and agents, (ii) that they failed to obtain written dual agency agreements required by S.C. Code Ann. §40-57-137(M)(1), (iii) that they failed to disclose prior and/or existing business relationships with multiple purchasers, (iv) that they improperly disclosed the Appellants' “bottom line” price to potential purchasers with whom they had an undisclosed, existing banking relationship in violation

of their fiduciary duty of loyalty, (v) that they failed to obtain listing agreements mandated by S.C. Code Ann. §40-57-135(C)(4); and (vi) that they failed to make the disclosures of applicable law and fiduciary standards mandated by S.C. Code Ann. §40-57-139.

#### **IV. SUMMARY OF THE REASONS FOR THE PETITION**

As set forth in this Petition, the opinion of the Court of Appeals is primarily based on a **pre-answer** factual determination of unpleaded statute of limitations and laches defenses in violation of the appropriate standard of review at this stage of this case, and which denies the Appellants the right to establish a record of and litigate the validity of its numerous separate and distinct claims. As more fully discussed in this Petition, the opinion of the Court of Appeals affirmed the Circuit Court's granting of the pre-answer Rule 12(b)(6) motion to dismiss (i) by relying on prohibited negative inferences against the Appellants drawn from the allegations of the Complaint, (ii) by making and relying on pre-answer factual determinations which have no support in the Record of this case, (iii) by improperly ruling on unpleaded affirmative and equitable defenses of the statute of limitations and laches while failing to properly apply controlling Supreme Court decisions with respect to the application of those two defenses; (iv) by incorrectly ruling that no private right of action is authorized (i) under the statutorily enumerated fiduciary duties owed by licensed real estate brokers and agents to their clients under S.C. Code Ann. §40-57-137(A), or under the applicable fiduciary disclosure and consent mandates of S.C. Code Ann. §§40-57-135, 137 and 139. Additionally, the opinion of the Court of Appeals raises two novel issues of law set forth in subpart B of this Section IV, and failed to rule on multiple issues raised in the Appellants appeal which are identified in subpart C of this Section IV.

Concise statements of the issues presented by this Petition are set forth below. The detailed arguments and the authorities supporting those arguments are set forth in Section V of this Petition.

### **A. The Court of Appeals Opinion is Contrary to Prior Supreme Court Decisions**

1. The opinion of the Court of Appeals violated the appropriate standard of review for a pre-answer Rule 12(b)(6) motion to dismiss by going beyond testing the sufficiency of the Complaint.

2. The opinion of the Court of Appeals failed to determine which of the Appellants' separate and distinct causes of action are legal in nature, to then identify the separate and distinct "discovery date" for each and every one of those separate and distinct causes of action which were determined to be legal in nature.

3. The opinion of the Court of Appeals failed to consider the issue of "fiduciary reliance" when making the premature factual determination of the dates of "discovery" for purposes of applying any applicable statute of limitations.

4. The opinion of the Court of Appeals held that violations of a licensed real estate broker or agent's statutory and common law fiduciary duties, including the specific statutorily mandated fiduciary duties of loyalty and disclosure as expressly set forth in S.C. Code Ann. §§40-57-135, 137 and 139 do not support a private cause of action by a damaged client.

5. The opinion of the Court of Appeals failed to determine which of the various and distinct claims of the Appellants were equitable in nature and therefore not subject to any statute of limitations under the Supreme Court's holding in Thomerson v. Devito, 430 S.C. 246, 844 S.E.2d 378 (S.C. 2020).

6. The opinion of the Court of Appeals failed to abide by the prior decisions of the Supreme Court on the application of the equitable defense of laches.

### **B. The Court of Appeals Opinion Raises Two Novel Questions of Law**

7. This case presents the novel question of law as to whether the equitable doctrine of “unclean hands” may act as an equitable bar to the assertion of a statute of limitations defense or the equitable defense of laches.

8. This case presents a novel question of law as to whether a plaintiff will be charged with “knowledge of the law” applicable to licensed real estate brokers and agents when the Respondents, in their fiduciary roles, were statutorily required to disclose and explain the relevant law pursuant to S.C. Code §40-57-139 and failed to do so.

### **C. The Court of Appeals Failed to Rule on Issues Raised by the Appellants**

Pursuant to Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999), the Court of Appeals declined to address the remaining issues raised on appeal by the Appellants in Issues I, IX, X, XI and XII of the Appellants’ appeal briefs which the Appellants contend are indispensable rulings at this pre-answer stage of this case.

## **V. ARGUMENTS**

**1. The opinion of the Court of Appeals violated the appropriate standard of review for a pre-answer Rule 12(b)(6) motion to dismiss by going beyond testing the sufficiency of the Complaint.**

**a. The opinion of the Court of Appeals violated the appropriate standard of review for a pre-answer Rule 12(b)(6) motion to dismiss by drawing negative inferences from the allegations of the Complaint.**

As argued in Issues II and XI of the Appellants’ appeal briefs, at this pre-answer stage of this case, the Respondents’ motion to dismiss should go no further than to test the sufficiency of the Appellants’ Complaint, and should not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses. Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 180, 826 S.E.2d 585, 588 (S.C. 2019). “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.” Spence v. Spence, 368 S.C. 106, 116-117, 628 S.E.2d 869 (S.C. 2006).

At this stage of this case, the Respondents have not yet filed a responsive pleading pursuant to Rule 8(b) and have not (i) denied any of the allegations of the Complaint, and/or (ii) have not pleaded any affirmative defenses such as the statute of limitations and/or laches which formed the basis of the Rule 12(b)(6) motion to dismiss.

The express allegations of the Complaint are that the Appellants were not put on inquiry notice of any of the separate and distinct causes of action against the three separate and distinct Respondents until January 10, 2017. There are no allegations in the Complaint which contradict these allegations; and none of which have been denied by the Respondent pursuant to Rule 8(b).

**b. The opinion of the Court of Appeals violated the appropriate standard of review for a pre-answer Rule 12(b)(6) motion to dismiss by making factual determinations on quintessential fact issues such as the date of discovery of each of the separate and distinct causes of action.**

As argued in Issues II and XI of the Appellants’ appeal briefs, at this pre-answer stage in this case, the Respondents have not formally denied the allegations of the Complaint pursuant to Rule 8(b), nor have the Respondents pleaded any facts to support the affirmative defenses of the statute of limitations and laches as required by Rule 8(b). The Supreme Court held in Walbeck v. The I’On Co., 439 S.C. 568, 889 S.E.2d 537 (S.C. 2023) that “the burden of establishing the bar of the statute of limitations rests upon the one interposing it ... and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide.” Walbeck at 581 (citing Brown v. Finger, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962)). “Specifically, the question of when a plaintiff discovered, or should have discovered the alleged harm is for the jury to decide because it is an objective question.” Id.

The Complaint contains specific allegations that the Appellants did not have actual or constructive notice of any of the multitude of separate and distinct causes of action which are the subject of this case. Furthermore, the opinion of the Court of Appeals denies the Appellants the right and opportunity to even identify on the record and present the specific facts of each of the separate and distinct fiduciary breaches, the separate and distinct acts of intentional fraud, and the separate and distinct acts of unfair and deceptive trade practices; and denies the Appellants the opportunity to establish the facts on the record of the multiple and different acts of intentional concealment of this wrongful conduct from the Appellants. As an example, the Appellants specifically pleaded at ¶317 of the Complaint that the files produced to the Appellants in their post January 10, 2017 due diligence efforts had been “purged” of relevant documents. The opinion of the Court of Appeals also denies the Appellants the opportunity to develop on the record the steps taken by the Respondents to hide the availability of the property from several thousand competing real estate professionals who were members of the CMLS and their clients who were potential purchasers. The Appellants contend that the question of when a plaintiff discovered or should have discovered the alleged harm from a fiduciary breach, from a fraudulent act of concealment, or from an intentionally concealed unfair or deceptive trade practice is for the trier of fact to determine after the development of a sufficient record in accordance with the S.C. Rules of Civil Procedure (the “Rules”).

**2. The opinion of the Court of Appeals failed to identify a “discovery date” for each and every one of the separate and distinct causes of action which are legal in nature.**

The Appellants contend that in considering a pre-answer Rule 12(b)(6) motion to dismiss, unpleaded, affirmative defenses should not be considered. **If** it were appropriate at this pre-answer stage of this case to reach the factual issues related to the “dates of discovery” of the separate and distinct causes of action against each of the three separate and distinct Respondents as alleged in

the Complaint, then the opinion of the Court of Appeals failed to correctly apply existing law on this issue.

Our appellate courts have consistently ruled that knowledge of a prior, distinct breach of fiduciary duty does not trigger the statute of limitations for other unrelated and separately actionable breaches by the same party, and certainly does not trigger the running of the statute of limitations on breaches of fiduciary duty by separate and distinct parties. McAlhany v. Carter, 415 S.C. 54, 66, 781 S.E.2d 105, 112 (S.C.Ct.App. 2015)(knowledge of termite damage was not knowledge of mold damage for purposes of statute of limitations); Holly Woods Ass'n of Owners v. Hiller, 392 S.C. 172, 184-185, 708 S.E.2d 787 (S.C.Ct.App. 2011)(litigation was based on development problems discovered years later than similar problems which plaintiffs had discovered earlier in different areas of the development); see also State v. Ortho-McNeil-Janssen Pharms, Inc., 414 S.C. 33, 78, 777 S.E.2d 176 (S.C. 2015)(discussing the “inequities that would arise if the expiration of the statute of limitations period following a first breach of duty or instance of misconduct were treated as sufficient to bar suit for any subsequent breach or misconduct.”).

The opinion of the Court of Appeals held that to the extent that the Appellants' causes of action are legal in nature, all applicable statutes of limitation were triggered because “the complaint makes clear 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 Respondents.” The opinion of the Court of Appeals makes no effort to identify what factual aspect of being “heavily involved” in this real estate project as owners of the property could have possibly put the Appellants on notice of the Respondents' intentional fiduciary breaches and acts of fraud which were actively and intentionally concealed

from the Appellants. This **material negative inference was improper at this pre-answer stage of this case** and is not supported by the record.

At no point in its per curiam opinion did the Court of Appeals identify a single factual allegation in the Complaint which was related to any of the separate and distinct causes of action; much less identify separately specific facts related to each and every one of the separate and distinct causes of action against each separate Respondent. Furthermore, the opinion of the Court of Appeals never identifies or in any manner discusses the separate and distinct injuries pleaded in the Complaint; nor does the opinion address how each separate and distinct injury could have been discovered prior to January 10, 2017.

As a first example, one of the separate and distinct fiduciary breaches is that Anne Brooks, a licensed agent with Respondent SVR disclosed the Appellants' "bottom line" price in negotiations with a purchaser who was Ms. Brooks' personal mortgage loan officer and who had made business loans to another real estate development in which Ms. Brooks was a principal investor. There are no factual allegations in the Complaint which could possibly have put the Appellants on notice of this claim. This flagrant fiduciary breach of loyalty and disclosure was first discovered by the Appellants when a private email (previously undisclosed to the Appellants) was first produced to the Appellants on August 28, 2018 (a little over 16 months prior to the filing of the Complaint) by the Respondents' prior attorneys.

As a second example, Respondent SVR was hiding the availability of the various lots from competing members of the CMLS in flagrant violation of the rules of the CMLS and the CMLS membership agreement in order to market the lots to potential purchasers who could be represented by SVR. Such dual representation is statutorily prohibited without a properly executed "dual agency" agreement under S.C. Code Ann. §40-57-137(M)(1) which must be obtained from both

the seller and the purchaser (after informed consent is obtained through full and adequate fiduciary disclosure). The Appellants were not members of the CMLS and did not have access to the CMLS database or the confidential CMLS rules prior to making arrangements for such access to perform their necessary due diligence after January 10, 2017. There are no allegations in the Complaint which could possibly form the basis for the Appellants being on notice of these potential claims for breach of fiduciary duty, fraud and unfair trade practices arising from the CMLS rule violations prior to January 10, 2017.

**3. The opinion of the Court of Appeals failed to consider the issue of “fiduciary reliance” when determining the date of “discovery” for purposes of applying any applicable statute of limitations.**

The Appellants contend that in considering a pre-answer Rule 12(b)(6) motion to dismiss, unpleaded, affirmative defenses should not be considered. If it were appropriate at this pre-answer stage of this case to reach the factual issues related to the “dates of discovery” of the separate and distinct causes of action against each of the three separate and distinct Respondents, the opinion of the Court of Appeals failed to apply the principles set forth in the Supreme Court’s prior decisions on justifiable reliance on the Respondents’ fiduciary status as licensed real estate brokers and agents, and on Respondent Wilkins’ status as a licensed attorney in South Carolina.

“Real estate agents occupy a fiduciary relationship with their clients and are under a legal obligation as well as a high moral duty to give loyal service to the principal.” Darby v. The Furman Co. Inc., 334 S.C. 343, 347-48, 513 S.E.2d 848 (S.C. 1999). “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” (emphasis added). Darby at 347-348. The Court of Appeals has previously ruled that “[p]arties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is

triggered, silence may constitute fraud”(emphasis added). Ellie v. Miccichi, 358 S.C. 78, 594 S.E.2d 485 (S.C.Ct.App. 2004). “Nondisclosure becomes fraudulent concealment only **when it is the duty of the party having knowledge of the facts to make them known to the other party to the transaction**” (emphasis added). Lawson v. Citizens S. Natl. Bank of S.C., 259 S.C. 477, 481-82, 193 S.E.2d 124, 126 (1972).

The Respondents’ silence while under a fiduciary duty to speak constituted fraud, and therefore estopped them from asserting the statute of limitations or laches as a defense. “Estoppel by silence arises where a person owing another a duty to speak refrains from doing so and thereby leads the other to believe in the existence of an erroneous state of facts.” Southern Development Land Golf Co. v. S.C. Public Serv. Auth., 311 S.C. 29, 33, 426 S.E.2d 748, 751 (S.C 1993).

In True v. Monteith, 327 S.C. 116, 489 S.E.2d 615 (S.C. 1997), the South Carolina Supreme Court addressed the application of the “discovery rule” in the context of a fiduciary relationship with a licensed attorney. The Court allowed a legal malpractice action filed in 1993 to proceed although filed 20 years after the conduct which occurred in 1973, holding that the Appellant properly brought the action within 3 years of the “discovery” of the cause of action even though the “injury” was apparent for at least 20 years. The court stated that “knowledge of an injury alone does not, *a fortiori*, give rise to a suspicion of any impropriety by her attorney.” True at 120. “[A]bsent other facts, the client should be able to rely on the attorney’s advice and should be able to follow this advice without fear the attorney is not acting in the client’s best interest” (emphasis added). Id.

The issue of what is reasonable due diligence in **the context of a fiduciary relationship involving intentional acts of fraud is a question of fact**; and is not an issue to be addressed at the pre-answer stage of this case.

**4. The opinion of the Court of Appeals held that violations of a licensed real estate broker or agent’s statutory and common law fiduciary duties, including in part the specific duties of loyalty and disclosure as expressly set forth in S.C. Code Ann. §§40-57-135, 137 and 139 do not support a private cause of action by a damaged client.**

The opinion of the Court of Appeals misapplied the principles set forth by the Supreme Court in Fulbright v. Spinnaker Resorts, Inc., 420 S.C. 265, 802 S.E.2d 794 (S.C. 2017) where it held that the provisions of Title 40, Chapter 57 (e.g. §§40-57-135, 137 and 139), enumerate specific fiduciary duties which are expressly and unequivocally owed to the clients of licensed real estate brokers and real estate agents, but does not create a right on behalf of those clients to bring a private cause of action for breach of fiduciary duty. In arriving at its holding, the Court of Appeals (i) ignores the clear and unambiguous language of S.C. Code Ann. §40-57-137(Q) authorizing private causes of action, and (ii) is directly contrary to the Supreme Court’s prior holding in Darby v. The Furman Co. Inc., 334 S.C. 343, 347-48, 513 S.E.2d 848 (S.C. 1999).

The Court of Appeals ignores the clear and unambiguous language of S.C. Code Ann. §40-57-137(Q) which expressly provides that “[*e*]xcept as otherwise stated, nothing in the section precludes an injured party from bringing a cause of action against licensees, their companies, or their brokers-in-charge”(emphasis added). In S.C. Code Ann. §40-57-137(A) the legislature expressly provides that the fiduciary duties owed to clients are “the duties of loyalty, obedience, disclosure, confidentiality, reasonable care, diligence and accounting **as set forth in this chapter.**”(emphasis added). The words “as set forth in this chapter” reference the entirety of Chapter 57, and clearly and unambiguously incorporate all of the various fiduciary requirements set forth in §§40-57-135, 137 and 139 which are at issue in this case. “An agent’s breach of fiduciary duty is a basis on which the agent may be required to forfeit commissions and other compensation paid or payable to the agent during the period of the agent’s disloyalty.” Darby v. Furman at 348; see also Restatement Third, Agency §8.01, Official Comments (d)(2).

In Darby v. Furman, the real estate agent violated a fiduciary disclosure requirement now codified at §40-57-135(D). The fiduciary breach in Darby occurred in 1987 prior to the enactment of the material restatement of Title 40, Chapter 57 in 1997. Not only did the Supreme Court affirm that a breach of fiduciary duty claim is a proper cause of action for violations of a real estate broker's fiduciary duty of disclosure and loyalty, but the Court held that the appropriate remedy for the broker's failure to make the legally mandated written disclosure in that case was forfeiture of the commissions. Id.

**5. The opinion of the Court of Appeals failed to determine which of the various and distinct claims of the Appellants were equitable in nature and therefore not subject to any statute of limitations under the Supreme Court's holding in Thomerson v. Devito, 430 S.C. 246, 844 S.E.2d 378 (S.C. 2020).**

The Appellants contend that in considering a pre-answer Rule 12(b)(6) motion to dismiss, unpleaded, affirmative defenses should not be considered. If it were appropriate at this pre-answer stage of this case to rule on the Respondents' yet unpleaded affirmative defense of the statute of limitations, the opinion of the Court of Appeals failed to properly determine and identify which of the separate and distinct causes of action against each of the three separate Respondents were equitable in nature, and therefore not subject to the application of the affirmative and fact based defense of the statute of limitations. In Thomerson v. Devito, 430 S.C. 246, 844 S.E.2d 378 (S.C. 2020), the Supreme Court held that equitable claims are not subject to the affirmative defense of a statute of limitations. The Complaint alleges at multiple separate and distinct equitable claims seeking restitution and disgorgement of compensation arising from the Respondents' breaches of their fiduciary duties of loyalty and disclosure, and the Respondents' statutorily prohibited conduct under S.C. Code Ann. §§40-57-135, 137 and 139.

**6. The opinion of the Court of Appeals failed to abide by the prior decisions of the Supreme Court on the application of the equitable defense of laches.**

The Appellants contend that in considering a pre-answer Rule 12(b)(6) motion to dismiss, unpleaded, affirmative defenses such as laches should not be considered. **If** it were appropriate at this pre-answer stage of this case to address the Respondents' unpleaded affirmative defense of laches, the opinion of the Court of Appeals misapplies the fact based elements of laches established in prior decisions of the Supreme Court. In Jefferson Pilot Life Ins. v. Gum, 302 S.C. 8, 393 S.E.2d 180 (S.C. 1990) the Supreme Court held that under South Carolina law, "[t]o be charged with laches, a party must have knowledge of the facts upon which he bases his claim". As alleged throughout the Complaint, the Respondents intentionally concealed the facts supporting the Appellants' various causes of action.

The determination of "whether laches applies in a particular situation is highly fact-specific, so each case must be judged on its own merits." Mid-State Trust, II v. Wright, 323 S.C. 303, 307, 474 S.E.2d 421 (S.C. 1996). "Delay alone in the assertion of a right does not constitute laches." Jefferson Pilot Life Ins. v. Gum, 302 S.C. 8, 11, 393 S.E.2d 180 (S.C. 1990).

In the present case, the Appellants contend that the Respondents had full knowledge of each and every potential claim of the Appellants, as they are the parties responsible for knowingly and intentionally committing the wrongful conduct. The Respondents cannot be deemed to have been prejudiced by the success of their intentional and knowing acts of self-dealing, fraud, and unfair competition; and by their intentional acts of concealment such as the creation of the fraudulent documents to cover up their malfeasance. In Epstein v. Howell, 308 S.C. 528, 531, 419 S.E.2d 379 (S.C.Ct.App. 1992), the Court of Appeals 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 existence of the two fraudulent “listing agreements” along with other third party testimony will prove irrefutably at trial that the various written consents and agreements required by S.C. Code Ann. §§40-57-135, 137 and 139 were never created or obtained. As a result, the Court of Appeals reliance on a 5 year document retention rule as proof of prejudice is misplaced as the rule cannot apply to nonexistent documents. Moreover, the Appellants will prove irrefutably at trial that the Respondents kept all documents and did not employ a 5 year document retention rule in any respect, as all documents going back to 2006 were actually produced by prior legal counsel to the Respondents on August 28, 2018.

As discussed above, the Respondents’ affirmative defense of laches has not yet been pleaded in accordance with Rule 8(b), and no record of the facts and circumstances related to the affirmative defense of laches has not yet been developed.

### **Novel Questions of Law**

**7. This case presents the novel question of law as to whether the equitable doctrine of “unclean hands” can be a bar to the statute of limitations defense or to the equitable defense of laches.**

The Appellants contend that in considering a pre-answer Rule 12(b)(6) motion to dismiss, unpleaded, affirmative defenses should not be considered. When the Respondents’ affirmative defenses of the statute of limitations and laches are reached at the appropriate stage of this case, this case presents the novel question of law as to whether the doctrine of “unclean hands” may bar a defendant from either utilizing the statute of limitations defense or the equitable defense of laches in the same manner the “unclean hands” doctrine may bar a plaintiff with “unclean hands” from recovering in equity. The Appellants contend that the Respondents’ wrongful conduct in their fiduciary capacities, including but not limited to (i) statutorily prohibited conduct under Title 40, Chapter 57, (ii) intentional acts of fraud and self-dealing, and (iii) intentional and knowing acts of

unfair and deceptive trade practices under the CMLS rules constitute “unclean hands” and **may** act as an equitable bar to the Respondents asserting the equitable defenses of statute of limitations or laches at the appropriate stage of this case.

The opinion of the Court of Appeals held that a defendant’s “unclean hands” is not an equitable bar to the application of a statute of limitations or to the application of laches in direct contradiction of its prior decision in Vicary v. Town of Awendaw, 427 S.C. 48, 828 S.E.2d 229 (S.C.Ct.App. 2019).

Laches is an equitable doctrine. Historic Charleston Holdings v. Mallon, 381 S.C. 417, 432, 673 S.E.2d 448 (S.C. 2009). It is well established that one who seeks equitable relief must act equitably in the first instance”. Robinson v. Estate of Harris, 391 S.C. 114, 131, 706 S.E.2d 41 (S.C. 2011). In the present case, separate and distinct from other fiduciary breaches such as the violations of the CMLS rules, Respondent SVR was **statutorily prohibited from advertising or marketing the Appellants’ property**, or conducting any of the 23 real estate transactions due to their failure to make the statutorily mandated fiduciary disclosures and obtain the various statutorily mandated written consents set forth in the applicable sections of Title 40, Chapter 57 (e.g. written dual agency agreements under S.C. Code Ann. 40-57-137(M)(1) and written listing agreements under S.C. Code Ann. §40-57-135(C)(4)).

The Supreme Court has consistently held that the courts should not lend assistance to conduct which is violative of statutory law or the public policy of South Carolina. White v. Bank, 66 S.C. 491, 503-4, 45 S.E. 94, (S.C. 1903). “The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for the performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions.” White v. J.M. Brown Amusement Company, Inc., 360 S.C. 366, 601 S.E.2<sup>nd</sup>

342 (S.C. 2004). A “Court will not lend its assistance to carry out the terms of a contract that violates statutory law or public policy.” Ward v. West Oil Co., 387 S.C. 268, 692 S.E.2<sup>nd</sup> 516 (S.C. 2010). By failing to consider the effect of the “unclean hands” of the Respondents on their right to assert equitable defenses such as the statute of limitations and laches, the opinion of the Court of Appeals effectively lends assistance to the Respondents’ conduct which conduct violates South Carolina statutory law and public policy.

The Appellants contend that the Complaint adequately alleges “unclean hands” on the part of all three Respondents. The Appellants further contend that all three Respondents may be equitably barred from asserting the equitable defenses of the statute of limitation and laches at the appropriate stage of this case based on the factual record of the case at that stage of the litigation.

**8. This case presents a novel question of law as to whether a plaintiff will be charged with “knowledge of the law” applicable to licensed real estate brokers and agents when the Respondents, in their fiduciary roles, were statutorily required to disclose and explain the relevant law pursuant to S.C. Code §40-57-139 and failed to do so.**

The Appellants contend that in considering a pre-answer Rule 12(b)(6) motion to dismiss, unpleaded, affirmative defenses should not be considered. When the Respondents’ affirmative defense of the statute of limitations and equitable defense of laches are considered at the appropriate stage of this case, this case presents a novel question of law as to whether a plaintiff will be charged with “knowledge of the law” under principles of South Carolina common law **when** (i) the Respondents, in their fiduciary roles, were statutorily required to disclose and explain the applicable real estate brokerage laws pursuant to S.C. Code §40-57-139 and failed to do so; (ii) the provisions of the applicable laws required to be disclosed by §40-57-139, and at issue in this case, do not apply in any respect to the conduct of the plaintiffs by the express terms; and (iii) S.C. Code Ann. §40-57-137(Q) expressly supersedes any common law principle which is inconsistent with the statutory provisions of Title 40, Chapter 57 (e.g. §40-57-139).

In making their premature factual determinations with respect to the equitable defenses of the statute of limitations and laches, the Circuit Court and the Court of Appeals rely on a common law principle of a party being “charged with knowledge of the law” which is applicable in non-fiduciary contexts. Moreover, the courts ignore the specific and unambiguous statutory language of S.C. Code Ann. §40-57-139 to the contrary. Pursuant to the clear and unambiguous language of S.C. Code Ann. §§40-57-139(A) and (B), a licensed real estate broker or agent must provide to their client “at the first practical opportunity” a “meaningful explanation of agency relationships in real estate transactions” and “an agency disclosure form prescribed by the [S.C. Real Estate Commission].” By ignoring the Appellants’ arguments (Issue IX of the Appellants’ appeal briefs) regarding this clear and unambiguous statutory mandate, the opinion of the Court of Appeals effectively ruled that the Appellants are charged with knowledge of the very law the Respondents, in their fiduciary capacities, were required by statute to disclose.

In S.C. Code Ann. §40-57-137(Q) the General Assembly expressly and unequivocally preempted all inconsistent common law by stating that “[t]he provisions of this section which are inconsistent with applicable principles of common law shall supersede the common law ...” Therefore, any common law principle that citizens are generally charged with knowledge of the laws governing the conduct of licensed real estate professionals acting in a fiduciary capacity was expressly preempted by §40-57-137(Q) and the specific disclosure requirements of S.C. Code Ann. §40-57-139(A) and (B). By enacting S.C. Code Ann. §40-57-139(A) and (B) the General Assembly clearly intended to place on licensed real estate professionals the fiduciary burden of disclosing and explaining the various legal requirements of Title 40, Chapter 57 to their clients and customers, and clearly intended to supersede the common law principles regarding the charging of knowledge of the law in this specific fiduciary context.

### **Failure to Rule**

As set forth in Section 5 of the opinion of the Court of Appeals, the court did not rule on the remaining arguments of the Appellants pursuant to Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999). Specifically, the Court of Appeals declined to address the issues raised on appeal by the Appellants in Issues I, IX, X, XI and XII of the Appellants' appeal briefs; which the Appellants contend are indispensable rulings at this pre-answer stage of this case. These unaddressed issues and arguments are identified below.

1. The opinion of the Appeals court failed to issue a ruling as to the effect of the alleged acts of common law intrinsic fraud committed by all three of the Respondents raised in Issue III of the Appellants' appeal briefs; which the Appellants contend is an indispensable ruling in light of the Court of Appeals' decision to prematurely rule on the statute of limitations and laches defenses in affirming the dismissal of this case at the pre-answer stage. The arguments and the authorities supporting those arguments are fully set forth in the two appeal briefs of the Appellants which are included in the Appendix filed with this Petition.

2. The opinion of the Appeals court failed to issue a ruling as to the effect of the irrefutable acts of extrinsic fraud committed by Respondent Wilkins raised in Issue I of the Appellants' appeal briefs, and which extrinsic fraud arose from the creation of fake "listing agreements" which were concealed from the Appellants until a mere 42 days prior to the filing of the Complaint on January 2, 2020. The Appellants contend that a ruling on this extrinsic fraud is an indispensable ruling in light of the Court of Appeals' decision to prematurely rule on the unpleaded equitable defenses of the statute of limitations and laches at the pre-answer stage of this case. The arguments and the authorities supporting those arguments are fully set forth in the two appeal briefs of the Appellants which are included in the Appendix filed with this Petition.

3. The opinion of the Appeals court failed to address in any fashion the legal arguments raised in Issue IX of the Appellants' appeal briefs with respect to the Lower Court improperly considering documents received in an ex parte submission by the Respondents, and the Lower Court's claim to have taken judicial notice of fictional and nonexistent records in violation of Rule 201 of the South Carolina Rules of Evidence; both of which the Appellants contend are indispensable rulings in light of the Court of Appeals' decision to make improper factual determinations at the pre-answer stage of this case. It is important to note that the ex parte submission of documents (referred to in footnote 4 of the Circuit Court opinion) has never been denied by the Respondents or their attorneys in the various briefs filed with respect to this issue.

4. The opinion of the Appeals court failed to issue a ruling with respect to Issue XII of the Appellants' appeal and which deal with the circuit court's dismissal of the Appellants' equitable claims for unjust enrichment, quantum meruit and restitution, which the Appellants contend is an indispensable ruling in light of the Court of Appeals' in affirming the Circuit Court's dismissal of this case at the pre-answer stage. The arguments and the authorities supporting those arguments are fully set forth in the two appeal briefs of the Appellants which are included in the Appendix filed with this Petition.

5. The opinion of the Appeals court failed to issue a ruling with respect to Issue XIII of the Appellants' appeal which deals with the circuit court's dismissal of the Complaint with prejudice; which the Appellants contend is an indispensable ruling in light of the Court of Appeals' opinion affirming the circuit court's dismissal of this case at the pre-answer stage. The arguments and authorities supporting those arguments are fully set forth in the two appeal briefs of the Appellants which are included in the Appendix filed with this Petition.

6. The opinion of the Appeals court failed to issue a ruling as to Issue X of the Appellants' appeal with respect to the circuit court's improper factual ruling that the Appellants were "*in pari delicto*" with the Respondents' illegal conduct and acts of fraud. As set forth in the Appellants' briefs on this issue, the Appellants owed no fiduciary duty to the Respondents, were not subject to the statutory provisions of Title 40, Chapter 57, and were not members of the CMLS. The Appellants contend this is an indispensable ruling on this yet unpleaded affirmative defense in light of the circuit court's reliance on the fact based "*in pari delicto*" defense in its dismissal of this case at the pre-answer stage. The arguments and authorities supporting those arguments are fully set forth in the two appeal briefs of the Appellants which are included in the Appendix filed with this Petition.

### **Conclusion**

Based on the foregoing arguments, the Appellants respectfully request this Court grant its Writ of Certiorari and reverse the Court of Appeals' decision.

Respectfully submitted,

s/ Clarence Davis

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**Apr 08 2024**

CERTIFICATION

S.C. SUPREME COURT

Pursuant to Rule 242 of the South Carolina Appellate Court Rules, counsel for the Appellants attests that a petition for rehearing was made and finally ruled on by the Court of Appeals.

s/ Clarence Davis

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