THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley Price, Circuit Court Judge
Charleston County

Appellate Case No. 2023-001575
Trial Court Case No. 2020-CP-10-4076

Atlantic International, Inc. d/b/a Coldwell Banker Commercial Atlantic, John W. True, and Aaron B. Rowley, Appellants,

v.

IBYDIT, LLC, 1537 Ben Sawyer Blvd., LLC, Curt Nesbitt, Richard M. McColl, East Island Real Estate, Inc., and Ashley Haynes, individually and as an agent of East Islands Real Estate, Inc., Respondents,

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FINAL BRIEF OF RESPONDENTS IBYDIT, LLC AND CURT NESBITT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ABUSE ITS DISCRETION IN GRANTING SUMMARY JUDGMENT BEFORE APPELLANTS COMPLETED DISCOVERY WHERE THE EVIDENCE IN THE RECORD, INCLUDING APPELLANTS' OWN ADMISSIONS, ESTABLISHED THAT EACH OF APPELLANTS' CLAIMS FAILED AS A MATTER OF LAW?

II. HAVE APPELLANTS ABANDONED THEIR THIRD AND FOURTH ARGUMENTS ON APPEAL WHERE APPELLANTS' INITIAL BRIEF IS DEVOID OF DISCUSSION AND CITATIONS OF AUTHORITY AS REQUIRED BY RULE 208, SCACR?

STATEMENT OF THE CASE

This dispute relates to a real estate transaction for the purchase of the real property located at 1537 Ben Sawyer Blvd., Mount Pleasant, South Carolina (the "Property") by Respondent IBYDIT, LLC ("IBYDIT") in July of 2020.

In January of 2020, Appellant John W. True ("True") passed along a list of several properties to Respondent Curt Nesbitt ("Nesbitt"). (R. p. 39.) At that time, Nesbitt had been looking for a property to purchase for his business for over a year. (R. p. 38.) True and Nesbitt discussed presenting an offer on the Property at issue in this appeal. (R. p. 39.) True is a licensed salesperson in South Carolina. (R. p. 139.) At all times relevant to this dispute, True was licensed with Appellant Atlantic International, Inc. d/b/a Coldwell Banker Commercial Atlantic ("CBC"). (R. p. 139.) Appellant Aaron B. Rowley ("Rowley") was also a licensed salesperson with CBC. (R. p. 142.) On or about January 11, 2020, Rowley communicated with the owner of the Property through the owner's agent. (R. p. 142.) True and Rowley then worked together in connection with the sale of the Property. (R. p. 139; R. p. 142.)

It is undisputed that Appellants did not enter into any written agreements with Respondents. (R. p. 3.) Rowley acted as an agent for the sale of the Property without an executed listing agreement in place. (R. p. 136.) Similarly, True presented a buyer without a buyer representation agreement in place. (R. p. 136.) True never presented a buyer's representation agreement to IBYDIT or Nesbitt, or even mentioned entering any such agreement and the parties never discussed any terms that would indicate an agreement relating to a scope of services, compensation, or expiration of an agreement. (R. pp. 27 – 29.)

Rowley informed True that the seller was not ready to proceed and did not know what he wanted to do. (R. p. 217, lines 4 – 5.) On January 29, 2020, True informed Nesbitt that the "seller

has gone dark." (R. p. 40.) On February 4, 2020, True stated that the "seller still won't respond." (R. p. 40.) All communication between True and Nesbitt ceased as of February 11, 2020. (R. p. 40.)

On March 2, 2020, Respondents Richard McColl, East Island Real Estate, Inc. ("EIRE"), and Ashley Haynes entered into a One Time Agreement to Show, in which the parties agreed that if Nesbitt or IBYDIT purchased the Property, 1537 Ben Sawyer Blvd, LLC would pay EIRE a four percent (4%) commission at closing. (R. p. 3; R. p. 40; R. p. 189.) There were several issues that needed to be resolved in order to close on the Property. (R. p. 40.) The biggest issue involved negotiating an early termination of the then-existing leases with two tenants. (R. p. 40.) Reaching an agreement with the two tenants for the early termination of the leases required extensive negotiation with the tenants and their counsel. (R. p. 40.) After months of negotiation, a settlement with the tenants was accomplished in order to finalize the deal and close on the Property. (R. p. 40.) Appellants had no involvement with the transaction and did not participate in any of these negotiations. (R. p. 40.) Upon closing the Property, a commission payment in the amount of $44,000.00 was paid to the broker who procured the transaction. (R. p. 3; R. p. 41; R. pp. 191-192; R. p. 231, lines 20 – 21.)

Notwithstanding the fact that they had no written agreements in place relating to the Property, Appellants sued Respondents to recover real estate commission payments and other damages relating to the purchase and sale of the Property. (R. pp. 9 – 37.) While the case was pending, True and Rowley, as well as the broker-in-charge for CBC, were named as respondents in three separate proceedings before the South Carolina Department of Labor, Licensing and Regulation (the "LLR") before the South Carolina Real Estate Commission (the "Commission") in connection with the Property. (R. pp. 194 – 213.) Disciplinary hearings were held on July 13,

2022, before the Commission during which Appellants presented sworn testimony. (R. p. 194; R. p. 198; R. p. 202.)

Appellants entered into a Memorandum of Agreement with the Commission in which the parties stipulated to the fact that no written listing agreement or buyer's agreement was executed in violation of S.C. Code §§ 40-57-10, *et seq*. (R. pp. 206 – 213.) The Memorandum of Agreement provided, as a stipulated fact, that "Rowley then acted as agent for the sale of the Subject Property without an executed listing agreement in place. True then presented a buyer without a buyer representation agreement in place." (R. p. 207.)

Based upon the evidence before the Commission, including Appellants' own admissions and testimony at the hearing, the Commission determined that Rowley and True had each violated S.C. Code § 40-57-135(I)(2), which requires a real estate licensee to have written agreements with specific provisions in place for any representation of a seller or buyer. (R. pp. 199 – 200; R. pp. 203 – 204.) The Commission determined that the broker-in-charge for CBC, Brent A. Case, had violated S.C. Code § 40-57-135(A)(1) and (5) for failing to adequately supervise Appellants Rowley and True, and had "demonstrated incompetency in a manner as to endanger the interest of the public." (R. p. 196.) On July 18, 2023, the Commission issued a Final Order in each of the proceedings in which the Commission concluded that Appellants' conduct, and specifically their failure to obtain a listing agreement or buyer's representation agreement relating to the Property, by their own admission, violated S.C. Code § 40-57-135. (R. pp. 194 – 204.) The Commission ordered that each Appellant be publicly reprimanded for their conduct in connection with the Property. (R. p. 4; R. p. 196; R. p. 200; R. p. 204.)

Appellants, having admitted that no written agreements were entered into with respect to the Property in violation of South Carolina law and receiving public reprimands, continued to

pursue their claims in the trial court. On September 7, 2023, the trial court issued the Order Granting Summary Judgment in favor of Respondents (hereinafter, the "Order"). (R. pp. 2 – 8.) Appellants did not notice any deposition of any witness in the three years that the case was pending. Based on the evidence in the record, the trial court determined that the admitted statutory violations on the part of Appellants warranted summary judgment in favor of Respondents. (R. pp. 5 – 6.)

STANDARD OF REVIEW ON APPEAL

In reviewing a grant of summary judgment, the appellate court applies the same standard as the trial court under Rule 56(c), SCRCP. *Woodson v. DLI Properties, LLC,* 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014). Under that legal standard, "summary judgment is proper if, viewing the evidence and inferences to be drawn therefrom in a light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." *Id*., citing Rule 56(c), SCRCP.

It is established that "[t]he plain language of Rule 56(c) mandates the entry of summary judgment [. . .] against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof." *Hansson v. Scalise Builders of S.C*., 374 S.C. 352, 357, 650 S.E.2d 68, 71 (2007).

ARGUMENT

I. SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS WAS APPROPRIATE WHERE THE RECORD ESTABLISHED THAT APPELLANTS WERE PRECLUDED FROM RECOVERING DAMAGES

Appellants argue that summary judgment was granted prematurely because Appellants had not completed discovery and were unable to fully develop their claims. Despite having the opportunity to do so, Appellants did not notice the deposition of any witnesses in the three years

preceding the Order. It is not premature for the trial court to grant summary judgment where Appellants had a full and fair opportunity to develop the record on an issue but failed to do so. *See George v. Empire Fire & Marine Ins. Co*., 344 S.C. 582, 594, 545 S.E.2d 500, 506 (2001) (affirming trial court's decision to grant summary judgment).

The trial court's Order is reviewed under the abuse of discretion standard. *See Black v. Lexington School Dist. No. 2*, 327 S.C. 55, 488 S.E.2d 327 (1997) (applying abuse of discretion standard to trial court's rulings pursuant to Rule 56, SCRCP). An abuse of discretion occurs when the trial judge's ruling is based upon an error of law or, when based on factual conclusions, is without evidentiary support. *See Bayle v. S.C. Dep't of Transp*., 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001). The trial court did not abuse its discretion in determining that the evidence in the record was dispositive of the issues.

The trial court properly considered the evidence in the record and determined that Respondents were entitled to judgment as a matter of law as to each of Appellants' causes of action. (R. p. 6.) The record before the trial court included the admissions by each Appellant in the proceedings before the Commission, the stipulated facts set forth in the Memorandum of Agreement, and the Commission's conclusions of law in the Final Orders. (R. pp. 194 – 213.) Also before the trial court was the Affidavit of Curtis B. Nesbitt based on his personal knowledge, as well as relevant documents exchanged during discovery. (R. pp. 38 – 41; R. pp. 183 – 213.)

It is an undisputed fact that there was no written listing or buyer's agreement with Respondents. (R. pp. 3 – 7.) It is also an undisputed fact that Appellants violated the statutory requirements imposed upon "Real Estate Brokers, Brokers-in-Charge, Salespersons, and Property Managers." *See* S.C. Code §§ 40-57-5, *et seq*. (R. pp. 5 – 7.) Section 40-57-135, provides in pertinent part, that "[a] listing or buyer's representation agreement **must be in writing** and must

set forth all material terms of the parties' agency relationship." *See* S.C. Code § 40-57-135(I)(2) (emphasis added). (R. p. 5.) Furthermore, Section 40-57-370 provides in part as follows:

> (E) For all real estate transactions, no agency relationship between a buyer, seller, landlord, or tenant and a real estate brokerage firm and its associated licensees exists unless the buyer, seller, landlord, or tenant and the brokerage company and its associated licensees agree, in writing, to the agency relationship. **No type of agency relationship may be assumed by a buyer, seller, landlord, tenant, or licensee or created orally or by implication**. A real estate brokerage firm may not be considered to have an agency relationship with a party or have agency obligations to a party but is responsible only for exercising reasonable care in the discharge of the real estate brokerage firm's specified duties, as provided in this chapter, and, in the case of a client, as specified in the agency agreement.
>
> (F) The payment or promise of payment of compensation to a real estate brokerage firm by a seller, buyer, landlord, or tenant does not determine whether an agency relationship has been created between a real estate licensee and a seller, buyer, landlord, or tenant

See S.C. Code § 40-57-370 (emphasis added). (R. p. 5.)

Based on the undisputed fact that Appellants admittedly violated the law, the trial court correctly determined that Appellants are precluded from any recovery under any cause of action under the doctrine of *in pari delicto*. (R. pp. 6 – 7.) As discussed in the Order, the doctrine of *in pari delicto*, which is well-established and recognized by this Court, is the principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing. *See Lauren Proctor & Trans-Union Nat'l Title Ins. Co. v. Whitlark & Whitlark, Inc.,* 414 S.C. 318, 326, 778 S.E.2d 888, 892 (2015). (R. p. 6.)

As the party opposing summary judgment, Appellants had a burden to come forward with specific facts to create a genuine issue of material fact. *See* Rule 56(e), SCRCP; *see also Baughman v. Am. Tel. & Tel. Co*., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) ("Once moving party carries its initial burden, opposing party must, under Rule 56(e), do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts

showing that there is a genuine issue for trial."). Appellants have not offered any material evidence to dispute the fact that Appellants, by their own admissions, violated the law. Having failed to meet their burden, Appellants now ask this Court to reverse the Order on the alleged basis that summary judgment was premature.

The party asserting the need for further discovery must demonstrate the likelihood that further discovery will uncover additional relevant evidence. *See Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991). Based on the undisputed facts that have already been established, Appellant cannot uncover any further evidence that could change the events that have admittedly transpired. There was no written listing or buyer's agreement with Respondents. No agency relationship arose or could arise by implication. (R. pp. 4 – 7.) Appellants violated the statutory requirements imposed upon "Real Estate Brokers, Brokers-in-Charge, Salespersons, and Property Managers." *See* S.C. Code §§ 40-57-5, *et seq*. (R. pp. 5 – 7.) Further discovery would not have contributed to the trial court's finding that Appellants are precluded from recovering any damages under any cause of action. *See Cap. Bank, N.A. v. Moore*, 2015 WL 1235179, at *1 (S.C. Ct. App. Mar. 18, 2015) (finding find the trial court did not abuse its discretion in granting summary judgment prior to the completion of discovery because the record does not demonstrate that further discovery would have contributed to the resolution of the issues).

Accordingly, the trial court's decision should be affirmed.

II. APPELLANTS' UNSUPPORTED ARGUMENTS ON APPEAL SHOULD BE DEEMED ABANDONED

Appellants' third and fourth issues on appeal should be deemed abandoned, as there is no reference to any case, statute, rule, or other authority within sections three and four of Appellants' brief other than a reference to the standard of summary judgment. *See Broom v. Jennifer J.*, 403 S.C. 96, 115, 742 S.E.2d 382, 391 (2013) (finding an issue abandoned where the party's brief cited

only one family court rule and presented no argument as to how the ruling was an abuse of discretion or constituted prejudice). Rule 208 of the South Carolina Appellate Court Rules requires citation to authority in the argument section of an appellant's brief. *See* Rule 208(b)(1)(E), SCACR ("At the head of each part, the particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority."). Appellants have not done so.

Appellants' discussion of the third issue on appeal consists of a conclusory statement that the trial court erred in granting summary judgment because there were genuine issues of material fact. Appellants do not identify any specific facts, evidence, or authorities that demonstrate a genuine issue of material fact to warrant reversal. In lieu of citations of authority, Appellants provide a list of conclusory statements labeled as "material facts in controversy." Appellants may not create a genuine issue of material fact through speculation or guesswork. *See Nelson v. Piggly Wiggly Cent., Inc*., 390 S.C. 382, 390, 701 S.E.2d 776, 780 (Ct. App. 2010) (holding one may not create a genuine issue of material fact by speculation or an "inferential leap").

Appellants' discussion of the fourth issue on appeal is also deficient. Appellants argue that the trial court erred by hearing IBYDIT and Nesbitt's Motion for Summary Judgment during the hearing held on May 30, 2023, such that Appellants did not have sufficient time to form a defense or opposition. Appellants' argument consists of arguments of counsel and conclusory statements without supporting authority. *See Solomon v. City Realty Co*., 262 S.C. 198, 203 S.E.2d 435 (1974) (where only passage in brief relating to issue appealed was single conclusory statement which left unargued the error assigned by exception, issue was abandoned). The pleadings on file demonstrate that IBYDIT and Nesbitt's Motion for Summary Judgment was filed with the trial court on Friday, May 19, 2023, and was "served at least 10 days before the time fixed for the hearing" held on Tuesday, May 30, 2023. *See* Rule 56(c), SCRCP. (R. pp. 154 – 158.)

Appellants' arguments are so conclusory that the issues have been abandoned. An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority. *See, e.g., State v. Jones*, 344 S.C. 48, 58–59, 543 S.E.2d 541, 546 (2001); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting when a party fails to cite authority or when the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on appeal); *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority.").

To the extent the Court were to consider the unsupported arguments, Appellants provide no basis for this Court to reverse the trial court's Order granting summary judgment.

Accordingly, the Order should be affirmed.

CONCLUSION

For the reasons set forth above, Appellants fail to present a basis warranting reversal of the trial court's Order and therefore, the Order should be affirmed by this Court.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondents complies with Rule 211(b), SCACR.

April 18, 2024

Respectfully submitted,

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