RECEIVED

May 08 2024

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Appellate Case No.: 2021-000597

Circuit Court Case No.: 2020-CP-32-00005

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.

RETURN TO PETITION FOR WRIT OF CERTIORARI

Steven R. Kropski (S.C. Bar No: 101441)
David W. Overstreet (S.C. Bar No: 16965)
Ryan M. Gunther (S.C. Bar No: 104141)
Earhart Overstreet LLC
P.O. Box 22528
Charleston, SC 29413

Eric S. Bland (SC Bar No.: 64132)
Ronald L. Richter (SC Bar No.: 66377)
Scott M. Mongillo (SC Bar No.: 16574)
Bland Richter, LLP
P.O. Box 72
Columbia, SC 29202

Attorneys for Respondents Robert P. Wilkins Jr., RPW Development, Inc., and Southern Visions Realty, Inc.

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES

Cases: **Page(s):**

Statutes

Rules

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly hold that an action seeking to claw-back compensation paid to a realtor under an agreement entered into thirteen years prior to the lawsuit was untimely?

2. Did the Court of Appeals correctly hold that no private cause of action exists against a real estate agent solely for an alleged violation of S.C. Code § 40-57-5 et seq?

3. Did the Court of Appeals correctly deem Developers' remaining arguments immaterial, as they do not allege facts supporting a cause of action under any theory?

STATEMENT OF THE CASE

Appellants R. Kent Porth ("Porth") and Panorama Point, LLC ("Panorama") (collectively the "Developers") filed this action seeking to claw-back compensation paid to the Respondents, Robert P. Wilkins, Jr., RPW Development, Inc., and Southern Visions Realty, Inc. (collectively, the "Realtors") in connection with the development and sale of Porth and his family members' real property located on Lake Murray (the "Property"). The Developers allege that although a written "development agreement" was signed providing for clearly defined compensation to the Realtors, because they did not execute a document with the Realtors specifically titled "listing agreement," the Realtors should not have received any compensation for sales of the Property. The Developers claim that they are entitled to money damages in the amount of compensation earned by the Realtors.

Following commencement of the action, the Realtors filed a motion to dismiss on the grounds that (1) the statute of limitations bars the Developers' claims under any theory; and (2) no private right of action exists to recover monetary damages for an alleged technical violation of the statute governing licensed real estate agents and brokers in South Carolina. (R. pp. 120-129). The Realtors also filed an amended motion to dismiss (R. pp. 144-145), and a memorandum supporting their motion (R. pp. 157-186). In response, the Developers filed a memorandum in opposition (R. pp. 130-143), a supplemental memorandum in opposition (R. pp. 146-156), and a third memorandum in opposition to the motion (R. pp. 187-270). A hearing was held on the motion in front of Hon. Edgar W. Dickson. (R. pp. 351-375).

By order entered February 16, 2021, Judge Dickson granted the Realtors' motion. (R. pp. 1-21). Thereafter, Developers filed a motion to reconsider (R. pp. 271-292).

In response, the Realtors filed a memorandum in opposition to the motion to reconsider (R. pp. 293-303). Developers then filed a Reply in support of the motion to reconsider. (R. pp. 304-

346). Realtors thereafter filed a memorandum in response to the Developers Reply. (R. pp. 347-350). By order entered May 5, 2021, Judge Dickson denied the motion to reconsider. (R. pp. 22-25).

On June 4, 2021, the Developers filed and served their notice of appeal, which was heard by the Court of Appeals on December 5, 2023. On February 14, 2024, the Court of Appeals affirmed the Trial Court's dismissal of the action.

Thereafter, on February 28, 2024, the Developers filed a petition for rehearing, which was denied by the Court of Appeals on March 8, 2024. This petition for certiorari followed.

INTRODUCTION

A. Development of Property on Lake Murray and hiring of Realtors.

In late 2005 and early 2006, Porth, an experienced tax attorney partner with the Nexsen Pruet law firm, began exploring options to best develop and sell all or a portion of his family's Property as a residential subdivision. (R. p. 30, 58). In furtherance of Porth's plan to sell a portion or all of his family's Property, the Developers engaged the Realtors to develop, market, and sell the Property in early 2006. (R. p. 39). Porth signed a Development Agreement on behalf of Panorama Point with Defendant RPW on or about December 21, 2006 ("Development Agreement"). (R. p. 44). The Development Agreement contained provisions for the payment of fees for development activities as well as separate provisions for the payment of real estate commissions for listing and sales with Defendant SVR serving as the exclusive listing agent. (R. p. 45).

B. Sale of Properties and payment of compensation to Realtors.

Thereafter, between January 2007 and May 2015, Developers sold twenty-three (23) separate parcels of the Property aided by the Realtors totaling sales in an amount of $6,179,215 (R. pp. 59-64). For their services as real estate agents, the Realtors received commissions totaling $267,035.37. (Id.). Additionally, pursuant to the Development Agreement, Developers paid "development fees" totaling $232,641.03. (R. pp. 64-67). In sum, the Realtors received $499,676.40 for real estate agent and development services pursuant to the Development Agreement. (R. pp. 59-67). The final sale under the arrangement between Developers and Realtors pursuant to the Development Agreement occurred on May 7, 2015. (R. pp. 63).

C. Developers file suit in January 2020 to recoup all compensation paid to Realtors for sales starting in 2007.

Developers allege, however, that despite a written Development Agreement providing for compensation to the Realtors, they never executed a document specifically titled "listing agreement" with the Realtors[1]. (R. pp. 26-119). The Developers allege that statutes governing licensed real estate agents and brokers, South Carolina Code § 40-57-135(E)(1) and -137[2], requires "a written listing agreement between the property owner and the real estate brokerage firm with whom the licensee is associated." Since the Developers allege that there are no "listing agreements," the

[1] As this is appeal is related to a motion to dismiss, the allegations made by the Developers must be accepted as true. However, for purposes of clarity, the Realtors deny that listing agreements were not executed by the Developers. Furthermore, as the Court of Appeals noted, Realtors are only required to maintain business transaction records for a period of five years. S.C. Code §40-57-350(D)(1).

[2] The statutory sections referenced in this Appeal are those in effect at the relevant time, however, S.C. §40-57-350 replaced §40-57-137.

Developers contend they are entitled to repayment of all compensation earned by Realtors with respect to sales at the Property between 2007 and 2015[3]. (Id.).

In their lawsuit, Developers alleged causes of action for (1) Breach of Fiduciary Duty; (2) Negligent Misrepresentation; (3) Negligence; (4) Conversion; (5) Quantum Meruit; (6) Constructive Fraud; (7) Restitution; and (8) Unfair Trade Practices. (R. pp. 96-118).

Each cause of action, however, relies upon the same allegation—that the Realtors did not present a document specifically entitled "listing agreement[4]," which the Developers allege is a technical violation of the statute governing real estate agents in South Carolina. Based on this alleged technical violation, Developers allege that the Realtors should not have received any compensation for their work in selling 23 lots resulting in over $6,000,000 for the benefit of the Developers. (Id.).

LEGAL STANDARD

Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action. *Baird v. Charleston County,* 333 S.C. 519, 511 S.E.2d 69 (1999); *Bergstrom v. Palmetto Health Alliance,* 352 S.C. 221, 573 S.E.2d 805 (Ct. App. 2002). A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. *Williams v. Condon,* 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). Generally, in

[3] The Complaint acknowledges, and the Developers do not dispute, that a written agreement was entered into providing for compensation to the Realtors. Developers simply allege that because an agreement was not specifically titled "listing agreement," that the Realtors were not entitled to any compensation and should be required to pay the Developers back for all compensation received in connection with sales of the Property.

[4] Based upon the posture of the case, Respondents accept the allegations pleaded by Appellants as true. However, Respondents deny that they violated any South Carolina statute.

considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. *Stiles v. Onorato,* 318 S.C. 297, 457 S.E.2d 601 (1995).

ARGUMENT

I. The Court of Appeals correctly determined that the Developers' Complaint was untimely.

A. The transactions that are the subject of this litigation occurred between January 2007 and May 2015; over three years prior to the filing of the lawsuit.

Under South Carolina law, the causes of action asserted by Developers are each subject to a three (3) year statute of limitations. *See, Walbeck v. I'On Co.*, 426 S.C. 494, 519, 827 S.E.2d 348, 361 (Ct. App. 2019) ("The three-year statute of limitations, section 15-3-530(5) of the South Carolina Code (2005), applies to [ ] negligent misrepresentation claims[]"); *Gibson v. Bank of Am., N.A.*, 383 S.C. 399, 405, 680 S.E.2d 778, 782 (Ct. App. 2009) (three-year limitations period set forth in § 15-3-530(5) applies to negligence actions); *Walsh v. Woods,* 358 S.C. 259, 264, 594 S.E.2d 548, 551 (Ct. App. 2004) ("The statute of limitations for . . . a conversion claim is three (3) years [under § 15-3-530(5).]"); *Dorman v. Campbell*, 331 S.C. 179, 183-84, 500 S.E.2d 786, 788-89 (Ct. App. 1998) (applying three-year statute of limitations set forth in § 15-3-530 to claim for constructive fraud); see also S.C. Code § 15-3-530(7) ("an action for relief on the ground of fraud" is subject to the three-year statute of limitations); S.C. Code § 39-5-150 (an action alleging violation of South Carolina's Unfair Trade Practices Act must be brought within three years); *Mazloom v. Mazloom*, 382 S.C. 307, 322, 675 S.E.2d 746, 755 (Ct. App. 2009)(Action for breach of fiduciary duty is subject to a three-year statute of limitations); *See*, S.C. Code § 15-3- 530(1) (action for unjust enrichment or quantum meruit, based upon an implied contract or obligation, are subject to a three year statute of limitations).

Having established that each cause of action is subject to a three-year statute of limitations, when applying the allegations of the Complaint on their face, it is clear that all claims brought by the Developers are untimely.

The Complaint alleges that all activity between the Developers and Realtors with respect to the Property took place between 2006 and at the latest December 2016. (R. p. 59). Thus, all activity complained of by Developers occurred more than three years from the filing of the subject lawsuit on January 2, 2020.

Relevant to this appeal, however, the allegations of wrongdoing alleged by Developers occurred far earlier than December 2016. Indeed, to the extent that the Developers allege that the Realtors failed to provide them with a document entitled "listing agreement," or failed to comply with the statutes governing real estate licensees in South Carolina, this occurred at the outset of the relationship in 2006. (R. p. 44). Therefore, Developers' attempt to recover compensation they allege was unjustly paid to the Realtors beginning in 2006 was untimely in January 2020, and the Court of Appeals correctly held that Developers' action was untimely based upon a plain reading of the Complaint.

i. The Developers knew or should have known of the alleged wrongful conduct years before January 2, 2020.

The Developers' attempt to excuse their untimely Complaint by suggesting that they did not "discover" that the Realtors had breached their fiduciary duty by, inter alia, failing to provide a document specifically entitled "listing agreement" prior to 2017. (App. In. Br. pp. 27-30). To support this assertion, the Developers aver that they were unaware of the relevant South Carolina Statutes, S.C. Code. §§40-57-135(C)(4) and 40-57-139(B), prior to 2017, and thus did not discover that they had causes of action against the Realtors. This argument, however, is without merit.

As the Trial Court and the Court of Appeals correctly held, ignorance of the law does not excuse the Developers' untimely Complaint. (R. pp. 8-9, Appx. p. 494[5]).

It is well established in South Carolina that ignorance of the law does not suspend the accrual of a statute of limitations. *See, Ott v. Maryland Dep't of Pub. Safety and Corrs. Servs.*, 909 F.3d 655, 661 (4th Cir. 2018) ("Ignorance of the law does not justify tolling, even when a party does not have legal representation); *United States v. Sosa*, 364 F.3d 507, 512 (4th Cir. 2004) (observing ignorance of the law is not a basis for tolling). "Citizens are presumed to know the law and are charged with exercising reasonable care to protect their interests." *American Legion Post 15 v. Horry Cnty.*, 381 S.C. 576, 584, 674 S.E.2d 181, 185 (Ct. App. 2009); *Smothers v. U.S. Fidelity and Guar. Co.*, 322 S.C. 207, 210–11, 470 S.E.2d 858, 860 (Ct. App. 1996) ("[e]veryone is presumed to have knowledge of the law and must exercise reasonable care to protect his interests[]").

Here, contrary to the Developers' arguments, the mere fact that they allege they were not expressly aware of a specific statutory section within the South Carolina Code does not mean that they were not aware of the underlying facts that make up the alleged wrong.

As the Court of Appeals noted in its opinion, the allegations in Developers' Complaint establish that they were at least on notice of some harm they allege was caused by the Realtors that could be redressed through legal action no later than May 2013[6]. (R. pp. 1-21). Thus, any allegation that the Developers were not on notice of alleged negligence or alleged improper actions by the Realtors is expressly contradicted by their own Complaint.

---

[5] The appendix is not paginated beyond the Record on Appeal. Respondents' counsel made its best effort to determine the page number of documents contained within the appendix.

[6] The Developers' Complaint alleges that by May 2013, they had discovered "evidence of [Realtors'] negligence, incompetence, and lack of attention in performing their duties. (R. p. 88).

Under South Carolina law, in determining when a cause of action arises under § 15-3-530, courts apply the "discovery rule." *Rumpf v. Mass. Mut. Life Ins. Co.*, 357 S.C. 386, 394, 593 S.E.2d 183, 187 (Ct. App. 2004). According to this rule, the statute of limitations begins to run "when a cause of action reasonably ought to have been discovered," or, in other words, "when a plaintiff has notice that he might have a remedy for a harm." Id.

"A party cannot escape the application of [the statute of limitations] by claiming ignorance of existing facts and circumstances, because the law also provides that if such facts and circumstances *could have been known* to the party through the exercise of ordinary care and reasonable diligence, the same result follows. Thus, either actual or constructive knowledge of facts or circumstances indicative of fraud trigger a duty on the part of the aggrieved party to exercise reasonable diligence in investigating and, ultimately, in pursuing a claim arising therefrom." *Burgess v. Am. Cancer Soc.*, 300 S.C. 182, 185, 386 S.E.2d 798, 799-800 (Ct. App. 1989).

"The exercise of reasonable diligence means that an injured party must act promptly where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point, and not when advice of counsel is sought, or a full-blown theory of recovery developed." *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981); Brown v. Pearson, 326 S.C. 409, 483 S.E.2d 477 (Ct.App.1997) (emphasis added).

Here, the statutory sections relied upon by Plaintiffs were public and widely available to anyone of common knowledge, no less a tax lawyer with over 22 years of business and legal experience by 2006. *Rumpf*, 357 S.C. at 394, 593 S.E.2d at 187. It is

inconceivable – even accepting the Developers' allegations as true – that the Developers were not aware that they compensated the Realtors at closings beginning in 2006. Indeed, the Complaint acknowledges that the Developers knew compensation was paid to the Realtors and likewise knew the amount of the Compensation. (R. pp. 59-68).

In other words, if the Developers believed at the time of these transactions that the Realtors may not have been entitled to compensation they received, or that the Realtors had not performed their services consistent with their standard of care, they could have easily looked into the South Carolina Code and identified the very same allegations asserted in their untimely Complaint. Yet, the Developers waited over 13 years to claim that the compensation agreement with the Realtors was "unlawful."

Furthermore, the allegations of the Developers' Complaint itself acknowledge that they had prior notice of alleged potential shortcomings by the Realtors but did not timely pursue a remedy for alleged harm. For instance, the Developers allege that by May 2013, they had "evidence of [Realtors'] negligence, incompetence, and lack of attention in performing their duties for which they received the Development Fee." (R. pp. 86-88). Likewise, on December 31, 2013, in connection with the sale of "Lot 15," Developers discovered that Respondent Wilkins allegedly had an undisclosed conflict of interest in the form of a prior business relationship with the purchaser, for whom an alleged unnecessary $2,500 credit was negotiated by Wilkins. (R. pp. 68-70). Each time, the Developers were on notice of alleged failures or alleged wrongdoings by the Realtors[7], but did not act promptly or diligently to determine if they had a "right that had been invaded." *Snell*, 276 S.C. at 303 278 S.E.2d at 334.

[7] Realtors again deny that they committed any improper acts during the course of their 10 years providing services for Developers.

Here, it is indisputable that the allegations of Developers' Complaint acknowledge being on notice of alleged "negligence" or "incompetence" of the Realtors long before filing of this action in January 2020. Moreover, the Developers' Complaint acknowledges being aware of the *facts* that underlie each of their claims long before filing the Complaint. (R. pp. 27-119). Indeed, in Developers' petition for certiorari, it is noteworthy that not a single fact is alleged to have been unknown by Developers at the time of the sales transactions. They do not allege they were unaware of the compensation paid to Realtors, they do not allege they were not aware of the identity of the buyers, nor do they allege they were unaware of the identity of the agent representing a buyer at the time of the transactions.

Instead, Developers simply allege that they were unaware of a statute that they mistakenly believe provides them a perpetual right to claw-back compensation paid to Realtors, despite a valid written representation agreement. In this respect, the Court of Appeals correctly held that the Developers' action was untimely.

ii. The Developers' claims are each legal, not equitable.

In an effort to circumvent the consequences of their untimely lawsuit, the Developers argue that their claims are equitable in nature, and therefore, are not subject to a statute of limitations. Alternatively, Developers argue that the Court of Appeals failed to analyze each claim and decide whether such claim was equitable. (Petition at p. 7(2)). This argument is contrary to the Court of Appeals opinion. Indeed, the Court of Appeals did not have a need to do a claim-by-claim analysis, as under any theory, Developers' claims were untimely. (Appx. 491-495).

Nonetheless, the claims in this action are legal. Whether an action is legal or equitable is decided by the nature of the claim. *Insurance Fin. Servs., Inc. v. South Carolina Ins. Co.*. 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978) ("The main purpose of the action should generally be

ascertained from the body of the complaint. . . . However, if necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action."); *Bell v. Mackey*, 191 S.C. 105, 119–20, 3 S.E.2d 816, 822 (1939) ([t]he nature of the issues raised by the pleadings and character of relief sought under them determines the character of an action as legal or equitable).

Here, the nature of the Developers' causes of action are legal. Although a request for money damages is not conclusive to establish a cause of action as legal, in the current action, the Developers allege that the Realtors breached a duty they owed to the Developers in their capacity as real estate professionals governed by the S.C. Code § 40-57-5 *et seq.*, which in turn caused the Developers' money damages. (R. pp. 98-99). Thus, the relief the Developers seek is economic resulting from alleged breaches of a duty or obligation by the Realtors.

To be clear, while the Developers seek a return of the commissions and fees earned by the Realtors, the basis for this relief relies on Developers' theory that the Realtors did not provide services to the Developers that met their professional standard of care, including the execution of written "listing agreements."

Thus, although the Developers attempt to characterize this relief as "restitution," restitution is not automatically classified as an equitable remedy. Indeed, "'restitution is a legal remedy when ordered in a case at law and an equitable remedy . . . when ordered in an equity case, and whether it is legal or equitable depends on the basis for [the plaintiff's] claim' and the nature of the underlying remedies sought." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213, 122 S. Ct. 708, 714, 151 L. Ed. 635, 644 (2002) (internal citation omitted).

Here, whether styled as a cause of action for conversion, restitution, unjust enrichment, breach of fiduciary duty, or any other theory of recovery, the main purpose of an action is to recover

money damages "proximately caused" by the Realtors' breach of a duty or obligation allegedly owed to the Developers. Thus, each cause of action asserted by the Developers is an action at law, and subject to a three-year statute of limitations.

iii. The Court of Appeals correctly held that, to the extent any claims are equitable, laches also bars the Developers' action.

As an alternative sustaining ground, to the extent that any claims are deemed to be equitable, the Court of Appeals correctly held that the doctrine of laches barred Developers' claims.

The equitable doctrine of laches is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). "Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." *Chambers of S.C., Inc. v. County Council for Lee County*, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993).

Here, the allegations of the Complaint expressly acknowledge that despite notice of the Realtors' alleged "negligence" and "incompetence," the Developers did not pursue any action against the Realtors while the Realtors were making the Developers millions of dollars in sales. Rather, only after the Realtors were no longer useful to the Developers did they belatedly pursue this lawsuit[8]. This inequity was specifically noted by the Trial Court in ruling that laches barred the Developers claims, the Trial Court specifically noted:

[8] The Trial Court and Court of Appeals specifically noted that the Developers continued to accept the benefit (i.e. millions of dollars) of the Realtors work, despite knowledge of alleged

> Accepting the allegations of the Complaint to be true, the Complaint alleges that the Plaintiffs were aware of the Defendants alleged improper conduct, yet continued to accept the benefit of their services in the development and sale of the Property.

(R. p. 4).

Indeed, a specific element of laches is the prejudice resulting from the claimant's delay in asserting their rights. *See Chambers of S.C., Inc. v. County Council for Lee County,* 315 S.C. at 421, 434 S.E.2d at 280. In the matter at bar, the Developers' belated lawsuit prejudices realtors in two obvious ways.

First, it is established in the Complaint that compensation earned by the Realtors extends back to January 2007, thirteen years prior to commencement of the lawsuit. (R. p. 59). The last payment was earned by the Realtors in May 2015, approximately five years prior to commencement of the action. (R. p. 63).

Under the Developers' theory, real estate agents would effectively never be able to realize any compensation, as the threat of a client seeking to disgorge the realtor's commission would go on in perpetuity. Such a result is precisely what the equitable doctrine of laches seeks to avoid.

Furthermore, under S.C. Code § 40-57-135(D)(1), brokers-in-charge are only required to retain documents related to a transaction, including listing agreements, for a period of five (5) years. In this action, the Developers seek to use the alleged lack of "listing agreements" as evidence of their claim, despite the fact that the Realtors had no legal obligation to retain such documents as of the date the Developers' lawsuit was filed. This too supports a finding that laches bars the Developers' claims.

"negligence," "incompetence" and "breaches of duties" no later than 2013. Based upon these actions, the Developers' claims were also barred under the theory of unclean hands and/or *in pari delecto*. (R. p. 19).

In this respect, the Court of Appeals held:

> Appellants sat on their rights to challenge Respondents' alleged breach of fiduciary duty while Respondents continued to expend their efforts on Appellants' behalf and Appellants benefited from Respondents' services, gaining over $6 million in profit. In addition, Respondents are prejudiced because real estate agents are only required to maintain business transaction records for a period of five years and the vast majority of these transactions occurred more than five years from the initiation of this action.

(Appx. p. 494).

Accordingly, the Court of Appeals correctly held that as an additional sustaining ground, laches barred the claims being asserted by the Developers. (R. p. 18).

II. The Court of Appeals correctly held that no private cause of action exists under S.C. Code §§40-57-135 and 40-57-137.

Developers' 92 page, 473 paragraph Complaint can be summarized simply; Developers allege that if a real estate agent does not obtain a specific document entitled "listing agreement," then the seller of real estate, *who benefits from the realtor's services*, does not need to pay the real estate agent. In other words, under the Developers' theory, a seller can exploit the hard work of a real estate agent, and then refuse to pay their realtor once the sale is closed. The Developers seek to obtain this windfall despite no allegation that they were actually injured due to the alleged lack of document entitled "listing agreement."

The allegations in the Complaint do not allege that the Developers incurred any damages caused by the lack of a document entitled "listing agreement," nor does the Complaint allege that the compensation paid to the Realtors was not known to Developers. In fact, the Complaint expressly acknowledges the compensation earned by Realtors was earned pursuant to a valid written agreement between Developers and Realtors.

Rather, the Developers' lawsuit is a cynical attempt to obtain a windfall to which they had no expectation at the time of the subject sales, based upon the Developers' perception that they discovered a loophole (an alleged technical violation of the statute).

However, the statute does not allow private actions to punish alleged technical violations, nor does it provide for statutory damages to private parties. This is consistent with long standing South Carolina law. *Overcash v. South Carolina Elec. and Gas Co.*, 364 S.C. 569, 575, 614 S.E.2d 619, 622 (2005) (A private party may not use the statute alone as her basis for a civil action seeking damages absent specific authorization in the statute).

Rather, the statute expressly provides that enforcement of the statutory requirements is vested exclusively in the South Carolina Real Estate Commission.

The statutory section relied upon by the Developers states:

> A licensee may not advertise, market, or offer to conduct a real estate transaction involving real estate owned in whole or in part by another person without first obtaining a written listing agreement from the owner and when advertising or marketing in any medium including site signage, a licensee clearly shall identify the full name of the company with which the licensee is affiliated. Brokers-in-charge who are members of a multiple listing service must be allowed to make their company listings available for any cooperative marketing or advertising program, subject to the rules and regulations of the multiple listing service and with the consent of the owner. Consent may be contained and obtained from the owner through the listing agreement.

S.C. Code § 40-57-135(C)(4) (2004).

As is clear from its plain text, the purpose of this statute is the protection of the public from improper behavior by a class of professionals who are licensed by the State of South Carolina. For example, a real estate agent could be disciplined by the South Carolina Real Estate Commission if she advertised a property to the public that is not actually for sale. The statute is not intended

to act as a mechanism for sophisticated, wealthy developers to avoid paying their real estate agents.

Furthermore, nothing in §40-57-135(C)(4) suggests that a compensation agreement between a realtor and the seller must specifically be titled "listing agreement," as long as the realtor and the seller have agreed in writing to the representation and compensation[9]. Likewise, nothing in § 40-57-135(C)(4) suggests that a realtor who markets and sells property for the benefit of a seller (such as the Developers) is not entitled to a commission simply because the realtor and seller do not execute a specific document entitled "listing agreement."

In fact, the question of whether the Code authorizes a private cause of action for such an offense is answered by the Code itself. S.C. Code § 40-57-790 (Civil Actions) expressly provides that "[a] civil action may be brought for violations of this chapter as provided for violations of Article 1, Chapter 1, in accordance with Section 40-1-210." Section 40- 1-210 allows only the Department of Labor, Licensing and Regulation to institute civil actions through the Administrative Law Court, in the name of the State, "for injunctive relief against a person violating this article, a regulation promulgated under this article, or an order of the board," and further provides "[f]or each violation the administrative law judge may impose a fine of no more than ten thousand dollars[10]."

[9] The same statute upon which Plaintiffs rely recognizes multiple alternative relationships between realtors and sellers other than a strict written "listing agreement." See, S.C. Code § 40-57-350(L)(1) (recognizing transactional brokers who may give one or both parties customer service or facilitate the transaction without representing either party); S.C. Code § 40-57-350(L)(3) (recognizing that sellers who do not choose to establish an agency relationship but who use the services of the [brokerage] firm are considered customers).

[10] The statute gives the South Carolina Real Estate Commission exclusive jurisdiction over enforcing the Act, but it expressly allows an injured party to bring common law claims such as negligence or fraud against a licensee. S.C. Code § 40-57-350(M). Thus, an injured party who

The Court of Appeals correctly held that an alleged statutory violation on its own is insufficient to support a private cause of action. (R. p. 10). Therefore, the Court of Appeals properly affirmed dismissal of the Developers' action.

III. The Court of Appeals correctly deemed Developers' remaining arguments immaterial, as they do not allege facts supporting a cause of action under any theory.

The Court of Appeals concluded that even when accepting all allegations in the Complaint as true, the Developers' action was untimely. Furthermore, the Court of Appeals held that the Developers failed to state facts sufficient to plead a cause of action recognized under South Carolina law. (Appx. pp. 491-495). The reasoning for this holding is simple.

First, the facts alleged in the Complaint demonstrated unequivocally that the action was not timely brought. (Id.).

Second, the Developers did not allege facts that would satisfy the elements of any common law cause of action. Rather, each cause of action asserted by Developers relied on the same central argument—that the Developers were entitled to money damages for an alleged technical violation of S.C. Code § 40-57-135. As a technical violation of S.C. Code §40-57-135 on its own does not provide for a private cause of action for damages, the Developers did not state a claim for relief under any theory of recovery. (Id.).

Nonetheless, the Developers' attempt to shield the simplicity of the Court's ruling by suggesting that the Court of Appeals ignored the standard of review on a Rule 12(b)(6) motion and ignored certain immaterial allegations. These arguments do not have any relationship to the Court of Appeals' statute of limitations and laches ruling, nor the existence of a private cause of action

---

can satisfy the elements of a common law cause of action is free to pursue a licensee. However, an individual cannot sue a licensee solely on account of a violation of the licensing statute.

under S.C. Code §40-57-5 et seq. Therefore, the arguments are insufficient to support reversal of the Court of Appeals opinion.

A. Allegations of "unclean hands" by the Realtors did not bar Realtors from asserting a statute of limitations defense.

The Developers suggest that the Court of Appeals decided a "novel" issue by rejecting Developers' attempt to apply the equitable doctrine of "unclean hands" to affirmative defenses asserted by Realtors. However, there is no novel issue, as it is well established in South Carolina that unclean hands is a *defense* to a Plaintiff's claim, not a sword to be used by Plaintiffs.

The doctrine of unclean hands "precludes a *plaintiff* from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *First Union Nat. Bank of SC v. Soden*, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998) (emphasis added). This is not a novel issue of law. Unclean hands is an equitable defense, and there is no South Carolina case ever applying unclean hands to an affirmative defense.

Here, the Realtors are not plaintiffs making any claim for affirmative recovery. Furthermore, the Developers cite to no legal authority supporting their contention that the Realtors were barred from asserting a statute of limitations defense based on "unclean hands." *Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008) ("[a]n issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."). Thus, Developers' argument asserting that allegations of "unclean hands" bars a statute of limitations defense is without merit.

The Developers also argue that the Court erred by not equitably tolling the statute of limitations.

"Equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." *Hooper v. Ebenezer Sr. Services and Rehabilitation Center*, 386 S.C. 108, 117, 687 S.E.2d 29, 33(2009).

In *American Legion Post 15 v. Horry County*, the Court of Appeals explained the extraordinary nature of equitable tolling. The Court of Appeals held:

> The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff. However, equitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine.
>
> Equitable tolling has been deemed available where—
>
> —extraordinary circumstances prevented the plaintiff from filing despite his or her diligence.
>
> —the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass.
>
> —the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim.
>
> It has been held that equitable tolling applies principally if the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his or her rights. However, it has also been held that the equitable tolling doctrine does not require wrongful conduct on the part of the defendant, such as fraud or misrepresentation.

381 S.C. 576, 583, 674 S.E.2d 181, 184 (Ct. App. 2009).

Here, the grounds for equitable tolling of the statute of limitations simply do not exist in this case. Indeed, as the Trial Court noted; the Developers' Complaint admits they were aware of

alleged "negligence" or "incompetence" of the Realtors as of no later than 2013. (R. pp. 13-14). Yet, the developers did not pursue claims against the Realtors on account of such "negligence" or "incompetence" or investigate the propriety of the Realtors actions any further.

Similarly, the Developers were aware that they were compensating the Realtors for sales of portions of the Property. (R. pp. 59-67). The Developers knew that Wilkins was a realtor licensed under South Carolina law. There are no allegations in the Complaint that the Realtors prevented the Developers, including Porth – an experienced attorney at one of South Carolina's largest firms – from consulting the South Carolina Code or more specifically, those statutes governing real estate licensees.

Accordingly, the Developers' assertion that the allegations of their Complaint stated "extraordinary circumstances" warranting the application of equitable tolling is without merit. *Id*.

B. The Court of Appeals determined that reference to documents not attached to the Complaint was immaterial to its opinion.

In their petition, Developers assert an alleged error by the Court of Appeals in suggesting that the Court of Appeals "failed to address in any fashion" Developers' arguments that the Trial Court improperly considered documents that were not attached to Developers' Complaint.

This allegation is inconsistent with the Court of Appeals opinion. In its opinion, the Court of Appeals expressly stated:

> Appellants argue the circuit court erred by considering documents outside of the records and taking judicial notice of the public record to establish Appellants' knowledge of facts triggering the statute of limitations. Though the law provides that a Rule 12(b)(6), SCRCP motion will not become a summary judgment if a party attaches documents to a complaint or incorporates them by reference and that a party may not benefit from failing to attach documents that are incorporated by reference, see Brazell v. Windsor, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009), we need not address this argument because the complaint outlines events beyond the three year limitations period that would put Appellants on inquiry notice, if not

> actual notice, that they may have a cause of action against Respondents.

(Appx. p. 494)

Rather than ignore Developers' argument, the Court of Appeals decision was based exclusively on the Developers' own allegations taken from the Developers' Complaint. Therefore, the issue of whether documents outside of the Complaint were considered by the Trial Court was irrelevant. The fact that these alleged facts resulted in a legal conclusion adverse to the Developers does not mean the Court of Appeals "failed to address in any fashion" Developers' argument. To the contrary, the Court of Appeals dedicated a numbered section in its opinion to this argument. (Appx. p. 494).

C. The Complaint was correctly dismissed with prejudice.

In another purported issue for consideration, the Developers argue that the Trial Court erred by dismissing the Complaint with prejudice, and the Court of Appeals did not rule on whether the dismissal should have been with or without prejudice. This argument is also without merit.

When a complaint is dismissed under Rule 12(b)(6), SCRCP for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice. *Spence v. Spence*, 368 S.C. 106, 129, S.E.2d 869, 881 (2006). However, when a plaintiff fails to show how they would amend their complaint to avoid dismissal and presents no additional factual allegations or a different theory of recovery which may give rise to a cause of action, then the Trial Court dismissal with prejudice will be upheld. *Id.* at 130-131, 628 S.E.2d at 882.

Here, the Trial Court's Order Granting the Motion to Dismiss clearly dismissed the action with prejudice. (R. pp. 1-21). In Developers' motion to reconsider, they did not challenge this

part of the Order. Thus, they waived appellate review of this issue, and the Court of Appeals had no reason to rule on this argument.

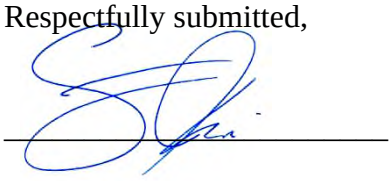
Furthermore, the Developers did not provide any additional facts that would support a viable claim if they were allowed to amend re-file their action. Indeed, as the relief sought by the Developers is barred by the statute of limitations, and the statute that is forms the basis each of Developers' claims does not provide for a private right of action, there are no additional facts or theories that could save the Developers' lawsuit.

Therefore, the Developers' Complaint was properly dismissed with prejudice. *Spence*, 368 S.C. at 131, 628 S.E.2d at 882.

CONCLUSION

For the reasons stated herein, Respondents respectfully request that the petition for certiorari be denied in its entirety.

Respectfully submitted,



Steven R. Kropski (S.C. Bar No: 101441)
David W. Overstreet (S.C. Bar No: 16965)
Ryan M. Gunther (S.C. Bar No: 104141)
Earhart Overstreet LLC
P.O. Box 22528
Charleston, South Carolina 29413
(843) 972-9404

Eric S. Bland (SC Bar No.: 64132)
Ronald L. Richter (SC Bar No.: 66377)
Scott M. Mongillo (SC Bar No.: 16574)
Bland Richter, LLP
P.O. Box 72
Columbia, SC 29202

Attorneys for Respondents Robert P. Wilkins Jr., RPW Development, Inc., and Southern Visions Realty, Inc.

May 8, 2024