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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
Fifteenth Judicial Circuit

Honorable Benjamin H. Culbertson
Circuit Court Judge

Appellate Case No.: 2023-001462

Thomas C. Onions, Jacqueline Onions, Laura Kopchynski, and Lane's Professional Pest Elimination, Inc. ……..……Of Whom Laura Kopchynski is the Petitioner.

v.

Rory M. Isaac and Kimberly J. Isaac …….. Respondents

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in applying the "mere scintilla" standard under Rule 56(c), SCRCP to an order granting summary judgment which was rejected by this Court in *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 892 S.E.2d 297 (2023)?

2. Did the Court of Appeals err in finding an issue of material fact existed as to Buyers' negligent misrepresentation claim?

3. Did the Court of Appeals err in finding a genuine issue of fact existed as to Buyers' Residential Property Condition Disclosure Act claim?

STATEMENT OF THE CASE

This matter arises out of Respondents Rory and Kim Isaacs' ("Buyers" or "Respondents") July 2018 purchase of a home at 24 Avenue of Live Oaks in Pawley's Island, South Carolina ("the Property") from sellers Thomas C. Onions and Jacqueline Onions ("Sellers"). Petitioner Laura Kopchynski ("Petitioner") served as the Sellers' agent and listed the Property for sale. Shortly after the Property was listed on or about April 23, 2018, it went under contract with prospective buyers Randy and Suzanne Cole ("the Coles"). (R. pp. 147-154). The Coles engaged a home inspector who provided them with a report dated May 10, 2018, a summary of which was provided to the Sellers and Petitioner.[1] (R. pp. 197-204). Relevant to this appeal, the May 10, 2018 inspection report noted "dampness in the crawlspace," "missing vapor barrier," "wet debris on top of vapor barrier," and "damp ground." (R. pp. 200-201).

Following receipt of the Coles' inspection report summary, Sellers requested that Stark Exterminators assess the dampness identified in the inspection report summary. On May 16, 2018,

[1] Petitioner provided this exact inspection summary report to the Respondents prior to their offer on the Property.

Andy Ward, an employee of Stark Exterminators, assessed the crawlspace and provided Sellers an "inspection graph" and proposed a "crawl space moisture management system" product.[2] (R. p. 156). The graph identified moisture levels in certain parts of the crawlspace between 22-25%. (R. p. 156). The proposed "crawl space moisture management system" offered to install a dehumidifier for $4,595 and a $200 renewal fee to maintain the service annually. (R. p. 157).

The Sellers also requested an opinion from a contractor that previously performed work for them, Emery Custer ("Custer").[3] (R. p. 167, ln. 18-p. 173, ln. 25). After receiving the contractor's recommendations, the Sellers then hired Custer who added vapor barrier where it was missing, installed a fan in the crawlspace to lower moisture levels, and performed other repairs identified on the Coles' inspection report summary. (R. p. 175).

On or about June 18, 2018, the Coles hired Lane's Professional Pest Elimination, Inc., ("CL-100 Inspectors" or "Lane's") to perform a South Carolina Wood Infestation Report inspection, commonly referred to as a CL-100. (R. pp. 625-626). The same day, however, the contract between the Coles and Sellers was terminated based upon the appraisal contingency in

[2] Mr. Ward describes himself as a "registered pest control technician," however he is not a licensed applicator as required by South Carolina law. (R. p. 433). Clemson Regulatory Services does not recognize "registered pest control technician" as a category of licensing. Furthermore, Section 27-1085K(1) of the Rules and Regulations for the Enforcement of the South Carolina Pesticide Control Act states "[a]ny wood infestation report issued for the purpose of describing the apparent absence of wood-destroying organisms from a building or structure in connection with a sale or mortgage of real property must be issued by an individual currently licensed in Category 7A, Industrial, Institutional, Structural, and Health-Related Pest Control and covered under a valid Pest Control Business License issued by the Department. The report must be signed by the licensed individual and include their applicator and business license number."

[3] Custer is licensed as a specialty contractor in South Carolina under license number 56967. (R. p. 175).

the contract.[4] (R. pp. 177, 179-180). This June 18, 2018 CL-100 was not delivered to the parties to the transaction at the time that the contract was terminated.

Despite the termination of the Contract, the Sellers paid for the June 18, 2018 CL-100 report two days later in order to receive the report. (R. pp. 179-180). This June 18, 2018 CL-100 identified moisture levels in the crawlspace ranging from 20-25%. (R. pp. 625-626). Petitioner, however, was not provided a copy of this report.

Following termination of the contract with the Coles, Petitioner contacted the Respondent Buyers' realtor, Ed Kimbrough ("Buyers' Agent") to advise him that the prior contract had terminated, and the Property was available. (R. pp. 179-180). Via email dated June 19, 2018, Petitioner advised Buyers' Agent that the "CL-100 was done yesterday and *from what I understand* it was good, but I can obtain the report if/when necessary as the sellers paid for it[]" (emphasis added). (R. pp. 179-180). At the same time, Petitioner provided an updated Property Condition Disclosure Statement ("PCDS") which expressly disclosed the repairs performed by Custer and included a copy of the same inspection report summary that she received from the prior purchasers. (R. pp. 191-195). Thus, prior to submitting their offer, Buyers were on notice of the exact same property condition issues that were identified to Petitioner by the prior buyers, as well as the actions taken by the Sellers to remedy such conditions, including moisture in the crawlspace.

On June 20, 2018, Buyers made an offer to purchase the Property. (R. pp. 207-219). The Buyers declined to perform a full home inspection; however, they did elect to have their own CL-100 inspection performed.

[4] The Parties agree that the Coles terminated their contract with Sellers for reasons not relevant to the condition of the Property.

Upon the recommendation of their realtor, Buyers hired Lane's to perform a CL-100 inspection on the Property[5] on July 11, 2018. The July 11, 2018 CL-100 identified lower moisture levels ranging from 8 to 18%. (R. pp. 221-222). On July 23, 2018, the Buyers and Sellers closed on the Property. (R. p. 507, lns. 10-17).

Shortly after closing, the Buyers allege that they experienced extensive standing water on the Property including water in the crawlspace after a period of severe rain[6]. (R. p. 25 at ¶ 54). Buyers further allege that they have spent a significant amount of money to address flooding on the property and moisture issues in the crawlspace. (R. pp. 34-35 at ¶119).

Buyers commenced this lawsuit on November 16, 2018 against the Sellers, Petitioner, and the CL-100 inspector, Lane's, alleging concealment of a history of flooding and water intrusion in the crawlspace. (R. pp. 18-37).

Petitioner timely answered the Complaint on December 19, 2018. (R. pp. 62-72). After extensive discovery, including nine depositions, Petitioner filed her Motion for Summary Judgment on the grounds that there was no genuine issue that Petitioner did not conceal any alleged flooding problems at the Property, and furthermore, that Buyers did not rely on Petitioner to inform them of crawlspace moisture conditions because they had their own CL-100 performed. (R. pp. 135-250). Petitioner's motion was supported by a Memorandum in Support of Summary Judgment with exhibits. (R. pp. 137-250). Buyers submitted a Memorandum in Opposition (R. pp. 251-285), and the Affidavits of Andy Ward (R. pp. 433-456), Henry Moore (R. pp. 425-432), and Brad Cromartie (R. pp. 414-424).

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[5] Buyers' realtor testified that he was not aware Lanes had performed any prior inspections at the Property, but recommended them based upon his own prior experience with Lanes being a reputable CL-100 inspection company.

[6] It should be noted that there is no alleged evidence of prior knowledge of standing water or flooding at the Property by Petitioner—the alleged issue that Buyers experienced post-closing.

The Motion for Summary Judgment was heard by the Honorable Benjamin H. Culbertson on July 26, 2019. (R. pp. 96-132). Judge Culbertson issued a Form 4 Order on July 26, 2019 (R. pp. 1-3) and entered the formal order granting summary judgment on August 12, 2019. (R. pp. 4-13). Buyers timely moved to reconsider on August 5, 2019. (R. pp. 286-301). Both parties submitted additional memoranda in support of their respective positions. (R. pp. 302-398, 399-413). On September 25, 2019, Judge Culbertson issued a Form 4 Order denying Buyers' Motion to Reconsider. (R. pp. 14-16). Buyers served a Notice of Appeal on October 25, 2019. (Appx. pp. 73-95).

The Court of Appeals heard the Buyers' appeal on November 15, 2022. (Appx. p. 708). On July 12, 2023, the Court of Appeals filed a per curiam decision, affirming in part and reversing in part the trial court's decision. (Appx. pp. 708-718). The Court of Appeals affirmed the trial court's grant of Petitioner's motion for summary judgment as to the Buyers' claims for fraud and civil conspiracy, yet reversed the trial court's grant of Petitioner's motion for summary judgment as to the Buyers' claims for negligent misrepresentation and violation of the Residential Property Condition Disclosure Act. (Appx. pp. 708-718).

Petitioner filed a Petition for Rehearing on July 27, 2023. (Appx. pp. 719-735). On August 16, 2023, the Court of Appeals denied the Petition for Rehearing. (Appx. pp. 736-737). Petitioner then sought a writ of certiorari to review the Court of Appeals' decision based upon the grounds that 1) the standard for summary judgment utilized by the Court of Appeals conflicts with this Court's decision in The Kitchen Planners, LLC v. Friedman, 440 S.C. 456, 892 S.E.2d 297 (2023); (2) the Court of Appeals incorrectly applied the elements of Negligent Misrepresentation to the facts of the case; and (3) the Court of Appeals' decision improperly expands the duties and

liabilities of a real estate licensees beyond those established by the Legislature. The Petition for Certiorari was granted on May 22, 2024.

ARGUMENT

1. The Court of Appeals improperly applied the "mere scintilla" standard to the negligent misrepresentation and residential property disclosure causes of action, which standard was rejected by this Court in *Kitchen Planners, LLC v. Friedman*.

In partially reversing the trial court's order, the Court of Appeals applied the incorrect "mere scintilla" standard of review to the negligent misrepresentation and "real property disclosure act" causes of action. In their decision, the Court of Appeals stated "[it] need not find the evidence presented so far is determinative; *simply that it is either a scintilla or more than a scintilla*." (Appx. p. 716) (emphasis added).[7]

Applying the "scintilla" standard, the Court of Appeals concluded that the Buyers had presented a scintilla of evidence necessary to survive a motion for summary judgment under Rule 56(c) as to their negligent misrepresentation and violation of the Residential Property Condition Disclosure Act claims. In its decision, the Court of Appeals stated: "considering the claims relating to the [Sellers'] disclosure, *we find there is at least a scintilla of evidence* supporting a theory" that Petitioner knew or had "reasonable to suspect the information was false, incomplete, or misleading[]" (emphasis added). (Appx. p. 716).

However, under a burden of proof above a mere scintilla, the Court of Appeals held the Buyers' fraud and civil conspiracy claims failed to demonstrate *more* than a scintilla of evidence

[7] We read the Court of Appeals opinion as applying the "mere scintilla" standard to Respondents' negligent misrepresentation and violation of the Residential Property Condition Disclosure Act claims, while applying the "more than a mere scintilla" standard to the Respondents' conspiracy and fraud claims.

necessary to withstand summary judgment. (Appx. pp. 716-717).[8] Specifically, the Court of Appeals explained that "[w]e struggle to find a 'verifiable spark' that [Petitioner] knew the statements she made regarding the June 18 CL-100 were false or that she *recklessly* disregarded their falsity[]" (emphasis in original). (Appx. p. 716).

In *Kitchen Planners, LLC v. Friedman*, this Court clarified that "the 'mere scintilla' standard does not apply under Rule 56(c). Rather, the proper standard is the 'genuine issue of material fact' standard set forth in the text of the Rule. As we stated in *Town of Hollywood v. Floyd*, 'it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.'" *The Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463-64, 892 S.E.2d 297, 301 (2023) (emphasis added).

Here, the *Kitchen Planners* decision confirms that the Court of Appeals committed reversible error in its opinion. While the Court of Appeals correctly determined the Buyers had failed to show *more* than a scintilla of evidence supporting their claims, it reversed the Circuit Court on the negligent misrepresentation and Residential Property Condition Disclosure Act causes of action finding that a "mere scintilla" of evidence was demonstrated. (Appx. pp. 708-718).

Because the Court of Appeals relied on the incorrect standard under Rule 56(c), SCRCP in reviewing the trial court's summary judgment order, the Court of Appeals reinstatement of negligent misrepresentation and Residential Property Condition Disclosure Act causes of action was erroneous and the Circuit Court's decision should be affirmed in its entirety.

[8] For example, the Court of Appeals explained that "for [Respondents'] fraud claim to survive, we must find that there is *more* than a scintilla of evidence supporting [Respondents'] case. Because of the higher burden and stricter elements of fraud, this claim falls short." (Appx. p. 716).

2. The Court of Appeals erred in finding that a genuine issue of fact exists as to whether Petitioner negligently misrepresented any material facts to Respondents.

In its opinion, the Court of Appeals improperly concluded that an issue of fact existed as to Buyers' claims for negligent misrepresentation and violation of the Residential Property Condition Disclosure Act. (Appx. pp. 715-717). As described above, the Court of Appeals relied on an improper standard under Rule 56(c), SCRCP. However, under *any* standard of review, the Court of Appeals erred in its application of the law and the facts.

The "essential elements to establish liability for negligence misrepresentation" are:

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

AMA Mgmt. Corp. v. Strasburger, 309 S.C. 213, 222, 420 S.E.2d 868, 874 (Ct. App. 1992); (Appx. pp. 712-713).

In its decision, the Court of Appeals identified five allegations that it believed provided a question of fact for the jury:

> (1) Kopchynski's position with the community newsletter; (2) the Kopchynski's knowledge of the earlier conditions in the Onions' crawlspace and the Onions' decision to hire Emery Custer rather than someone with more specialized knowledge; (3) the fact that Kopchynski could have known from a plain reading of the June 18 CL-100 that it was not "good," or should have corrected her mistaken impression once she became aware; (4) testimony indicating that she sent two distinct versions of the Emery Custer work "verification" to Kimbrough; (5) the text conversation between herself and Jackie.

(Appx. pp. 715-716).

As described below under separate headings, the Court of Appeals' finding that each of these allegations create a genuine issue of material fact for trial was an error of law and a misapplication of the facts to the law.

A. Petitioner's residence in the same residential community is not proof of knowledge of flooding at the Sellers' Property

Buyers assert that because Petitioner lived in the same residential community as the Sellers, that there is at least a "mere scintilla" of evidence suggesting she would have known of prior flooding at the Property.[9] This conclusion is not supported by the record, and directly contradicts the statutes governing realtors.

As an initial matter, it is pure speculation to suggest that simply because Petitioner lived in the same residential community as the Sellers that she would have knowledge of alleged flooding on the Sellers' Property. *See Kitchen Planners, LLC* at 464, 892 S.E.2d at 302 (finding that the plaintiff "failed to establish a genuine issue of material fact" where "the factfinder would be required to speculate"). There is no testimony or evidence in the record that demonstrates or even implies Petitioner knew of prior flooding at the Property, beyond the sole fact of her living in the same residential community and writing real estate updates for the community newsletter.[10] This

[9] We reiterate our argument before the Court of Appeals that Respondent's did not raise this issue before the Circuit Court and therefore Buyers have abandoned it. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (quoting *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("an issue cannot be raised for the first time on appeal, but must have been raised and ruled upon by the appellate judge to be preserved for appellate review")).

[10] As an example of her work for the community newsletter, Petitioner occasionally provided updates on how many properties were for sale or have sold within the community. (R. p. 611). Nothing in the record suggests that Petitioner ever wrote a newsletter that relates in any way to flooding or excessive moisture.

is an inference that is not reasonable and an issue of fact that is not genuine.[11] *Floyd* at 477, 744 S.E.2d at 166.

Moreover, the Court of Appeals' decision directly contradicts with S.C. Code Ann. §40-57-740(A)(3) which states: "[n]o cause of action may arise against an owner of real estate or a licensed real estate agent of a party to a transaction for failure to disclose in a transaction any off-site condition or hazard **that does not directly impact the property being transmitted**[]" (emphasis added).

Here, the Court of Appeals' opinion improperly expands a realtor's duty to identify any instance of flooding in an entire community. (Appx. pp. 715-716). In essence, the Court of Appeals held that a realtor should know and disclose potential property conditions that may exist within some undefined radius around the subject property.[12] *See* S.C. Code Ann. § 27-50-80; *see also Chastain v. Hiltabidle*, 381 S.C. 508, 519, 673 S.E.2d 826, 832 (Ct. App. 2009) ("a real estate licensee does not have a duty to inspect or investigate the physical condition of a piece of property for the purposes of confirming or denying statements made by a seller in a disclosure statement. Rather, the Legislature places the duty of performing such an inspection or investigation squarely on the buyer") (emphasis added).

The Court of Appeals' opinion in *Chastain v. Hiltabidle* is instructive. In *Chastain*, buyers of real property contended that because a realtor was allegedly aware of prior flooding in the

[11] As further evidence that no reasonable factfinder could infer that Petitioner was aware of a history of flooding at the Property, the Property is not located in a flood plain. (R. p. 514, lns. 8-9).

[12] Moreover, nothing in the record suggests that Respondents were unable to ascertain any alleged drainage or flooding issues in the neighborhood prior to purchasing the Property. Regarding the possibility of flooding during heavy rain, no South Carolina statute or case law requires a real estate licensee to disclose weather conditions at a listed property to potential buyers. That information is readily available online.

community where the real property was located, a question of fact existed as to whether the realtor knew or should have known that the subject property was prone to flooding. Rejecting this argument, the Court of Appeals explained that:

> [E]ven assuming that the substantive information about flooding in the [disclosure statement] was inaccurate or incomplete, and further assuming [the realtor] knew the [p]roperty had flooded in the past, it would not necessarily follow that [the realtor] knew [the sellers'] statements in the [disclosure statement] about the [p]roperty's flooding history were inaccurate or incomplete…if the owner of a property provides the purchaser with a disclosure form that contains false, incomplete, or misleading information, the real estate licensee is not liable unless he or she knew or had reasonable cause to suspect the information in the disclosure form was false, incomplete, or misleading. S.C. Code Ann. § 27-50-70. The statute is concerned with whether a real estate licensee knows the statements in a disclosure form are false, not simply whether the licensee knows of a defect in the property. Therefore, to survive summary judgment, [buyers] must present evidence that raises a question of fact as to whether [the realtor] knew or should have known that the statements in the [disclosure statement] were inaccurate.

Chastain at 520, 673 S.E.2d at 832.

Should the Court of Appeals' opinion stand, it will unworkably expand the duties of a real estate licensee beyond those expressly set out by South Carolina law. *See S.C. Pub. Interest Found. v. Courson*, 420 S.C. 120, 123, 801 S.E.2d 185, 186 (Ct. App. 2017) (quoting *Grimsley v. S.C. Law Enforcement Div.*, 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012) ("[w]hen interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation")) (emphasis added).

For the reasons described above, no reasonable jury could infer from Petitioner's work on the community newsletter or from the fact that Petitioner happened to live in the same community as the Sellers that she had reasonable cause to believe that Sellers were not being truthful about flooding on the Property in their PCDS.

B. Petitioner's knowledge of the Sellers' decision to hire the contractor that addressed moisture in the crawlspace.

The Court of Appeals also erred in finding that Petitioner's knowledge of the Sellers' decision to hire contractor Emery Custer, "rather than someone with more specialized knowledge" could lead a reasonable jury to infer that she had reasonable cause to believe she made false, incomplete, or misleading statements. (Appx. p. 715).

As an initial matter, it is unclear whom the Court of Appeals believed would have more specialized knowledge, as there is no recognized crawlspace "specialty" contractor category in South Carolina[13].

As to Petitioner's knowledge of the earlier conditions, Respondents have presented no evidence that Petitioner had actual knowledge of misrepresentations on Sellers' PCDS. S.C. Code Ann. § 40-57-350(G)(1) provides that "[a] licensee shall treat all parties honestly and may not *knowingly* give them false or misleading information about the condition of the property which is known to the licensee" (emphasis added). Likewise, the PCDS provides that "the real estate licensee must disclose material adverse facts about the property if actually known by the licensee about the issue, regardless of owner responses on this disclosure." (R. p. 38) (emphasis added).[14]

[13] To the extent this is a reference to Stark Exterminators, there is nothing in the record that suggests the exterminator company holds a contractor's, engineering, or architectural license. Thus, an actual licensed contractor, Mr. Custer, is more specialized than a pest control company with no construction related license.

[14] S.C. Code Ann. § 40-57-30(16) defines a "material adverse fact" as "(a) a condition or occurrence that is generally recognized as: (i) significantly and adversely affecting the value of the real estate; (ii) significantly reducing the structural integrity of improvements to real estate; or (iii) presenting a significant health risk to occupants of the real estate; or (b) information that indicates that a party to a transaction is not able to or does not intend to meet an obligation under a contract or agreement made concerning the transaction."

No evidence in the record indicates that any part of the Property's structural integrity was reduced. However, S.C. Code Ann. § 12-37-3130(1) defines "improvements" as "(a) new construction, (b)

Buyers do not dispute that Petitioner provided the prior inspection report summary which showed dampness and moisture in the crawlspace to Buyers' Agent, and disclosed actions taken by the Sellers to address these issues, such as installing a fan in the crawlspace. (R. pp. 191-195, 199-200, 205).

Additionally, Petitioner testified that Custer is "known as a very reputable and credible licensed contractor." (R. p. 476, lns. 8-9). Custer himself testified that he possesses a specialty contractor license in South Carolina. (R. p. 542, ln. 2- p. 543, ln. 23). Thus, as Petitioner is not a licensed contractor herself, she was entitled to rely on Custer's license and that he would perform the work within the standard of care. She likewise does not have the necessary expertise to evaluate his work.[15]

For the reasons described above, no reasonable jury could infer from Petitioner's knowledge of any earlier conditions or Sellers' decision to hire Custer that she had reasonable cause to believe that Sellers were not being truthful.

C. Petitioner's statement that "from what she understands" the June 18 CL-100 was "good."

The Court of Appeals further erred in finding there was a genuine issue of material fact as to whether Petitioner made a false representation as to her June 19, 2018 email to Buyers' Agent

reconstruction, (c) major additions to the boundaries of the property or a structure on the property, (d) remodeling, or (e) renovation and rehabilitation, including installation." The work performed on the crawlspace does not fall into any of these categories.

[15] It is also undisputed that Buyers were aware that Custer was hired to address moisture issues in the crawlspace, and that his solution was the installation of a fan in the crawlspace.

that stated the "CL-100 was done yesterday and *from what I understand* it was good, *but I can obtain the report* if/when necessary as the sellers paid for it." (R. pp. 179-180) (emphasis added).[16]

The relevant portion of Petitioner's email to Buyers' Agent is copied below:

From: Laura Kopchynski <laurainpawleys@gmail.com>
Sent: Tuesday, June 19, 2018 7:55 PM
To: Ed Kimbrough <Ed@thegeorgetownagency.com>
Subject: info for 24 ave of live oaks

Hey Ed,

Hopefully you received my voice message about the plantation house.

Because I have already gone ahead and sent additional information as per request to some of the other agents that were on my list and to who I reached out today, I wanted to at least keep you up to the same speed so you have all the info you need ahead of time in the event your folks have an interest and want to make an offer after previewing the home tomorrow.

Attached you will find the governing documents for LP (CC&R's, Rules & Regs and Master Deed), and I do have the home inspection summary report on hand as well as the repair verification form prepared by the contractor who made the repairs, should that be needed later. CL-100 was done yesterday and from what I understand it was good, but I can obtain the report if/when necessary as the sellers paid for it.

I thought it would be prudent to mention the current Market Value as it appears in the county records due to the significant discrepancy from years back and 2017. The sellers went to Georgetown County last year in an effort to grieve their tax bill as it was their opinion that they were being over taxed over the last few years at a $699,000 + market value, when they believed they should be taxed at a value between $625,000 - $645,000 based on the comps at that time. The county accepted the grievance and stated they only way they could make an effort to make it right is to under-assess the home for a period of one year as a way of extending a credit back to the sellers with the understanding that the home would be reassessed in 2018 as all of Georgetown County will be due a new assessment. The sellers agreed, and as a result, Georgetown County lowered the market value to $509, 400 for 2017.

(R. p. 274).

As the trial court correctly noted, "it is undisputed that [Petitioner] disclosed the June 18, 2018 CL-100 report to [Buyers'] realtor, and offered to obtain the report for [Buyers]." (R. p. 10).

Moreover, a plain reading of the above email shows this statement is not false or misleading, and cannot reasonably be construed as such.[17] Petitioner never definitively stated to Buyers or Buyers' Agent that the CL-100 was "good," only that it was good "from what [she understood]." For Respondents to demonstrate that this statement is false or misleading, they must show that there is a genuine issue of material fact that Petitioner did not in fact "understand" the

[16] To be clear, this email was sent to Buyers' Agent *before* Buyers submitted an offer. Respondent Rory Isaac testified that he likewise reviewed the summary inspection report before making an offer. (R. pp. 231 ln.23-p. 233 ln. 7).

[17] *See Turner v. Milliman*, 392 S.C. 116, 124, 708 S.E.2d 766, 770 (2011) (quoting *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 105, 439 S.E.2d 283, 285 (Ct. App. 1993) ("[t]o be actionable, the representation must be…**false when made**")) (emphasis added).

CL-100 to be good, and they have failed to do so here.[18] *See* Rule 56(e), SCRCP (in opposing a motion for summary judgment, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response…must set for specific facts showing that there is a genuine issue for trial").

Additionally, Petitioner had not read the CL-100 at that time, and the only reasonable interpretation of the phrase "from what I understand" would be that Petitioner was relaying secondhand knowledge of the CL-100, not direct knowledge. Likewise, Petitioner's offer that "I can obtain the report if/when necessary as the sellers paid for it" can only be read to portray that Petitioner was not in possession of the June 18 CL-100 at the time she sent the email. (R. p. 274). One does not need to "obtain" something of which they already have possession.

Moreover, the term "good" is both vague and subjective, and nevertheless is a mere statement of opinion that is not actionable under South Carolina law.[19] *See AMA Mgmt. Corp.* at 222, 420 S.E.2d at 868 (citing *Winburn v. Ins. Co. of North Am.*, 287 S.C. 435, 339 S.E.2d 142 (Ct. App. 1985)) (noting that "[n]ot every statement made in the course of commercial dealings is actionable at law. A mere statement of opinion…does not give rise to liability in tort[]").

In *Winburn v. Ins. Co. of North Am.*, for example, a plaintiff sought to hold a defendant liable for negligent misrepresentation where the defendant suggested a "good mechanic" who allegedly made inadequate repairs. *Winburn v. Ins. Co. of North Am.*, 287 S.C. 435, 339 S.E.2d

[18] Even under the impermissibly low "mere scintilla" standard utilized by the Court of Appeals, there is still no evidence in the Record suggesting Petitioner understood the CL-100 to be anything other than "good."

[19] For example, 'good' could reasonably mean 'no active termites.' *See Gecy v. S.C. Bank & Trust*, 422 S.C. 509, 523, 812 S.E.2d 750 (Ct. App. 2018) (quoting *Quail Hill, LLC v. Cty. of Richland*, 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010) ("[t]here is no liability for casual statements, representations as to matters of law, or matters which plaintiff could ascertain on his own in the exercise of due diligence")). If Buyers or Buyers' Agent had any question about what Petitioner meant by 'good,' they could have asked her, yet chose not to.

142 (Ct. App. 1985). Specifically, the Court of Appeals held that "[the Defendant's] representations that [the mechanic] was a good mechanic was nothing more than mere expressions of an opinion." *Id.* at 440, 339 S.E.2d at 146. By contrast, Petitioner's statement that "from what I understand it was good" regarding the June 18 CL-100 is not even an expression of her own opinion, and thus a reasonable person would be even less justified in relying on it than if had she not qualified the opinion by stating "from what I understand…"

In this case, as discussed herein, Petitioner also never stated that she saw the CL-100. Yet, the Court of Appeals found that a reasonable jury could infer that "Petitioner could have known from a plain reading of the June 2018 CL-100 that it was not 'good.'" (Appx. pp. 715-716). It is unclear how a plain reading of the CL-100 could have occurred when Petitioner had not seen or obtained the CL-100. Moreover, to the extent a plain reading would have demonstrated the CL-100 was not "good", the Buyers were offered the opportunity to review the June 2018 CL-100, but declined it. *See Chastain* at 519, 673 at 832.

It is undisputed that Kopchinski offered the prior CL-100 to Buyers' Agent, and he rejected it. Thus, regardless of how Petitioner represented the CL-100 to him, Buyers' Agent could have read the CL-100 for himself if chose he to or provided it to Buyers for their review. *See Gecy v. S.C. Bank & Trust*, 422 S.C. 509, 523, 812 S.E.2d 750 (Ct. App. 2018) (quoting *Quail Hill, LLC v. Cty. of Richland*, 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010) ("[t]here is no liability for casual statements, representations as to matters of law, or matters which plaintiff could ascertain on his own in the exercise of due diligence")).

In *Quail Hill, LLC v. Cty. of Richland*, for example, the plaintiff sought to hold Richland County liable for its employees allegedly negligently misrepresenting what the County's zoning rules would permit the plaintiff to build on a piece of property. *Quail Hill, LLC v. Cty. of Richland*,

387 S.C. 223, 692 S.E.2d 499 (2010). This Court held that there was no genuine issue of material fact regarding negligent misrepresentation because the plaintiff "*could have reviewed* the Official Zoning Map to ascertain the correct zoning classification." *Id.* at 241, 692 S.E.2d at 509 (emphasis added). Here, there is no genuine issue of material fact here that Respondents and/or their agent *could have reviewed* the June 18 CL-100 if they wished, but declined to do so.

Furthermore, the Court of Appeals erred in concluding that a jury could reasonably interpret the evidence before it to show that Buyers, through their agent, relied on Petitioner's statement that "from what I understand it was good" in declining to ask to review the June 18 CL-100. (Appx. pp. 715-716). Buyers' Agent explained in his deposition that the CL-100 was going to be Buyers' responsibility, and that he "wanted it that way." (R. p. 583, lns. 5-23). Buyers' Agent testified:

> Q: Did you want that CL-100 report?
>
> A: No.

(R. p. 584, lns. 22-23).

He further elaborated: "when she said 'good,' I thought, perfect. We're not going to have an issue on that. **We will order our own CL-100 and we'll verify the information** that we need regarding to repairs…**it was not even relevant** from a date period. CL-100 reports are only good for 30 days. **We would have to have another one done prior to closing anyways**."[20] (R. p. 585, lns. 3-12) (emphasis added).

[20] As Buyers' Agent correctly noted, the June 18 CL-100 conspicuously states "THIS REPORT [IS] VALID FOR 30 DAYS ONLY. THIS REPORT IS NOT A GUARANTEE OR WARRANTY AGAINST FUTURE INFESTATION OR DAMAGE." (R. p. 625). Thus, regardless of Petitioner's characterizations of the June 18 CL-100, there is no genuine issue of material fact that the report would not have not been "valid" at the time of closing, and thus no reasonable purchaser could rely on it prior to closing.

As Buyers' Agent himself made clear, he in no way relied on Petitioner's characterization of the June 18 CL-100 in deciding whether to have a subsequent CL-100 performed. Instead, he selected Lane's to perform the CL-100 for Buyers. (R. p. 586, ln. 19-p. 587 ln. 4). *See McLaughlin v. Williams*, 379 S.C. 451, 457-58, 665 S.E.2d 667, 672 (Ct. App. 2008) (holding that a home purchaser had no right to rely on a disclosure statement where a subsequent CL-100 was performed on the property and explaining that "if the undisputed evidence clearly shows that the party asserting reliance has knowledge of the truth of the matter, there is no genuine issue of material fact"). Accordingly, there is no evidence that Buyers or Buyers' Agent relied on Petitioner's statement, nor that Buyers were unable to discover relevant facts with proper due diligence.

Moreover, Lane's performed a subsequent CL-100 <u>on the Buyers' behalf</u> on July 11, 2018, which identified moisture levels ranging from 8 to 18% (R. pp. 221-222).[21] It is also undisputed that Lane's is licensed to perform CL-100 inspections. (R. pp. 221-222). The Buyers' subsequent CL-100 by Lane's showed that there were no excessive moisture levels in the crawlspace. (R. pp. 10, 221-222). This July 11, 2018 CL-100 was performed *after* Petitioner's statement that "from what I understand it was good." To the extent the Buyers' own July 11, 2018 CL-100 contained inaccuracies, it is Buyers' reliance on *this* CL-100, rather than any statement by Petitioner, that caused Buyers' to move forward with the purchase.

Ultimately, prior to even making an offer, the Buyers were offered and could have requested the June 18, 2018 CL-100. They declined. (R. p. 584, ln. 22- p. 585, ln. 22). Regardless of Petitioner's characterization of the June 18 CL-100 based upon "her understanding", it is

[21] Because Lane's had also performed the June 18 CL-100, they would have had full knowledge of the previous moisture levels at the Property which Respondents suggest Petitioner failed to disclose. Buyers were aware that Lane's when submitting their offer of Lane's previous involvement with the Property, and nothing prevented them from inquiring with Lane's about any previous reports or treatments they may have completed at the Property. (R. p. 193).

undisputed that Buyers neither relied on Petitioner's statement, nor the June 18, 2018 CL-100 at all. Buyers relied on the subsequent CL-100 which was performed at their request.

Accordingly, there was no concealment of any material fact or reliance on any false or misleading statement, and no reasonable jury could infer otherwise.

D. The two versions of the verification form.

The Court of Appeals further erred in finding that a reasonable jury could infer from the two versions of the verification forms that Petitioner had reasonable cause to suspect that Sellers were not being truthful. (Appx. pp. 715-716). By contrast, the Record contains no evidence to support this inference.

Although, the Buyers allege that the repair verification sent to Buyers' Agent was forged and that Petitioner knew of this forgery, they have cited to no evidence in the Record to support this contention. To the contrary, the repairs listed on the verification form were in fact performed, Seller Thomas Onions testified that he drafted the repair verification based upon repairs that were in fact performed, and Petitioner did not even have knowledge that Seller Thomas Onions had drafted the verifications. (R. p. 531 lns. 16-22). For these reasons, there is no evidence to support an inference that Petitioner knew of any alleged forgery.

Furthermore, any such allegation of "forgery" is immaterial. The only difference between the two "distinct" versions of the repair verification forms was the signature on the form. Likewise, Buyers do not dispute that Custer did in fact perform the repairs identified on the repair verification, including installing a fan in the crawlspace. (R. p. 175).

For the reasons described above, no reasonable jury could infer from the two versions of the verification form that Petitioner had reasonable cause to believe that Sellers were not being truthful.

E. Text conversations between Petitioner and Seller Jacqueline Onions.

The Court of Appeals further erred in finding that a reasonable jury could infer from the text conversation between Petitioner and Seller Jacqueline Onions that Petitioner had reasonable cause to suspect that Sellers were not being truthful. (Appx. pp. 715-716). It is unclear how these texts could be interpreted to show that Petitioner had reasonable cause to suspect that Sellers were not being truthful or that she was intentionally hiding any material facts from Buyers.

In the text conversations, Petitioner and Seller Jacqueline Onions agreed that Custer should not be working at the Property while Buyers were attempting to perform a walkthrough. (R. pp. 628-629). Buyers, however, have presented no evidence that Petitioner attempted to hide Custer or his work from them.

By contrast, Buyers were aware of the fan in the crawlspace that Custer installed and had their own CL-100 inspection performed on the crawlspace prior to closing. (R. p. 591 1n. 18- p. 592 ln. 8). Buyers were also aware, as discussed above, of repair verification forms identifying Custer as the contractor who performed the repairs. (R. p. 273; R. p. 512, lns. 16-20; R. p. 513 lns. 11-13). Nothing in the record suggests that Buyers were prevented from reaching out to Custer to discuss the verification form. *See AMA Mgmt. Corp. v. Strasburger* at 222, 420 S.E.2d at 874 (Ct. App. 1992) ("[t]here is no liability for… matters which plaintiff could ascertain on his own in the exercise of due diligence.")

Accordingly, no reasonable jury could infer that Petitioner had reasonable cause to believe Sellers were not being truthful from her text conversation with Seller Jacqueline Onions.

3. The Court of Appeals erred in finding that a genuine issue of fact exists as to whether Petitioner violated the Residential Property Condition Disclosure Act.

The Buyers argued before the trial court and Court of Appeals that Petitioner had actual knowledge of alleged misrepresentations on the PCDS and therefore violated the Residential

Property Condition Disclosure Act.[22] Buyers further suggested that Petitioner owed Buyers a legal duty to provide them with Andy Ward's inspection graph. However, the trial court properly ruled that the statutory framework outlining a real estate licensee's responsibility defeats Buyers' claim under the South Carolina Residential Property Condition Disclosure Act. (R. pp. 4-13).

A real estate licensee's responsibilities and liabilities under the South Carolina Residential Property Condition Disclosure Act are laid out in S.C. Code Ann. §§ 27-50-50(C), 27-50-70(B), and 27-50-80. As the trial court properly recognized, these sections "reference and reaffirm" a real estate licensee's obligation under S.C. Code Ann. § 40-57-350 (governing real estate licensees). (R. p. 9). Importantly, S.C. Code Ann. § 40-57-350 also makes clear that "[n]othing in this chapter limits the obligation of the buyer to inspect the physical condition of the Property." S.C. Code Ann. § 40-57-350(H).

As the Court of Appeals noted, the South Carolina Residential Property Condition Disclosure Act limits the liability of a real estate licensee for misstatements on a disclosure statement if "the real estate licensee did not know or have reasonable cause to suspect the information was false, incomplete or misleading." (Appx. p. 715); S.C. Code Ann. § 27-50-70(B). This statute "is concerned with whether a real estate licensee knows the statements in a disclosure form are false, not simply whether the licensee knows of a defect in the property." *Chastain* at 520,

[22] Importantly, nothing in The Residential Property Condition Disclosure Act creates a private cause of action against a real estate licensee arising out of a seller's allegedly false statements in the PCDS. *See* S.C. Code Ann. §§ 27-50-10 - 27-50-110; *Doe v. Marion*, 373 S.C. 390, 397, 645 S.E.2d 245, 248 (2007) (explaining that "[w]hen a statute does not specifically create a private cause of action, one can be implied only if the legislation was enacted for the special benefit of a private party[]").Here, the Residential Property Condition Disclosure Act makes clear that it "does not limit any other remedy available to the purchaser under law." *See* S.C. Code Ann. § 27-50-50(C). In other words, the statute does not abrogate common law causes of action unless expressly set forth in the statute. Accordingly, Buyers' cause of action for "violation of the Residential Property Condition Disclosure Act" is not a proper cause of action under South Carolina law.

673 S.E.2d at 832. Further limiting a real estate licensee's liability for alleged misstatements is S.C. Code Ann. § 40-57-350(G)(2), which provides that "[n]o cause of action may be brought against a real estate brokerage firm or licensee by a party for information contained in reports or opinions prepared by [a]…wood destroying organism control expert [or] termite inspector[]" (emphasis added).

Here, Petitioner is not a licensed contractor, nor is she licensed to prepare CL-100 reports. As a real estate licensee, she had no duty to inspect on- or off-site conditions of the Property. S.C. Code Ann. § 27-50-80; *Chastain*, 381 S.C. at 519, 673 S.E.2d at 832 (Ct. App. 2009). She also has no duty to advise Sellers on matters outside her expertise, including regarding moisture issues in the crawlspace. *Chastain* at 519, 673 S.E.2d at 832 (quoting S.C. Code Ann. § 40-57-137(F)).

Furthermore, Petitioner is entitled to the protections of the limitation of liability contained in S.C. Code Ann. § 40-57-350(G)(2), a plain reading of which bars a cause of action against Petitioner for information contained in the allegedly inaccurate July 11, 2018 CL-100 report, as the trial court correctly noted. (R. p. 10).

The Court of Appeals' opinion sidesteps the plain reading of the statute barring Buyers' claims by suggesting that Buyers are not seeking to hold Petitioner responsible for the information in the July 11, 2018 CL-100 report, but instead for her alleged *mischaracterization* of the June 18 CL-100 (emphasis in original). (Appx. p. 715). This ruling is contrary to well established South Carolina law. *See Gay v. Ariail*, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009) ("where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning[]").

As described at length above, there is no genuine issue of material fact that Petitioner did not mischaracterize the June 18 CL-100, and nevertheless, Buyers and Buyers' Agent had a

subsequent CL-100 performed following any statements regarding the June 18 CL-100 by Petitioner, on which they relied. (R. p. 511, ln. 18- p. 512, ln. 12). Accordingly, to the extent Buyers do seek to hold Petitioner liable for mischaracterizing the June 18 CL-100, the trial court properly found that summary judgment was appropriate.

There is no genuine issue of material fact that the proximate cause of the Buyers' alleged damages is alleged inaccuracies in the July 11 CL-100 performed on their behalf, *not* anything contained within a prior CL-100. Therefore, the trial court properly ruled that S.C. Code Ann. § 40-57-350(G)(2) bars Buyers' claims as to violations of the South Carolina Residential Property Condition Disclosure Act.

Lastly, Respondents' contention that there is a genuine issue of material fact that Petitioner knew the July 11, 2018 CL-100 was misleading and incomplete because she had alleged knowledge of the contents of the prior CL-100 is not supported by any evidence in the Record. *See* Respondents' Return to Petition for Writ of Certiorari, p. 18. As established above, Petitioner lacked the expertise to evaluate the contents of either CL-100, and regardless, is shielded from liability pursuant to S.C. Code Ann. § 40-57-350(G)(2) for their contents. Nonetheless, no reasonable jury could infer that because two reports prepared by the same company a month apart reach different conclusions, Petitioner would have knowledge that the latter report must be inaccurate. This assertion does not create a genuine issue of material fact for trial.

Because S.C. Code Ann. § 40-57-350(G)(2) bars Buyers' claims, the Court of Appeals erred in partially reversing the trial court's Order granting Petitioner's Motion for Summary Judgment as to violations of the South Carolina Residential Property Condition Disclosure Act.

4. The Court of Appeals properly found that Respondents' procedural arguments were either unpreserved or abandoned on appeal.

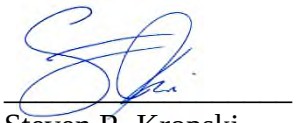
Respondents again raise several procedural arguments in their Return to Petition for a Writ of Certiorari that the Court of Appeals properly concluded were either unpreserved or abandoned on appeal. (Appx. p. 718). However, where an argument is conclusory and unsupported by authority, it is deemed abandoned. *Miller v. Dillon*, 432 S.C. 197, 207, 851 S.E.2d 462, 468 (Ct. App. 2020) (quoting *State v. Howard*, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009)); *see also Jones v. S.C. Dep't of Health & Envtl. Control*, 384 S.C. 295, 317, 682 S.E.2d 282, 294 (Ct. App. 2006). We incorporate by reference the findings of the Court of Appeals regarding Respondents' unpreserved or abandoned arguments. (Appx. p. 718).

CONCLUSION

For the reasons stated herein, Petitioner requests that this Court reverse the Court of Appeals' reinstatement of Buyers' claims for negligent misrepresentation and violation of the Residential Property Condition Disclosure Act and reinstate the Trial Court's grant of summary judgment in its entirety.

Respectfully submitted,

EARHART OVERSTREET, LLC



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