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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Greenville County
Court of Common Pleas

The Honorable J. Derham Cole
The Honorable G. D. Morgan, Jr.

Appellate Case No. 2023-001529

Zachary Leland Moody and Kristina L. Moody, ...Appellant,

v.

Gabriela B. Lopez a/k/a Gabriela Blatazar Lopez-Gutierrez, an individual, Leopoldo Vera Hernandez, an individual, Santa Fe Construction, LLC, Juan Carlos Maldonado, an individual, ServPro of Pickens County d/b/a Blue Moon Enterprises, Inc., Scott D. Caulfield, an individual, Keller Williams Western Upstate, The Haro Group of Keller Williams, Creasy Construction, LLC, Harry James Creasy, an individual, and John Allen Drew, an individual, ...Defendants,

Of Which ServPro of Pickens County d/b/a Blue Moon Enterprises, Inc., and TCT1, LLC d/b/a Keller Williams Western Upstate, ...Respondents.

BRIEF OF RESPONDENT TCT1, LLC d/b/a KELLER WILLIAMS WESTERN UPSTATE

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STATEMENT OF ISSUES ON APPEAL

1. **Whether the trial court correctly ruled that as a matter of law a buyer's agent is not required to ensure a seller has provided responses to each entry in the South Carolina Residential Property Condition Disclosure Statement.**
2. **Whether the trial court properly ruled that TCT1 neither owed nor violated any legal duty on which Appellants may base a claim for negligence.**
3. **Whether the trial court's ruling in favor of the Respondent TCT1 on a Breach of Fiduciary Duty must be affirmed, as Appellants have abandoned their appeal of this cause of action.**

STATEMENT OF THE CASE

Respondent, TCT1, LLC d/b/a Keller Williams Upstate (hereinafter, "Respondent TCT1") joins in and adopts the Statement of the Case by reference to the Factual Background, Procedural History, The Motion at Issue, and This Appeal sections as submitted by Respondent, ServPro of Pickens County d/b/a Blue Moon Enterprises, Inc. (hereinafter, "Blue Moon") pursuant to Rule 208(b)(6), SCACR. This brief addresses the second order granting summary judgment as to Respondent TCT1 only and supplements the Statement of the Case made by Respondent Blue Moon.

I. FACTUAL BACKGROUND

This case arises from the purchase of a single-family residence by the Appellants in April of 2017. (Amd. Compl., generally). Appellants entered into a buyer agency agreement with Respondent TCT1 to assist them with finding and purchasing a new home. (Amd. Compl. at ¶ 25 and Answer of TCT1 at ¶ 6). Respondent TCT1 employed Nate Emery, a real estate licensee, who assisted the Appellants during the purchase of the residence. (Amd. Compl. at ¶ 25). Nate Emery, as the buyer's agent for Appellants, received a State of South Carolina Residential Property Condition Disclosure Statement (hereinafter, "Disclosure Statement") from the seller of the residence, Gabriela Lopez. (Amd. Compl. at ¶ 26 and TCT1 MSJ Ex. 2 and TCT1 MSJ Ex. 3 at 47:14-22). Emery provided the Disclosure Statement to his clients, the Appellants, who acknowledged the Disclosure Statement by their individual signatures on January 20, 2017. (TCT1 MSJ Ex. 2 and TCT1 MSJ Ex. 3 at 46:24-47:13). Appellants allege they purchased the residence "without any knowledge of . . . Lopez's incomplete disclosure statement" in April of 2017. (Amd. Compl. at ¶ 30 and Aff. of Zachary L. Moody at ¶ 13). Appellants allege they began to experience issues related to the home by the Summer of 2018. (Amd. Compl. at ¶ 31).

II. PROCEDURAL HISTORY

Appellants filed this lawsuit on April 28, 2020, against numerous defendants, including Respondent TCT1. (Compl., generally). Appellants pled two causes of action against Respondent TCT1: (1) negligence in discharging agency duties to Appellant's as their buyer's agent; and (2) breach of fiduciary duty by "failing to exercise any skill or care in discharging [TCT1]'s agency duties . . ." (Amd. Compl. at ¶¶ 85-93). TCT1 filed responsive pleadings on September 22, 2020, denying the allegations and raising separate counterclaims for, *inter alia*, dismissal of the claim against TCT1 as no duty under the law exists. (Answer at ¶¶ 35-37).

III. TCT1'S MOTION FOR SUMMARY JUDGMENT

Respondent TCT1 filed a Motion for Summary Judgment as to Defendant TCT1, LLC d/b/a Keller Williams Upstate on May 9, 2023, which contained exhibits and arguments of law. (TCT1 MSJ). TCT1 sought summary judgment on the grounds that: (1) TCT1, as buyer's agent, owed no legal duty to the Appellants to "independently investigate the condition of the property;" (2) the Appellants clearly reviewed the blanks in the Disclosure Statement prior to their acknowledgement by signature; (3) the Appellants have no evidence that TCT1 violated a legal duty owed to them supporting a negligence claim; (4) the Appellants have no evidence that TCT1 owed a fiduciary duty to them and violated that fiduciary duty; and (5) the claims are barred by the South Carolina Residential Property Condition Disclosure Act (hereinafter, the "RPCDA"). (TCT1 MSJ).

In support of the Motion, TCT1 filed three exhibits on July 25, 2023, with the fourth referenced exhibit to be provided at the hearing. (TCT1 MSJ Exhs. in Supp.). The first exhibit, Appellants' Answers to TCT1's First Set of Requests for Admissions, sets forth the following admissions of Appellants:

A. Appellants read and examined the Disclosure Statement before Appellants initialed and signed the Disclosure Statement. (TCT1 MSJ Ex. 1 at ¶ 2). Appellants are able to read, write and speak the English language. (TCT1 MSJ Ex. 1 at ¶ 5). Appellants were capable of reading and understanding the statements made in the Disclosure Statement. (TCT1 MSJ Ex. 1 at ¶ 6).

B. Appellants have no evidence that TCT1 "knew specific (sic) about the specific facts or conditions pled in" the Amended Complaint. (TCT1 MSJ Ex. 1 at ¶ 13).

C. Appellants understood the Disclosure Statement to state that "Owner is solely responsible to complete this disclosure as truthfully and fully as possible." (TCT1 MSJ Ex. 1 at ¶ 14).

D. Appellants were capable of observing the lack of a response to Section II, number 7, of the Disclosure Statement prior to their acknowledgement by signature. (TCT1 MSJ Ex. 1 at ¶ 16).

E. Appellants knew that there were multiple questions on the Disclosure Statement that did not have a response from the owner. (TCT1 MSJ Ex. 1 at ¶¶ 17-25).

F. By signing the Disclosure Statement, the Appellants admit they received a copy of the Disclosure Statement; they examined the Disclosure Statement; they had both time and opportunity to consult with legal counsel; and that the Disclosure Statement was not a warranty by the real estate licensees, a substitute for obtaining inspections, a warranty by the owner. (TCT1 MSJ Ex. 1 at ¶ 32).

G. Appellants admit they did not rely solely on the Disclosure Statement in deciding to purchase their home and that they sought and obtained a home inspection report prior to the purchase of the home. (TCT1 MSJ Ex. 1 at ¶¶ 29-30).

H. Appellants admit their evidence against TCT1 is "Nate Emery had actual knowledge of the material fact that he failed to inform [Appellants] that the Disclosure Statement" was not fully answered by the seller. (TCT1 MSJ Ex. 1 at ¶ 36).

In further support of the motion, TCT1 filed the Disclosure Statement signed by the parties, which is in the form as promulgated by the SC Dep't. of Labor, Licensing, and Regulation. (TCT1 MSJ Ex. 2). The Disclosure Statement contains the following declarations, which the Appellants reviewed prior to affixing their signatures:

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This disclosure does not limit the obligation of the purchaser to inspect the property and improvements which are the subject of the real estate contract. Purchaser is solely responsible for conducting their own off site conditions and psychologically affected property inspections prior to entering into a real estate contract. The real estate licensees (acting as listing or selling agents, or other) have no duty to inspect the on site or off site conditions of the property and improvements. Purchasers should review all applicable documents (covenants, conditions, restrictions, bylaws, deeds, and similar documents) prior to entering into any legal agreements including any contract. The South Carolina Code of Laws describes the Residential Property Condition Disclosure Statement requirements and exemptions at § 27-50-10 (and following) which can be read online (www.scstatehouse.gov or other websites).

Current status of property or factors which may affect the closing:

(TCT1 MSJ Ex. 2 at p. 5).

Purchaser acknowledges prior to signing this disclosure:

- Receipt of a copy of this disclosure
- Purchaser has examined disclosure
- Purchaser had time and opportunity for legal counsel
- This disclosure is not a warranty by the real estate licensees
- This disclosure is not a substitute for obtaining inspections of on site and off site conditions
- This disclosure is not a warranty by the owner
- Representations are made by the owner and not by the owner's agents or subagents
- Purchasers have sole responsibility for obtaining inspection reports from licensed home inspectors, surveyors, engineers, or other qualified professionals

Purchaser Signature: Zachary Moody docusign verified 01/20/17 8:55 AM EST OLL2-2PYF-XBLV-ZXVQ Date: _____ Time: _____

Purchaser Printed Name: Zachary Moody

Purchaser Signature: Kristina Moody docusign verified 01/20/17 9:39 AM EST Date: _____ Time: _____

Purchaser Printed Name: Kristina Moody

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(TCT1 MSJ Ex. 2 at p. 5).

TCT1 also filed the deposition transcript of Appellant Zachary L. Moody, dated November 28, 2022. (TCT1 MSJ Ex. 3). In his deposition, Mr. Moody testified to the following:

Q: "[W]hat representation was made to you by this disclosure statement with Number 7 have no boxes checked, what representation did Ms. Lopez make regarding . . . Number 7 to you . . . ?"

A: I don't think there was any representation because nothing was checked."

(TCT1 MSJ Ex. 3 at 50:8-15).

Q: "What representation on this form did Ms. Lopez make to you about those conditions at this home?

A: None."

(TCT1 MSJ Ex. 3 at 51:16-19).

Q: "There wasn't anything that prevented you from seeing that those boxes were unchecked; is that right?

A: Correct."

(TCT1 MSJ Ex. 3 at 55:22-25).

Q: And did you at that point in time, did you approach Mr. Emery and say, hey, there's some missing answers on this form, would you please go get these responded to before we decide if we're going to buy the house?

A: Mr. Emery had already gotten a copy of this, so by the time we got it rapid fired to us, you know, during working hours, which was 8:55 in the morning which is very heavy for -- for, you know, work traffic, so I had assumed and -- and understood that he had taken his responsibility to ensure that this was filled out completely."

(TCT1 MSJ Ex. 3 at 56:4-15).

Q: Did you ever ask Mr. Emery prior to closing on the home to go back to the seller or to the seller's agent and get this form fully completed?

A: Not from my recollection, no."

(TCT1 MSJ Ex. 3 at 57:3-7).

Q: "[Y]ou did not raise any concerns over the fact that the blocks in the seller's disclosure statement were not checked until after issues arose and you realized there were problems with the home; is that accurate?

A: Yes."

Q: . . . Did you ask Mr. Emery to do anything for you as your buyer's agent that he refused to do for you?

A: Not from my recollection, no."

(TCT1 MSJ Ex. 3 at 63:14-20; 64:7-10).

Appellants filed a cross motion for summary judgment on July 17, 2023, as to the two causes of action against TCT1. (Cross MSJ at p. 1). Appellants' motion cites only to S.C. Code Ann. § 40-57-5, *et seq*., as the relevant statute. (Cross MSJ). Appellants filed an affidavit of Zachary L. Moody on July 25, 2023, in which Mr. Moody testified "[u]pon information and belief, Lopez omitted answering Disclosure No. 7 due to known issues with the Property's foundation" and that this "omission . . . was a material fact that Emery failed to disclosed (sic) to my wife and I." (Aff. of Zachary L. Moody at pp. 2-3).

A hearing on the Motions was held on July 27, 2023, before the Honorable G. D. Morgan. The trial court granted summary judgment to Respondent TCT1 and denied summary judgment to Appellants by order dated August 22, 2023. (TCT1 MSJ Order). Appellants filed a

Motion to Alter or Amend on August 31, 2023. (August 31, 2023, Motion). This motion was denied. (Sept. 20, 2023, Form 4 Order).

STANDARD OF REVIEW

Respondent, TCT1 joins in and adopts the Standard of Review by reference as submitted by Respondent Blue Moon pursuant to Rule 208(b)(6), SCACR.

ARGUMENT

Appellants are correct that South Carolina law is clear. (App. Br. at p. 11). The Appellants ignore the simple fact that the RPCDA "only imposes a duty on the *owner* of real property to make disclosures about the property to be sold." *McLaughlin v. Williams*, 379 S.C. 451, 460-61, 665 S.E.2d 667, 672 (Ct. App. 2008). Mindful of the need to ensure innocent homebuyers can identify any issues prior to closing, the RPCDA obligates the purchaser to "inspect the physical condition of the property" and specifically relieves the real estate licensee from a duty to inspect the conditions. S.C. Code Ann. § 27-50-80.

Mindful of the proverb "the Buyer needs a hundred eyes, the Seller only one,"[1] the legislature provided the homebuyer with additional safeguards in the event the real estate licensee had knowledge that the Disclosure Statement was "false, incomplete, or misleading." S.C. Code Ann. § 27-50-70(B). It follows therefore that a real estate licensee acting as a buyer's agent may still be liable to the purchaser of property "if a real estate licensee knows the information is incomplete or misleading." *McLaughlin v. Williams*, 379 S.C. 451, 461, 665 S.E.2d 667, 672-73 (Ct. App. 2008) (citing S.C. Code Ann. § 27-50-70(B)).

The Appellants frame this case as if it is an absurd conclusion reached by the trial court: "It cannot be that a buyer's agent's lack of knowledge about a material adverse fact can arise from the agent's own incompetence . . . in reviewing the . . . Disclosure Statement which obviates the agent's obligation to disclose material adverse facts [to] his client." (App. Br. at p. 12). The Appellants point to the absence of a response to one of many questions in the

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[1] *Box v. Sparrow Grp., LLC*, No. 2018-UP-353, 2018 S.C. App. Unpub. LEXIS 355, at *5 (Ct. App. Aug. 15, 2018).

Disclosure Statement as evidence that TCT1 was negligent by failing to inform the Appellants of the absence of a response to one of many questions in the Disclosure Statement. (App. Br. at p. 13). The argument proceeds that the absence of a response to one of many questions in the Disclosure Statement is a "material adverse fact," which TCT1 should have disclosed to the Appellants. (App. Br. at p. 14). The argument offered by Appellants fails because the Appellants had substantial knowledge of the lack of representations on numerous items in the Disclosure Statement and because the lack of a response does not give knowledge to a real estate licensee that the seller is hiding a material adverse fact.

Simply put, "[t]his is a case where two purchasers chose to shut their eyes and contract for the purchase of a house and lot without first" engaging in any inspection or investigation of the open and obvious lack of a response to numerous queries in the Disclosure Statement. *Watts v. Monarch Builders, Inc.*, 272 S.C. 517, 519, 252 S.E.2d 889, 891 (1979). The issues regarding TCT1 are resolved in their entirety by the fact that the Appellants themselves testified they knew of the lack of responses on the Disclosure Statement prior to the closing. The Appellants chose this course of action of their own volition, and they should not now be rewarded for their contrived ignorance.

I. The Trial Court Correctly Ruled that the Seller Bears Responsibility for Completion of the State of South Carolina Residential Property Condition Disclosure Statement Form.

Appellants argue that the lack of a response by the seller in the Disclosure Statement was a materially adverse fact that Respondent TCT1 had a duty to inform Appellants of in such a manner as to instill in them an understanding of the "potential ramifications thereof." (Amd. Comp., p. 14). This argument fails at the outset because Appellants cannot articulate what other

knowledge TCT1 should have provided the Appellants because the Appellants already had acknowledged personal knowledge of the seller's responses. (TCT1 MSJ Ex. 1 at ¶¶ 2-6; TCT1 MSJ Ex. 2 at p. 5). The Appellants shut their eyes because it was early in the morning and there was lots of work traffic. (TCT1 MSJ Ex. 3 at 56:4-15). The Appellants should not be rewarded for abandoning their obligations and duties as South Carolina case law has long denied recovery to litigants who fail "to learn the contents of a contract and thus be fully protected by reading it, that party is bound by its terms." *Gordon v. Tillman*, No. 2006-UP-424, 2006 S.C. App. Unpub. LEXIS 428, at *11 (Ct. App. Nov. 1, 2006) (citing *J. B. Colt Co. v. Britt*, 129 S.C. 226, 123 S.E. 845 (1924)). Similarly, in *Dukes*, the court denied liability when "the conduct of the plaintiff, in the circumstances recounted, amount to a conscious or reckless disregard of her duty to avail herself of the opportunity and means at hand to protect her own interests." *Dukes v. Life Ins. Co.*, 184 S.C. 500, 506, 193 S.E. 36, 38 (1937). The trial court rightly granted summary judgment for TCT1 as there was no dispute of material fact about whether Appellants knew full well the contents of the Disclosure Statement.

1) Statutory Scheme of the RPCDA

The trial court went to great lengths to set forth the constellation of statutes and regulations that proscribe the responsibilities and duties of real estate agents. South Carolina law requires the seller of real property to "furnish to a purchaser a written disclosure statement." S.C. Code Ann. § 27-50-40(A). This disclosure statement "must be in the form promulgated by the commission" and must include an enumerated list of "characteristics and conditions of the property." S.C. Code Ann. § 27-50-40(A)(1-8). The South Carolina Department of Labor, Licensing, and Regulation promulgated a South Carolina Residential Condition Disclosure Statement form which places the responsibility on the owner of the property to "answer the

questions fully, honestly, and appropriately." (TCT1 MSJ Order, p. 7). The Disclosure Statement informs the seller that they may be liable for making an intentional or negligent misrepresentation "[i]f owner fails to check 'yes' or make a disclosure and owner knows there is a problem". (TCT1 MSJ Order, p. 7).

Walking through the statutory scheme of the RPCDA, the obligation to complete the Disclosure Statement is placed squarely on the seller. S.C. Code Ann. § 27-50-50(A). A contract to purchase the residence cannot be signed until the Disclosure Statement is produced. *Id.* In this manner, the Disclosure Statement is completed upon delivery in order to effectuate the formation of a real estate contract by mechanism of law:

> The statutorily mandated "disclosure form," set out in § 5.10, needs to be signed and completed prior to the formation of a real estate contract, unless otherwise agreed in the real estate contract. Thus, the owner of real property is required to deliver to the purchaser the disclosure form before a real estate contract is signed by the parties unless an agreement in the real estate contract stipulates otherwise.

Matthew Bender & Co., Inc., *SC Residential Real Property Law and Practice* § 5.02 (2024) (citing S.C. Code § 27-50-50)). Similarly, the RPCDA exempts parties from having "to complete a disclosure statement" "when both parties agree in writing," which must take place prior to the formation of a real estate contract. S.C. Code Ann. § 27-50-30(13). By operation of law, the Disclosure Statement is complete when the seller and the seller's agent deliver to the purchaser the Disclosure Statement to effectuate a real estate contract. S.C. Code § 27-50-50(A). Mr. Moody testified that the Disclosure Statement was provided to him prior to purchasing the house. (TCT1 MSJ Ex. 3 at 55:8-13). Therefore, the Disclosure Statement was completed on January 20, 2017,

by the signatures of the Appellants because the Appellants do not challenge the formation of the resulting real estate contract.

The seller is under a continuing obligation to correct the Disclosure Statement "[i]f the owner discovers . . . a material inaccuracy." S.C. Code Ann. § 27-50-60. The legislature provided a private cause of action against the seller "who knowingly violates or fails to perform any duty prescribed by" the RPCDA "or who discloses any material information on the disclosure statement that he knows to be false, incomplete, or misleading." S.C. Code Ann. § 27-50-65. A real estate licensee "is not liable to a purchaser if . . . . the real estate licensee did not know or have reasonable cause to suspect the information was false, incomplete, or misleading." S.C. Code Ann. § 27-50-70(B)(2). The real estate licensee is not required to inspect the property; that obligation is upon the potential buyers. S.C. Code Ann. § 27-50-80.

Separately, Title 40 establishes the regulations and responsibilities of a real estate licensee, such as that of TCT1. S.C. Code Ann. § 40-57-350(A) sets forth only five types of relationships a real estate brokerage firm may establish. Of those, there is no evidence disputing the fact that TCT1 entered into an agency relationship as the "buyer agency" for the Appellants. S.C. Code Ann. § 40-57-350(A)(2). TCT1 shall, through the buyer's agent, perform a set of enumerated duties, which includes "disclosing to the buyer all material adverse facts concerning the transaction which are actually known to the licensee . . . . Nothing in this chapter may limit a buyer's obligation to inspect the physical condition of the property." S.C. Code Ann. § 40-57-350(E)(1)(b). Further, "[a] licensee is not obligated to discover latent defects" and "may not knowingly give them false or misleading information about the condition of the property which is known to the licensee." S.C. Code Ann. § 40-57-350(G)(1).

> Taken together, these sections provide that a real estate licensee does not have a duty to inspect or investigate the physical condition of a piece of property for the purpose 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 shoulders of the buyer.

Chastain v. Hiltabidle, 381 S.C. 508, 519, 673 S.E.2d 826, 832 (Ct. App. 2009).

The undisputed facts of this case demonstrate that Respondent TCT1 was entitled to summary judgment on the basis that Respondent TCT1 owed no duty to independently investigate the condition of the property, the Appellants acknowledged that they read the Disclosure Statement and understood it, and Appellants did not request any additional information. (TCT1 MSJ at p. 2). *Chastain*, 381 S.C. at 520, 673 S.E.2d at 832 ("Therefore, to survive summary judgment, Buyers must present evidence that raises a question of fact as to whether Realtor knew or should have known that the statements in the Disclosure were inaccurate."). The trial court properly ruled that Respondent TCT1 was "entitled to a judgment as a matter of law." (TCT1 MSJ Order at p. 1).

II. The Trial Court Properly Ruled That TCT1 Neither Owed Nor Violated Any Legal Duty on which Appellants May Base A Claim for Negligence.

The undisputed evidence shows that Appellants were aware of the details of the Disclosure Statement and were aware of the lack of representation by the seller on numerous questions. The seller provided the same information to the buyer's agent as to the Appellants with "no reason to suspect or believe the information in the Disclosure completed by Sellers was either false, misleading, or incomplete." *Chastain*, 381 S.C. at 522, 673 S.E.2d at 833.

South Carolina law is clear that the purchasers of property in South Carolina bear the obligation to inspect the property and the law does not afford these Appellants with relief after they shut their eyes in ignorance of the plain language of the Disclosure Statement. As said before, "[i]n the circumstances of this case we think the conclusion is irresistible, not only that the defendant owed the duty of reading the contract, but that in failing to read it he was guilty of reckless, if not a conscious, disregard of his duty in that regard." *J. B. Colt Co. v. Britt*, 129 S.C. 226, 236, 123 S.E. 845, 849 (1924). The undisputed evidence shows TCT1 provided the Disclosure Statement to the Appellants, answered all of their questions, and had no knowledge of any foundation problems. "Because Buyers presented no evidence Realtor or Agent knew or had reasonable cause to suspect Sellers' statements in the Disclosure about flooding were false, misleading or inaccurate, the trial court's grant of summary judgment was proper." *Chastain*, 381 S.C. at 522, 673 S.E.2d at 833. The trial court rightly found that there was no dispute of material fact and that summary judgment was proper for TCT1.

1) Appellants Had Actual and Personal Knowledge of the Incomplete Disclosure Statement

The trial court properly considered the evidence demonstrating that Appellants were furnished a Disclosure Statement and knew of the seller's failure to respond to question 7 prior to their purchase of the property. (TCT1 MSJ, p. 2). Appellants testified that they had direct and personal knowledge of the seller's omission in answering Disclosure No. 7: "Plaintiffs admit the[y] read and examined the Disclosure Statement as much as they were advised to." (TCT1 MSJ Ex. 1 at p. 2). Respondent TCT1 provided evidence to the trial court that Appellants were able to read and write in the English language; that Appellants were capable of reading and understanding the statements made in the Disclosure Statement; and that the Appellants read and

reviewed the Disclosure Statement prior to signing the document. (TCT1 MSJ Ex. 1 at pp. 2-3). The Appellants, as purchasers, were competent and able to understand the Disclosure Statement, including the lack of a response to Disclosure No. 7.

Appellants admitted that prior to signing the Disclosure Statement, Appellants received a copy of the Disclosure Statement; they examined the disclosures; they had time and opportunity for legal counsel; that the representations are made by the owner and not by the owner's agents; and that the disclosure is not a warranty by the real estate licensees. (TCT1 MSJ Ex. 1 at pp. 9-10). This admission extinguishes the validity or cogency of Appellants' arguments against Respondent TCT1 because Appellants had the opportunity to investigate the seller's responses prior to purchase but did not avail themselves of this opportunity. (TCT1 MSJ Ex. 1 at ¶¶ 29, 31).

The affidavit of Mr. Moody asserts TCT1 "failed to inform us that the Disclosure Statement was incomplete and the potential ramifications thereof." (Aff. of Zachary L. Moody at p. 2). Further, that by "failing to inform [Appellants] that Lopez omitted answering Disclosure No. 7, we would have had an opportunity to inspect the Property's foundation or decline to purchase the Property." (Aff. of Zachary L. Moody at pp. 2-3). It appears that Appellants argue liability is premised upon the failure of TCT1 to disclose the lack of a response to Disclosure No. 7, which is neither logical nor reasonable because the Appellants had read and reviewed the Disclosure Statement thereby having direct knowledge of the lack of response. (Aff. of Zachary L. Moody at p. 3).

In contrast, Appellant Zachary L. Moody testified that he would not have purchased the property but for Respondent TCT1 "failing to inform my wife and I that [the seller] omitted answering Disclosure No. 7. (Aff. Of Zachary Leland Moody, p. 2). This statement by Appellant

does not create a genuine issue of material fact because it is contradicted by Appellant's own testimony as well as other evidence in the record. In fact, the Appellants admitted "they did not rely solely on the seller's [Disclosure Statement] in deciding to purchase their home." (TCT1 MSJ Ex. 1 at ¶ 29).

The Appellants' admissions directly contradict the argument that Respondent TCT1 breached an owed duty because Appellants were aware of the same knowledge as Respondent TCT1's agent, Nate Emery. Appellants believe that Respondent TCT1 should have doubled down on the seller's lack of a response to question 7 in the Disclosure Statement by "inform[ing] Plaintiffs that the Disclosure Statement was incomplete and the potential ramifications thereof." (TCT1 MSJ Ex. 1 at p. 11). In fact, Appellants were aware of the incomplete nature of the Disclosure Statement, admitted they did not rely upon the Disclosure Statement, and still proceeded with obtaining a home inspection and purchasing the property. (TCT1 MSJ Ex. 1 at p. 9). Fatally, by Appellants own admission, there is no evidence that Respondent TCT1 had knowledge about the specific facts or conditions pled for by Appellants. (TCT1 MSJ Ex. 1 at ¶ 36; TCT1 MSJ Ex. 3 at 45:3-6).

In *Chastain*, a summary judgment motion against purchasers of real property was affirmed because the buyers presented no evidence of a genuine issue of material as to each element of the claim. *Chastain*, 381 S.C. at 521, 673 S.E.2d at 833. Similar to the instant case, the buyers presented no evidence that the real estate licensee "had knowledge of any false, incomplete or misleading information in the Disclosure." *Id.* Similarly, Mr. Moody testified that Emery did not have any knowledge about the issues related to the foundation, slab foundation, soil, and steps. (TCT1 MSJ Ex. 3 at 44:16-45:6). Mr. Moody testified that the issues with the steps were not visible and were hidden. (TCT1 MSJ Ex. 3 at 60:3-11). Mr. Moody testified that

the problems were not discovered until "water issues in the basement" (TCT1 MSJ Ex. 3 at 63:21-24) that were not discovered until approximately ten to twelve months later. (TCT1 MSJ Ex. 3 at 64:1-4). This resolves the question as to whether Respondent TCT1 should be held liable when Appellants have offered no evidence that Emery had knowledge of any false, incomplete or misleading information in the Disclosure. "In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The moving party must clearly establish the absence of a triable issue of fact through the record. *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991).

Appellants' brief posits that "the only testimony is that but for the failure to disclose that would not have purchased the Subject Property." (App. Br. at p. 14). This is contradicted by Appellants' own testimony and by the fact Appellants had the benefit of a home inspection report. This contradiction allowed the trial court to determine whether there existed an issue of material "fact regarding reliance on the Disclosure Statement in light of the information available to him prior to closing." *McLaughlin v. Williams*, 379 S.C. 451, 458, 665 S.E.2d 667, 671 (Ct. App. 2008). Similarly, this is an *ex post facto* attempt to shift the responsibility from the purchasers of property to their real estate agent because Appellants have identified no knowledge or fact available to the buyer's agent that was withheld from Appellants. This Court should disregard the attempt, just as the trial court did, given the overwhelming evidence indicating Respondent TCT1 complied with the statutory scheme laid out by the legislature.

The information Appellants appear to believe TCT1 should have given them would only be known to TCT1 if TCT1 employed a prophet or mind-reader who could foresee when a seller's non-response to a question meant the seller was engaged in fraud. The logic, as offered

by Appellants, is that "Emery should have reasonably known that there was the existence of undisclosed issues concerning the condition of the property as the Seller did not make any disclosure regarding the foundation . . ." (TCT1 MSJ Ex. 1 at ¶ 12). In essence, the seller had not made any representation about portions of the Disclosure Statement; therefore, Emery should have known the seller was hiding something. There is no rationale offered by Appellants for this illogical conclusion except the cursory line that Emery would "walk[] clients through the process of home buying." (Aff. of Zachary L. Moody at ¶ 9). "The duty of care is not a duty to take every possible care, still less is it a duty to be right; it is the familiar duty to exercise that care a reasonable man would take in the circumstances." *Ama Mgmt. Corp. v. Strasburger*, 309 S.C. 213, 223, 420 S.E.2d 868, 874 (Ct. App. 1992). TCT1 does not employ diviners or fortune tellers to walk clients through buying a home because the real estate licensees employed by TCT1 have all of the requisite skill and care to satisfactorily discharge their responsibilities under the law, which remains uncontradicted by the evidence.

The weight of evidence presented to the trial court far exceeds the genuine issue standard set forth by Rule 56(c), SCRCP, such that the trial court correctly applied the law to the undisputed facts when granting summary judgment to Respondent TCT1 because the Appellants failed to identify any duty breached by the buyer's agent. The Appellants failed to exercise due diligence when reviewing the State of South Carolina Residential Property Condition Disclosure Statement and, under the undisputed facts of this case, the resulting consequence of Appellants' willful ignorance should be Appellants' responsibility to bear. *Ama Mgmt. Corp. v. Strasburger*, 309 S.C. 213, 223, 420 S.E.2d 868, 874 (Ct. App. 1992) ("There is no liability for . . . matters which plaintiff could ascertain on his own in the exercise of due diligence.").

The trial court appropriately granted summary judgment for Respondent TCT1 because the Appellants failed to evidence genuine issues of material fact as to the essential elements of a duty owed to the Appellants, of TCT1 breaching that duty, or that the allegations against TCT1 were the proximate cause of Appellants' damages. Appellants' damages were due entirely to their abrogation and abandonment of the duty to vitiate their interests, to inspect the property, and to read the documents they signed.

III. The trial court's ruling in favor of the Respondent TCT1 on a Breach of Fiduciary Duty must be affirmed, as Appellants have abandoned their appeal of this cause of action.

Because Appellants failed to challenge the ruling on their cause of action for breach of fiduciary duty from the trial court and failed to raise the issue in Appellants' Motion to Alter or Amend, Appellants have abandoned their appeal of these issues. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 641 S.E.2d 903 (2007). Appellants brief does not mention this cause of action and Appellants may not address them for the first time in reply. *Glasscock, Inc. v. U.S. Fid. and Guar. Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001). Therefore, the trial court's grant of summary judgment in favor of TCT1 as to breach of fiduciary duty must be affirmed.

CONCLUSION

The trial court rightly ruled that Respondent TCT1 did not have a legal duty to ensure the Disclosure Statement was fully completed. The record supports the findings and conclusions of the trial court as correct, and whose ruling is founded upon the substantial weight of the evidence. The orders should be affirmed.

For the reasons stated, this Court should affirm the Circuit Court's order granting summary judgment to Respondent TCT1.

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