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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
Fifteenth Judicial Circuit

The Honorable Benjamin H. Culbertson
Circuit Court Judge

Civil Action No. 2018-CP-22-00956

Unpublished Opinion No. 2023-UP-263 (S.C. Ct. App. Filed July 12, 2023)
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.

RESPONDENTS' BRIEF

Respectfully submitted,

BELLAMY, RUTENBERG, COPELAND, EPPS, GRAVELY & BOWERS, P.A.
P.O. Box 357
Myrtle Beach, SC 29578
(843) 448-2400
Attorneys for Respondents

/s George W. Redman, III
George W. Redman, III, Esq., SCB # 72365
GRedman@BellamyLaw.com

July 22, 2024.

Steven R. Kropski
Earhart Overstreet, LLC
P.O. Box 22528
Charleston, SC 29413
Steve.Kropski@EarhartOverstreet.com
Attorneys for Petitioner

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STATEMENT OF THE CASE

On Monday, July 23, 2018, Respondents, Rory and Kimberly Isaac, purchased the personal residence of Defendants Thomas and Jackie Onions, located in the Litchfield Plantation of Pawleys Island (the "Property"). Petitioner Laura Kopchynski was the Onions' realtor.

Two days after Respondents' purchase, a rainstorm flooded the Property. The Isaacs filed their complaint on November 16, 2018, after they had learned that the Onions, Kopchynski, and Lane's Professional Pest Elimination, Inc. ("Lanes") had known of and failed to disclose the Property's history of drainage and flooding problems. The complaint forwarded Fraud, Fraud in the Inducement, Negligent Misrepresentation, and Civil Conspiracy claims against Mr. & Mrs. Onions, Lanes, and Petitioner Kopchynski; a claim for violation of the South Carolina Residential Property Condition Disclosure Act (found at S.C. Code 27-50-10, *et seq.*) against Mr. & Mrs. Onions and Petitioner Kopchynski; and a Negligence claim against Lanes.

Written discovery is partially complete, and the depositions of the parties and key witnesses have been taken in the underlying action:

Deposition of Thomas and Jacqueline Onions ..... March 26, 2019
(*See* R. 516-34)
Deposition of Petitioner Laura Kopchynski ..... March 27, 2019
(*See* R. 457-02)
Deposition Emery Custer (the Onions' "handyman") ..... March 28, 2019
(*See* R. 535-48)
Deposition of Rory Isaac ..... March 28, 2019
(*See* R. 503-15)
Deposition of Kimberly Isaac ..... June 10, 2019
Deposition of Ed Kimbrough (Isaac's Realtor) ..... June 10, 2019
(*See* R. 580-92)
Rule 30(b)(6) Deposition of Lane's Professional
Joseph Sheheen and Michael Coffey ..... June 12, 2019
(*See* R. 549-579)

On June 28, 2019, Mr. & Mrs. Onions filed for Summary Judgment under Rule 56, SCRCP, asserting there is no genuine issue of material fact as to their liability. (R. 133-34) On July 8, 2019, Petitioner Kopchynski filed her Motion for Summary Judgment arguing she did not have a duty to

inspect or confirm the Onions' statements about the Property, and that Plaintiffs had actual and constructive knowledge of the alleged defects before the closing. (R. 135-36)

The Honorable Benjamin H. Culbertson heard both Motions on July 26, 2019. Counsel for Onions and Kopchynski filed supporting memoranda the morning of the hearing. Plaintiffs filed their memorandum opposing the motions, citing to the depositions noted above, as well as the filed affidavits of an expert entomologist, Henry Moore, IV (R. 425-32), registered pest control technician, Norris Andy Ward (R.433-56), and the Onions' former neighbor, Brad Cromartie (R.414-24). After the hearing, the court denied the Onions' motion for summary judgment and granted Petitioner Kopchynski's motion for summary judgment. The Court issued a Form 4 Order and instructed counsel for Kopchynski to prepare a formal order, which was later filed on August 12, 2019 (R. 4-13).

On August 5, 2019, Plaintiff's filed their Motion for and Memorandum in Support of Altering and Amending the order granting summary judgment in favor of Kopchynski. (R. 286-301) Kopchynski filed a memorandum in opposition on August 29, 2019. (R. 302-98) After receipt of the transcript of the hearing, Plaintiffs filed supplemental memorandums in support on August 30, 2019 (R. 399-411), and September 20, 2019 (R. 412-13). By way of Form 4 Order dated September 25, 2019, the lower court denied Plaintiff's motion on briefs without oral argument. (R. 14-16) Plaintiffs served their Notice of Appeal to the Court of Appeals on October 24, 2019. (R. 73-93)

The South Carolina Court of Appeals heard argument on November 15, 2022 (R. 708). On July 12, 2023, the Court of Appeals issued its Order Affirming in Part, Reversing in Part, and Remanding the case back to the circuit court for trial on the Isaacs' claims for negligent misrepresentation and violation of the Residential Property Disclosure Act. (R. 708-17). On August 16, 2023, Petitioner Kopchynski's Petition for Rehearing was denied on the grounds that

the Court was unable to discover any material fact or principle of law which has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. (R. pp.736-37).

Petitioner now asks this Court to review the Court of Appeals decision by once again forwarding the argument that a licensed Realtor does not have a duty to disclose a known material defect revealed in a report that she had personally obtained and reviewed, nor any duty to correct a misleading misrepresentation she personally made about a second report confirming the defects still existed, nor any duty of honesty while she helped the sellers hide ongoing repair efforts and she knew the buyers were relying upon misleading and incomplete information.

Respondents' claims against Petitioner Kopchynski are not just based upon two reports that were not disclosed; they are based upon Respondent's entire knowledge as is shown by the extensive factual record below, which was only uncovered through an expensive and extensive discovery effort.

STANDARD OF REVEW

When reviewing a dismissal under Rule 56, SCRCP, this Honorable Court applies the same standard of review implemented by the circuit court. *Cowburn v. Leventis*, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005). *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002). A trial court's decision to grant a motion for summary judgment is appropriate only when there is no genuine issue of material fact so that the moving party is entitled to judgment as a matter of law. *Gilbert v. Miller*, 356 S.C. 25, 28, 586 S.E.2d 861, 863 (Ct. App. 2003).

The Court must liberally review the decision to construe the record in favor of Mr. and Mrs. Isaac as the non-moving parties. *Jackson v. Doe*, 342 S.C. 552, 555, 537 S.E.2d 567, 568 (Ct. App. 2000). All ambiguities, inferences, and conclusions arising from the evidence must be construed against the movant. *Gilbert v. Miller*, 356 S.C. 25, 28, 586 S.E.2d 861, 863 (Ct. App. 2003). *SSI Medical Services, Inc. v. Cox*, 301 S.C. 493, 392 S.E.2d 789 (1990); *McLaughlin v.*

Williams, 379 S.C. 451, 455-56, 665 S.E.2d 667, 670 (Ct. App. 2008). "Summary judgment should not be granted even when there is no dispute as to the evidentiary facts if there is a dispute as to the conclusions to be drawn therefrom." *Laurens Emergency Med. Specialists, P.A. v. M.S. Bailey & Sons Bankers*, 355 S.C. 104, 108-09, 584 S.E.2d 375, 377 (2003).

LEGAL ARGUMENT AND RECITATION OF FACTS

1. STATUTORY STANDARD: THE COURT OF APPEALS CORRECTLY HELD THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT TO KOPCHYNSKI BECAUSE LICENSED REALTORS HAVE A STATUTORY DUTY OF HONESTY WHICH FORBIDS KOPCHYNSKI FROM CONVEYING INFORMATION SHE KNEW OR SUSPECTED TO BE FALSE, INCOMPLETE, OR MISLEADING

S.C. Code § 27-50-70, entitled as Listing Agent Liability for Inaccuracy of Disclosure Statement, provides the standards for licensed realtors by stating, in pertinent part:

> (B) This article does not conflict with or alter the duties of the real estate licensee pursuant to the regulations of the commission. The real estate licensee, whether acting as the listing agent or selling agent, is not liable to a purchaser if:
>
> (1) the owner provides the purchaser with a disclosure form that contains false, incomplete, or misleading information; and,
>
> (2) the real estate licensee did not know or have **reasonable cause to suspect** the information was **false, incomplete, or misleading**.

The standard set by S.C. Code § 27-50-70 is not simply actual knowledge of fraud. Instead, the standard is very broad and provides that a licensed real estate agent may face liability to a prospective purchaser if the owner of real property provides a purchaser with a disclosure form that contains **false, incomplete, or misleading information**, where the real estate licensee knew, or **has reasonable cause to suspect**, the information is false, incomplete, or misleading. Therefore, liability for a listing agent can exist where the agent only has a reasonable suspicion, which is dramatically less than actual or constructive knowledge. Second, liability doesn't hinge on a determination of whether a statement was objectively false, because the statute states liability

may exist when information provided is only incomplete or misleading. No provision of South Carolina law allows a real estate agent to claim truthful disclosure by forwarding information which she knows or suspects to be false, incomplete, or misleading. In other words, a licensed South Carolina realtor can be liable for telling a type of lie commonly referred to as a "half-truth." Such a lie is particularly dangerous because it is specifically designed to deceive.

Additionally, the instructions on the top of the CDS form states that Kopchynski was required to have the Onions fill out sets forth the law, providing in part:

> The South Carolina Code of Laws (Title 27, Chapter 50, Article I) requires that an owner of residential real property … shall provide to a purchaser this completed and signed disclosure statement prior to forming a real estate contract. This disclosure must be provided in connection with any sale ...
> ….
> If owner is assisted in the sale of property by a real estate licensee, owner remains solely responsible for completing and delivering this disclosure statement to the purchaser. **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. 355) The Court of Appeals recognized that the lower court's Order erroneously excused Kopchynski from liability for her misrepresentations and violations of the disclosure statute at summary judgment by holding that a realtor cannot be responsible for latent defects or the contents of any expert report where she has partially disclosed information and told several half-truths. Petitioner's entire argument seeks to avoid a thorough review of the facts so they may conveniently disregard those sections of S.C. Code § 40-57-350(G)(l)-(3), which mandate honesty, prohibit the giving of misleading or incomplete information, and require "truthful disclosure":

> (1) 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. A licensee is not obligated to discover latent defects or to advise parties on matters outside the scope of the licensee's real estate expertise. Notwithstanding another provision of law, no cause of action may be brought against a licensee who has truthfully disclosed to a buyer a known material defect.

(2) No 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 an engineer, land surveyor, geologist, wood destroying organism control expert, termite inspector, mortgage broker, home inspector, or other home inspection expert, or other similar reports.

(3) A licensee, the real estate brokerage firm, and the broker-in-charge are not liable to a party for providing the party with **false or misleading information** if that information was provided to the licensee by the client or customer and the licensee did not know the information **was false or incomplete**.

As discussed in detail within the totality of the factual chronology in Petitioners' briefing below, the Isaacs' claim is based upon Kopchynski's actual knowledge, being much more than the two documents Respondent secreted (while watching the Isaacs rely upon an incomplete and misleading CL-100).

Thus, in stark contrast, S.C. Code Ann. § 40-57-350(G)(1) starts by providing a real estate agent licensed by the State of South Carolina "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." The lower court failed to construe facts in the Isaacs' favor, which demonstrated Kopchynski had knowledge of problems, and therefore a duty **to be honest with all parties**. The statute does protect real estate agents by providing realtors are not required to know of latent defects, not required to interpret expert reports, and cannot be sued for **truthfully** disclosing information. While Section 40-57-350 (G)(2) provides no cause of action may be brought against a real estate licensee for information contained in reports or opinions prepared by a wood-destroying organism control expert, termite inspector, home inspector, or other home inspection expert, that statute doesn't provide protection for information in reports **which were not disclosed**.

The lower court erred in granting Kopchynski summary judgment because she did not truthfully disclose a tremendous amount of information and acted to help hide prior problems as well as repairs in progress.

2. *KITCHEN PLANNERS*: THE COURT OF APPEALS USED THE CORRECT STANDARD OF REVIEW IN DENYING SUMMARY JUDGMENT

After the Court of Appeals entered its decision in this case, but before Petitioner's Petition for Certiorari was due, this Honorable Court issued *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 892 S.E.2d 297 (2023). In *Kitchen Planners*, this Court held that Rule 56 of the *South Carolina Rules of Civil Procedure* cites the proper standard for Motions for Summary Judgement, requiring the non-moving party must set forth specific facts showing that there is a genuine issue for trial. After a thorough examination of an extensive record, the Court of Appeals applied the proper standard for Summary Judgment, as set forth below:

> All courts view summary judgment the same: "the appellate court applies the same standard of review as the trial court . . . ." *Cowburn v. Leventis*, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005). This means that "summary judgment may be affirmed if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Id*. Our task is not to attempt to divine the truth on a motion for summary judgment. See *Chastain v. Hiltabidle*, 381 S.C. 508, 514, 673 S.E.2d 826, 829 (Ct. App. 2009) ("A court considering summary judgment makes neither factual determinations nor considers the merits of competing testimony."). To the contrary, "all inferences from the facts in the record must be viewed in the light most favorable to the party opposing the summary judgment motion." *Manning v. Quinn*, 294 S.C. 383, 385, 365 S.E.2d 24, 25 (1988).

(R. 712) The Court of Appeals specifically found that "[b]ased upon the record before us, the Isaacs presented enough evidence for two of their claims to survive summary judgment." (R. 715) According to the Court of Appeals, "There are reasons to believe Kopchynski *might* be *eligible* [for statutory immunity under S.C. Code Ann § 27-50-70(B)(2)] and there are reason to believe that she *might* be *ineligible*." (*Id*.) Again, the Court correctly stated:

> [W]e are not supposed to weigh that evidence and are instead required to consider it in the light most favorable to the Isaacs. See *Chastain*, 381 S.C. at 514, 673 S.E.2d at 829 ("In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party."); *see also Montgomery v. CSX Transp., Inc.*, 376 S.C. 37, 47, 656 S.E.2d 20, 25 (2008) ("[E]ven if there is no dispute regarding the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied."), modified on other grounds by

> *Hancock*, 381 S.C. at 330–31, 673 S.E.2d at 802–03, as recognized in *Bean v. S.C. Cent. R. Co.*, 392 S.C. 532, 545 n.7, 709 S.E.2d 99, 106 n.7 (Ct. App. 2011).

(R. 715). Summarizing some of the record as set forth below in this Brief, the Court of Appeals found that a jury could reasonably find that Kopchynski acted with knowledge of the existence of prior water intrusion and repair efforts that had failed, specifically made misrepresentations about the contents of an expert report, and thereafter stood by knowing the Isaacs were relying upon information that was false, incomplete, or misleading in violation of S.C. Code § 27-50-70.

Importantly, the Court of Appeals found that the proper starting point is to understand the evidence which speaks to what Kopchynski initially knew,[1] and thereafter, look to see how she handled the subsequent information relied upon by Mr. and Mrs. Isaac. This evaluation of the facts provides direct evidence which supported all of the Isaacs' claims against Defendant Kopchynski.

3. FACTUAL RECORD: THE COURT OF APPEALS CORRECTLY HELD THAT THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT BY IGNORING OR CONSTRUING ALL EVIDENCE AND INFERENCES AGAINST THE ISAACS WHICH WOULD PROVE THAT KOPCHYNSKI KNEW THE PROPERTY HAD A HISTORY OF FLOODING, DRAINAGE PROBLEMS, AND MOISTURE DAMAGE, AND SHE WAS COMPLICIT IN CONVEYING FALSE, MISLEADING, AND INCOMPLETE INFORMATION

Defendants Thomas and Jackie Onions hired realtor Laura Kopchynski to sell their personal residence located in the Litchfield Plantation of Pawleys Island (the "Property"). Two days after Respondents Rory and Kimberly Isaac purchased the Property, a rainstorm flooded the Property. (R. 18-61) Before filing this lawsuit, Mr. and Mrs. Isaac came to learn that Mr. & Mrs. Onions and their agent, Laura Kopchynski, knew the Property had a history of flooding, drainage problems, and moisture-related damage. (R. 433-456) During discovery, the Isaacs were able to

[1] *See e.g.*, Aff. of Ward, where a disinterested witness testified that he specifically told Kopchynski of the serious problems with the house very early in the sale process. (R. 433-56).

confirm Petitioner Kopchynski actively conspired with the Onions to conceal material facts.[2] Under SCRCP, Rule 56, this Court construes all ambiguities, inferences, and conclusions arising from the evidence against Petitioner Kopchynski.

The lower court heard two Motions for Summary Judgment on July 26, 2019, the first of which was the Onions' motion for summary judgment. (R. 133-36) The denial of the Onions' motion means the lower court found evidence which would support the Isaacs' claim that the Onions' knew the Property had flooded, poor drainage, and damage due to moisture. (R. 1) The lower court erred in overlooking an extensive amount of evidence in the record proving Kopchynski had actual knowledge of these problems, didn't disclose them, and conspired with the Onions to conceal them. Kopchynski violated her statutory duties by failing truthfully disclose and correct information she knew or **had reasonable cause to suspect**, was false, incomplete, or misleading.[3]

Kopchynski's knowledge of these adverse material facts is important because, licensed realtors in South Carolina have a legal duty to disclose known material adverse information, as well as a legal duty to correct any known material representations which she knows, or has reasonable cause to suspect, to be false, misleading, or incomplete.

[2] The active concealment included adverse conditions known to have been covered up by repair instructions given to the Onions' handyman, ongoing repair efforts, as well as conspiring with the Onions to get the Isaacs to avoid Andy Ward to obtain and rely upon a CL-100 report Kopchynski knew to be materially incomplete and misleading.

[3] *See related discussion*, p. 4-6 *above* (S.C. Code § 27-50-70 (Establishing liability where real estate agent knows or has reasonable cause to suspect information conveyed was false, incomplete, or misleading), and S.C. Code § 40-57-350(G)(1)-(3) (Recognizing real estate agents' duty to be honest with all parties, and truthful as to any disclosures).

a. KOPCHYNSKI LIVED IN LITCHFIELD PLANTATION FOR 10 YEARS AND WROTE AT LEAST 27 NEWSLETTERS FOR THE HOA, CREATING AN INFERENCE SHE KNEW THE HOA BOARD MEMBERS, SHE KNEW THE HOA HANDYMAN, AND SHE KNEW THE HOA HAD HIRED AN ENGINEER TO STUDY DRAINAGE PROBLEMS.

An extensive amount of evidence in the record proves that Kopchynski had actual knowledge of these problems, and conspired with the Onions to fraudulently conceal them, thus violating her statutory duty to be truthful, disclose, and correct information she knew, or had reasonable cause to suspect, was false, incomplete, or misleading.

Kopchynski testified that she lived in the Litchfield Plantation neighborhood for ten years, was a "close personal friend" of the Onions, and the author of at least twenty-seven (27) monthly Litchfield Plantation newsletters. (R. 460-61, 477-78) The neighborhood newsletters authored by Kopchynski include advertisements for her realty services, specifically identify HOA officers (including Mr. Onions), and list Emery Custer as a neighborhood handyman. (R. 477-81, 608-611) Kopchynski testified Custer was well known in the community as "the Onionses used him for much of their work and so did the HOA for Litchfield Plantation for several homeowners and some of the board members." (R. 475-76) Kopchynski also knew the HOA had hired an engineer to study flooding and drainage issues in the community. (R. 466-67) The Property is located at the front gate of the community, and record evidence established that any significant rain flooded the entrance road. (R. 414-24, Aff. of Cromartie, ¶¶4-6). Kopchynski listed the Onions' property and earned a $15,625.00 commission from the sale to the Isaacs, that is, half of all the commissions she received in 2018. (R. 493-94)

Due to her extremely close personal and professional relationship to both the Onions and their neighborhood, coupled with a significant financial incentive, the lower court should have acknowledged the inference: (1) that if the Property flooded or had severe drainage problems, she would know about or have reasonable cause to suspect them; (2) that Mr. Onions, Kopchynski,

and their handyman Emery Custer knew each other well; and (3) that Kopchynski had viable personal and financial motives to help or allow the Onions conceal adverse information when she listed the Property.

Respondents erroneously argues these arguments were not raised to the lower court and they are therefore without merit. Respondent is wrong because each assertion before the lower court and was based upon and supported by references to Kopchynski's own testimony. (See Mem. in Opp. to S.J., R. 251-285, Mot. to Alter & Amend, R. 286-301, and Mem. in Sup. of M. to Am. R 399-405, 409-411; R. 414-24 (Aff. of Cromartie, Depicting flooding at entrance of subdivision).

b. THE LOWER COURT SHOULD HAVE ACCEPTED THE INFERENCE THAT KOPCHYNSKI QUICKLY LEARNED THE INITIAL PROPERTY CONDITION DISCLOSURE STATEMENT WAS INCOMPLETE, MISLEADING, AND INACCURATE BECAUSE SHE PERSONALLY RECOMMENDED AND CONTACTED A CRAWLSPACE SPECIALTY INSPECTOR, SHE WAS PRESENT AT THE INSPECTION, THE INSPECTOR' S REPORT WAS PERSONALLY HANDED TO HER, AND HE SPECIFICALLY INFORMED HER OF THE SEVERE PROBLEMS.

As part of her representation, Kopchynski had the Onions fill out the requisite South Carolina Residential Property Condition Disclosure Statement (CDS). (R. 468-69; 519). Through the CDS, the Onions falsely represented they did not know of any problem or conditions in the crawl space foundation; they had not installed mechanical underground pumps to push drainage water under the street and onto the property of others; they had no knowledge of wood destroying organisms, dry rot, or fungus; they had no knowledge of problems caused by water, drainage issues, or flooding during their ownership; that Lane's had provided termite/pest treatment; and, there were no other known material issues. (R. 593-598, 602-606)

The Onions knew the CDS was incomplete, misleading, and inaccurate when it was signed on April 23, 2018. (R. 508-10, 514-15; Aff. of Cromartie, ¶¶4-6, R. 414-24). Due to the close personal and professional relationship with the Onions and the neighborhood, a jury could

reasonably infer Kopchynski knew the CDS was inaccurate at that time as well. However, even if the lower court correctly rejected an inference that Kopchynski knew of problems with the CDS in April, there is direct evidence she knew the CDS was inaccurate a very short time later.

On May 10, 2018, prior prospective buyers, Mr. & Mrs. Cole (not a party to this Action), entered into a contract to buy the Onions' Property. The Coles hired Cornerstone Home Inspections of SC, LLC (hereinafter "Cornerstone") to perform a general inspection. Their report noted issues in the crawl space, including hanging and missing insulation, missing vapor barriers, debris, and damp ground. (R. 612-621). The home inspection recommended further investigation by a "crawl space specialty company" (R. 616, 471-72).

Petitioner Kopchynski knew of and took the initiative to personally contact a crawl space specialty inspector, Andy Ward of Stark Exterminating ("Stark"). (R. 471-73; Aff. of Ward, R. 435-39, ¶¶ 4-5). Kopchynski was present when Mr. Ward inspected the Property on May 16, 2018, and Mr. Ward personally provided her with a written report and verbally informed her of the very serious issues with the Property, including excessive moisture, wood decay fungi, wood to ground contact, existing visible damage, and areas of possible hidden damage. (R. 433-34, ¶¶ 6-11). Mr. Ward stated, "I also informed Mrs. Onions and Kopchynski that conditions would worsen during summer," and further contradicted the deposition testimony of Kopchynski by stating, "I have NEVER and would NEVER tell anyone that a Property with excessive moisture conditions would 'pass a CL-100 inspection' because that is NOT true." (R. 434, ¶10 *(emphasis in original*)).

Mr. Ward gave his report to Mrs. Onions and Kopchynski, and he spoke with them about its contents, and as a result they had reason to suspect the Property had problems, and that statements in the CDS were inaccurate, misleading, or incomplete. (R. 433-34) At that time, due to her direct involvement and actual knowledge, Kopchynski would have had a legal duty to disclose Mr. Ward's report to make the suspected material adverse problems known to any

purchaser, along with a legal obligation to correct the CDS representations which she knew, or had reasonable cause to suspect, to be false, misleading, or incomplete. Mr. Ward's Report and the problems it identifies were never disclosed; the incomplete, misleading and inaccurate responses of the CDS were not corrected; and, as set forth below Kopchynski took additional affirmative actions to help the Onions conceal these problems. The Isaacs would not have purchased the Property had they been told the truth as to the Property's problems with stormwater drainage, flooding, and the Onions' failed remediation efforts. (R. 508-10, 514-15).

c. KOPCHYNSKI EMAILED TWO VERSIONS OF A REPAIR VERIFICATION (WITHOUT MENTION OF THE DECEPTIVE CHANGES), PURPORTING TO HAVE BEEN PREPARED BY HANDYMAN EMERY CUSTER TO FALSELY VERIFY PROPER REPAIRS; DURING DISCOVERY, RESPONDENTS LEARNED CUSTER HAD NEVER SEEN EITHER LETTER; MR ONIONS HAD FORGED THE LETTERS; THE LETTERS FALSELY CLAIMED CUSTER WAS A LICENSED GENERAL CONTRACTOR AND THAT HE WAS GIVEN THE CORNERSTONE REPORT; AND EMERY'S WORK ONLY COVERED UP PROBLEM AREAS AND DAMAGE

Mr. Ward recommended installing an encapsulation and dehumidifying system in the crawlspace at the cost of $4,595.00. (R. 437-39). Mr. Onions was traveling when Mr. Ward inspected the Property, and he dismissed Mr. Ward's report as soon as he learned of it. (R. 471-475) Upon his return, Mr. Onions called his handyman, Emery Custer, and gave him verbal instructions to make a few cosmetic repairs. During his deposition, Mr. Onions described Emery Custer as "just a worker … a drone." (R. 533) Likewise, Emery Custer testified that he was "positive" that he was never given nor saw the Cornerstone report. (R. 539-41) Custer was simply told to install plastic where it was missing, to replace insulation where it was hanging down due to moisture, and to install an electrical box for an extension cord and a fan. (R. 531-33, 541) As discussed below, his repairs were improper and only served to temporarily cover up and hide issues. (R. 425, 431-32, Aff. of H. Moore)

On June 2, 2018, Kopchynski emailed the Cole's realtor "a list of repairs made by the Onions' contractor, in the form of a summary letter provided by the contractor,"[4] which stated repairs had been made "as per home inspection report." (R. 483-84; R. 297 (Aug. 5, 2019)) The Isaacs were shocked to learn Emery Custer had not drafted, had not provided, had not created, and had never seen the summary letter prior to the day of his deposition. (Dep. of Custer, R. 546, ln. 23, to 548, ln. 11). Only after this action was filed did Mr. Onions reveal that he had secretly forged the first "summary letter." (R. 530-32, 600). The forged summary letter also falsely states Emery Custer is a "Licensed General Contractor." Discovery revealed Mr. Custer is not only not a licensed general contractor, he had no experience remediating moisture in crawl spaces in the Low Country of South Carolina, the work he performed concealed and worsened damage in the crawl space, and it included several code violations. (R. 428-30, 431-32; R. 531-32, 534; R. 542-45, 546-47).

On or around June 20, 2018, the Onions' contract with the Coles fell through.[5] Kopchynski promptly contacted the Isaacs' realtor, Ed Kimbrough, because she knew the Isaacs were very interested in the Property. Kopchynski quickly scheduled a site visit, and rapidly fired off numerous emails with multiple attachments to Mr. Kimbrough. Kopchynski emailed approximately seven hundred (700) pages of documents, including the May 10, 2018 Cornerstone report, with the forged and falsified "summary letter" discussed above. (R. 269-270).

After a careful review of these emails in discovery, the Isaacs learned that Kopchynski had emailed a second version of the "summary letter" to Mr. Kimbrough approximately 3 hours later on that same day. (R. 271-273, 369) Kopchynski's email to Kimbrough falsely asserted it was "prepared by the contractor," and she did not mention any of the deceptive changes made to the

[4] Emery Custer was the contractor being referenced.

[5] The Cole contract was terminated due to an unrelated issue.

summary letter, which included: (1) a title in bold and underlined font: "Repair Verification Form"; (2) a line in bold font indicating "Work Completed: May 25, 2018"; and (3) a signature line for the Owners. (R. 273, R. 502 (identifying the second, signed "Repair Verification Form"). The changes made the purported repair verification even more misleading.[6]

The lower court should have accepted the inference that the short time and manipulative edits to the forged and false contractor verification indicate that Kopchynski had a role in procuring the changes. The lower court also should have accepted the inference that all of these undisclosed changes, forwarded by Kopchynski, were made to: (1) provide a false and misleading representation that the appropriate licensed professional made the appropriate repairs which thoroughly addressed the issues raised in the Cornerstone report; and, (2) conceal materially adverse information, including Andy Ward's report, the Onions' inaccurate, misleading, and incomplete CDS, and an ongoing undisclosed and failed remediation effort.

d. KOPCHYNSKI DID NOT DISCLOSE MATERIAL ADVERSE INFORMATION (THE STARK REPORT), NOR DID SHE CORRECT THE ONIONS' INITIAL CDS

The Isaacs entered into a contract to purchase the Property on or around June 20, 2018 ("Contract"). The Contract was contingent upon an accurate CDS from the Onions. Kopchynski delivered the original CDS dated April 23, 2018, which was only revised to refer to the second version of the Repair Verification Form forged and falsified by Co-Defendant Tim Onions. Thus, at that time, Kopchynski delivered the CDS to Mr. and Mrs. Isaac, even though she knew or at least should have suspected that the following misrepresentations were inaccurate, misleading, and incomplete:

a. Failure to disclose moisture and fungi problems (Question #7);

[6] The Repair Verification Form was submitted at the same time Kopchynski represented that the June CL-100 "was good" as discussed below.

b. Failure to disclose the installation of a non-engineered underground irrigation system discharging water on the property of others (Questions #12, 14);

c. Failure to disclose present or past infestation of wood-destroying fungus (Section IV);

d. Failure to disclose problems caused by water (Question#19);

e. Failure to disclose flood and drainage problems (Questions #20, 21); and,

f. Forging a false, misleading, and inaccurate "Repair Verification Form (Section IX)."

At that time, due to her personal involvement and actual knowledge, Kopchynski would have had a legal duty to disclose Mr. Ward's report to make the suspected material adverse problems known to the Isaacs, along with a legal obligation to correct the CDS representations which she knows, or had reasonable cause to suspect, to be false, misleading, or incomplete. The Court of Appeal was correct in noting that the finder of fact could have reasonably relied upon the impermissible misrepresentations and failures of Kopchynski.

e. THE 700 PAGES OF DOCUMENTS EMAILED TO THE ISAACS' REALTOR ED KIMBROUGH INCLUDES KOPCHYNSKI'S MISREPRESENTATION ABOUT THE FIRST CL-100 REPORT ON JUNE 20, 2018 – STATING: "IT IS GOOD"

Kopchynski contacted Mr. Kimbrough just after Lane's Professional Pest Control had conducted a CL-100 wood infestation report. Without having seen the report, Kopchynski emailed Kimbrough and erroneously stated the CL-100 "was good." (R. 274) It was not good. The first CL-100 performed by Lanes identified the persistence of "excessive moisture" and severe problems in the crawl space over a month after Mr. Custer performed his "repairs" on May 25, 2018. (R. 557-58) Kopchynski admits she did not disclose the first CL-100 after she obtained it, and she did **not** correct her misrepresentation that it "was good." (R. 274, 485-486) She also knew Mr. Custer's prior repairs had failed, and she did not correct the two prior CDS representations. (R. 485-86).

The lower court specifically pointed to Laura Kopchynski's "email dated June 19, 2018, [where] Kopchynski advised Kimbrough [the Isaacs' Agent,] the "CL-100 was done yesterday and from what I understand it was good …" along with an out of context statement from Mr. Kimbrough's deposition to conclude the Isaacs absolved Kopchynski of her assertion the June 2018 CL-100 was good, waived their right to rely upon any of other fraudulent statements, and waived their right know of the acts of active concealment by Kopchynski. (R. 5-6). The other false, incomplete, and misleading statements, including the cover-up by Kopchynski are discussed in this Brief above and below.

The lower court erred by construing Mr. Kimbrough's testimony against Mr. and Mrs. Isaac. In his deposition, Mr. Kimbrough clarified that he did not think Lane's first CL-100 was relevant because Kopchynski specifically misrepresented[7] the contents of that report by stating, "**<u>It was good</u>**." *Id.* (*emphasis added*). This very issue was so critical that Mr. Kimbrough specifically testified he would not have relied upon a report purchased by the Onions -- **<u>if that report suggested the Property was good</u>**.

BY MR. OXNER:

Q. [C]orrect me if I'm wrong, but it's my understanding your testimony was that you really didn't care about the original CL-100; is that correct?

A. I wouldn't say I wouldn't care about it, but the fact is it was reported that it was good and it was up to us to verify that it was good and the only way to verify it was to have -- take responsibility for the CL-100 ourselves, which is what we planned to do all along.

Q. Okay. My understanding was your testimony is you didn't have any interest in that first CL-100. You knew it was out there, but you were going to get your own; is that right?

[7] For purposes of context, Kopchynski made this misrepresentation: (i) after Mr. Ward had personally explained numerous troubling findings to her, including excessive moisture, existing damage, and visible wood-decaying fungi; and, (ii) a month after the sham "repair procedure" performed by an unlicensed contractor, Emery Custer, had failed. Mr. Ward and Mrs. Kopchynski sharply dispute what was said during their interactions. (*See* Aff. of Ward, R. 433-344, ¶ 10 (Unequivocally stating he did not tell Kopchynski the house passed inspection)).

A. Correct. And perhaps [if] she would have reported that it was bad, I would have probably said, yeah, let us see it. But the fact is she reported it was good.· So we're moving along at that point. Things look good, you know.

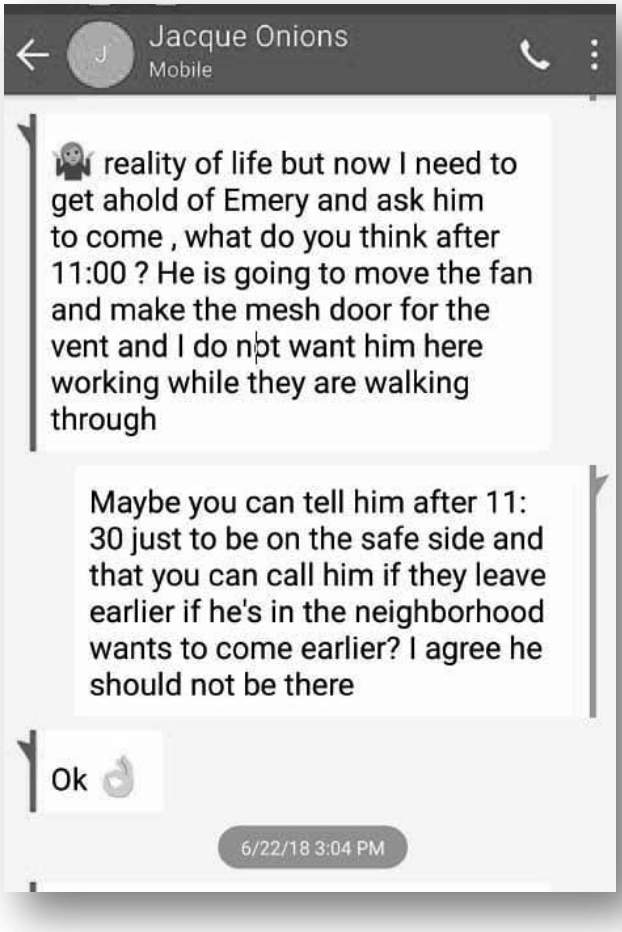
Dep. of Kimbrough (R. 590, ln. 1-22. (*emphasis added*))

The truth is that the first CL-100 of June 20, 2019 identified the persistence of severe problems in the crawl space a month after the sham repairs of an improperly licensed contractor. (R. 556-58) Kopchynski acknowledged that she received the report, reviewed it, and did not disclose the CL-100, nor did she correct the material misrepresentation she had made to Mr. Kimbrough about it. (R. 485-86).

According to Plaintiffs' expert, Henry Moore, a licensed real estate agent would have known the CL-100 report of June 20, 2018 was not clear and would have stopped the closing because no mortgage lender or buyer would have closed on the purchase of that property until those issues had been resolved or the contract renegotiated. (R. 425-32, Affs. of Moore)

f. ONE DAY AFTER THE FIRST LANES INSPECTION, KOPCHYNSKI HAD TEXT MESSAGE CONVERSATIONS WITH THE SELLERS CONSPIRING TO DELAY A PLANNED CRAWLSPACE REPAIR OF MOISTURE-RELATED ISSUES BECAUSE THE ISAACS WOULD BE VISITING THE PROPERTY. A REPAIR AT THIS TIME CREATES AN INFERENCE THE ONIONS AND KOPCHYNSKI KNEW EARLIER REPAIRS HAD FAILED & THE ONIONS AND KOPCHYNSKI WERE HIDING THE EXISTING PROBLEMS AND ONGOING REPAIRS

The first CL-100 was ordered by the prior buyers (Mr. and Mrs. Cole), but the Onions paid for it to establish a relationship with the Lane's inspector, who then advised the Onions as to the need for continued repairs. (R. 274, 584, 710) Indeed, Kopchynski's text messages the very day after she falsely represented Lane's CL-100 was "good," reveal that she specifically told Mrs. Onions to make sure their handyman, Emery Custer, did not show up as scheduled to perform additional work in the crawl space the next day as planned because Mr. and Mrs. Isaac would be visiting the Property. (R. 628-29)



The lower court erred in granting summary judgment in favor of Kopchynski where this text message conversation creates a clear inference that both Onions and Kopchynski knew the initial work performed by Custer did not work, moisture problems were persisting, and specific repairs were ongoing. All of this information was actively concealed from the Isaacs by the Onions with the assistance of Kopchynski.

g. KOPCHYNSKI AND THE ONIONS CONSPIRED TO CONVINCE THE ISAACS TO AVOID HIRING ANDY WARD OF STARK EXTERMINATORS TO CONDUCT THEIR CL-100 BY FALSELY ASSERTING STARK WOULD BE UNPROFESSIONAL AND FALSELY CLAIMING LANES HAD ROUTINELY PERFORMED PEST CONTROL AT THE PROPERTY. THESE FACTS ALSO CREATE AN INFERENCE KOPCHYNSKI WAS DIRECTLY INVOLVED IN HIDING STARK'S PRIOR REPORT

Kopchynski incredulously testified that she and Mrs. Onions conspired to steer the Isaacs away from Stark Exterminators, and toward Defendant Lane's for their CL-100 inspection.

> A. The only time it came up with the Isaacs with the CL-100 is I was noticing it was time to schedule one. And I called Ed and said, you have to schedule the CL-100. And he thought it was the seller's responsibility. And I looked back over the contract, I said, no, the buyer is paying for it, and the buyer is choosing the provider and we're in that time frame. And that was the same time I had told -- when Jackie Onions and I had talked about we need to get -- that the CL-100 has to get done. I said, I'm going to find out who's going to do it and I'm going to let Ed know what happened with – **if Stark comes, that it could be awkward.**
>
> Q. Okay. So there was a discussion with you and Jackie about I'm going to find out who it is and that if Stark shows up, it could be awkward because –
>
> A. **I'm going to let Ed know that it could be awkward if Stark comes**, but they are welcome to use Stark.
>
> Q. And you had that conversation with Jackie?
>
> A. Yes.
>
> ****
>
> Q. Okay. So your testimony is that a discussion took place that having Stark back out there would be a problem?
>
> A. No, not a problem. That it could be awkward, that's all.
>
> Q. Okay. And after you had that conversation with Jackie and you were going to go and talk to Ed …

R. 488-90 (*emphasis added*).

Based upon her own testimony, Kopchynski actively conspired to misrepresent and conceal material facts which would have been disclosed if Mr. and Mrs. Isaac would have contacted Andy Ward of Stark Exterminators to prepare a CL-100 report prior to their purchase of the Property.

Instead of disclosing the first moisture report that she had personally procured from Andy Ward, and without correcting her statement asserting the second CL-100 "was good," Kopchynski came up with the lie that Lane's Pest Control was the Onion's "main provider" for pest control. (R. 552, 589).

h. KOPCHYNSKI VIEWED THE LANES #2 REPORT OBTAINED BY THE ISAACS, AND SHE KNEW THAT IT WAS MISLEADING AND INCOMPLETE BECAUSE IT DID NOT MENTION ANY PRIOR PROBLEMS, OR THE LANES #1 REPORT AND THE PROBLEMS IN IT, OR THAT REPAIRS WERE ONGOING, OR THAT THE LANE'S INSPECTOR HAD BEEN AT THE PROPERTY ONLY TWO WEEKS PRIOR.

Before closing, the Isaacs insisted upon having their CL-100 report to verify the absence of moisture issues in the crawl space. Unfortunately, discovery has revealed the CL-100 inspector Joseph Sheheen, of Lane's Professional Pest Control, actively worked to assist the Onions in concealing the flooding, drainage, and moisture problems. (R. 563, 567-79) As stated above, Kopchynski admits she and Mrs. Onions actively steered the Isaacs away from Stark Exterminators and toward Joseph Sheneen of Lanes by falsely representing that Lane's routinely provided pest control for the Property (R. 589), and suggesting that Andy Ward and Stark Exterminators would be unprofessional or awkward. (R. 488-492)

While Lane's inspector, Joseph Sheheen, admits that he had numerous recommendations for and discussions and agreements with Mr. & Mrs. Onions on site about fixing excessive moisture in the crawl space, these discussions were denied by Mr. & Mrs. Onions. (R. 562-63, 577-79; R. 520) Mr. Sheheen also testified as follows:

a. His name was forged on the first and second CL-100 reports by Lanes, and that he did not see either until after this lawsuit was filed. (R. 567-68)

b. The Isaacs would be the **only people** who **did not know** that Lane's second report was misleading and inaccurate because it failed to disclose excessive moisture and the existence of wood decay organisms and damage noted "throughout" the Property just two weeks earlier by the same inspector from Lanes and that the inspector, Mr. Sheheen, had personally recommended measures to temporarily hide damage during his extended conversations with the Onions despite having been hired by the Isaacs (R. 561-572);

c. That his July CL-100 states moisture readings that were not possible (R. 431-32, 564-66, 574);

d. That the wood decay fungi somehow disappeared on its own in two weeks (R. 575-76);

e. That the CL-100 has information in his report which could not have come from him (R. 554, 555, 559, 570, 571); and,

f. That Lanes did not routinely conduct pest control upon the Property, as the only time it was done was during the first CL-100 inspection in June 2018 (R. 552-53, 560).

The Court of Appeals and the lower court failed to consider these facts, let alone to construe them as evidence that Kopchynski actively worked to conceal moisture-related problems and flooding by steering the Isaacs to Lanes Pest Control. Kopchynski knew the Isaacs were relying upon incomplete and, therefore, misleading information. Instead of complying with her statutory duty of honesty, she successfully pressed the Isaacs to close on the sale quickly.

The lower courts erred by concluding that Kopchynski's only alleged failures were her failures to disclose the Stark Report and the first Lanes CL-100 report. While Respondents have not yet completed discovery, they have uncovered a tremendous amount of evidence which the lower courts simply ignored or impermissibly construed against Mr. and Mrs. Isaac.

4. RIGHT TO RELY: THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT TO KOPCHYNSKI BECAUSE THE ISAACS HAD A REASONABLE RIGHT TO RELY UPON REALTORS, AS THEY HAVE A STATUTORY DUTY OF HONESTY, AND RELIANCE IS A QUESTION OF FACT FOR THE JURY

The right to rely must be determined in light of the duty to use reasonable prudence and diligence under the circumstances in identifying the truth concerning the representations made to him. *Florentine Corp.,* 287 S.C. at 386, 339 S.E.2d at 114 (1985) . The determination of what constitutes reasonable diligence and prudence must be made on a case by case basis. *Slack v. James*, 364 S.C. 609, 615, 614 S.E.2d 636, 639 (2005). As a general rule, questions concerning reliance and its reasonableness are factual questions that must be construed in favor of the nonmoving party and ultimately left for the trier of fact to resolve after hearing all of the evidence. *Id*.

In this case, Kopchynski's knowledge of and involvement in the misrepresentations began when she personally procured, received, and discussed the adverse information from the report of Stark Exterminators on or around May 16, 2018. (R.433-56, 471-473) Not only did she fail to disclose the Stark report or the information in it, she emailed two versions of Mr. Onion's forged "Repair Verification Form" dated May 25, 2018, which had been edited just three (3) hours after the original verification had been sent on the day the Isaacs sought to contract to buy the Property. (R. 269-273) Kopchynski emailed the second form as a more professional and persuasive assurance that a qualified general contractor had made the appropriate repairs. Kopchynski knew Emery Custer, just like she knew about the Property (R. 475-76, 479-481)

With knowledge of the moisture problems, and on the same day Kopchynski emailed two versions of the "Repair Verification" -- she personally wrote to the Isaac's Realtor, Mr. Kimbrough, stating that the first CL-100 report issued by Lane's on June 20, 2018, "was good." As confirmed by her counsel before the Court of Appeals, Kopchynski testified that she reviewed the report and noted that excessive moisture had been noted, and is therefore charged with

knowledge that problems persisted and that Emery Custer's repairs had failed. (R. 485-86) That report and the information within it remained undisclosed. Instead, Kopchynski worked with the Onions to make sure the Isaacs would not discover that additional repairs were in progress by telling them to make sure Emery Custer did not come to the Property as planned (R. 628-29), and by coming up with a lie to steer the Isaac's unsuspecting realtor away from Andy Ward of Stark Exterminators, and toward Defendant Lanes' Professional (R 399-402). Kopchynski contacted Ed Kimbrough to ask him not to use Stark and suggested that Lanes would appropriate because Lane's routinely provided pest control at the Property. (*Id.*) In truth, the only time Lanes had provided pest control was when Mr. Sheheen was at the Property for the first Lanes CL-100, i.e., June 18, 2018 (R. 560).

The Isaacs supposedly hired Lane's, yet Mr. Sheheen's testimony indicates the Onions were able to convince him to issue what turned out to be an impossibly clean CL-100 (R 425), without noting that he had personally found excessive moisture, wood decay fungi, and damage just two weeks earlier (R. 566-76). Kopchynski, Onions, and Lanes all knew that the Isaacs were relying upon incomplete and misleading information. Isaacs' reliance upon Kopchynski's duty to be truthful, to disclose, and to correct her misrepresentations was reasonable because the problems were hidden by the Onions and the repairs of their handyman, and in each instance, the truth was squarely in the knowledge she had procured and subsequently lied about. As a result, the Court of Appeals properly noted Kopchynski's motion for Summary Judgment should have been denied by the lower court.

5. *CHASTAIN V. HILTABIDLE* - WHERE THE SELLERS HAD MARKED THEIR CDS "YES" TO PROVIDE NOTICE OF PRIOR FLOODING

Respondent asserts the only applicable statute in this case is S.C. Code § 40-57-350(G)(2), because the Appellants obtained the July CL-100 report from Lane's. (Resp. Br., p. 9-10). In support, Respondent cites to *Chastain v. Hiltabidle*, 381 S.C. 508, 519, 673 S.E.2d 826, 832 (Ct.

App. 2009) for the proposition 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." (R. 683).

While the Chastain Court dismissed claims against a listing agent at the summary judgment stage, Chastain is easily distinguished and supports the Appellants in this case in several important ways. (*Id.* p. 512, 828) First, the lower court in Chastain actually reviewed the statements made on a Disclosure Statement and applied the correct statutory standard from the Disclosure Act to those facts. (*Id*. p. 520-21, 832-33) Second, and most importantly, the selling homeowners had responded "yes" and offered substantive explanation to inquiries on the Disclosure Statement concerning prior flooding and moisture intrusion. (*Id*. p. 512, 828). Following the Buyers' purchase of the Property, two days of rain resulted in flooding. The Chastains sued on the ground that the realtor should have known the seller's substantive explanations were inaccurate. (*Id.* p. 513, 828). The Court held that the Seller had put the Buyers on notice of past flooding, and even if the agent knew of past flooding, there was no evidence the realtor knew the substantive explanations were false or inaccurate. (*Id*. p. 520-21, 832-33).

The key distinguishing facts in the case at bar are that the homeowners unequivocally lied on both of the Disclosure Statements that Petitioner filled out,[8] and Petitioners have uncovered a litany of facts which clearly and convincingly show that Respondent knew that statements in the Disclosure Statements were false, and she actively conspired to conceal the truth.[9]

[8] *See* Dep. of T. Onions, R. 521, 525-528 (Defendant Thomas Onions admitted numerous incidents of flooding and that mechanical pumps were installed to remove floodwaters, however, did failed to note any drainage issues or that pumps had been installed).

[9] *See e.g.*, Aff. of Andy Ward, R. 433-434, ¶¶ 6-10. (Mr. Ward verbally informed Kopchynski that the Property had material defects.)

6. CAVEAT VENDITOR IS THE LAW OF SOUTH CAROLINA

Kopchynski cannot and should not escape liability concerning the contents of the Stark Report, the Lanes CL-100 Reports, or the CDS - because she chose to secret their contents. As to information Kopchynski did disclose, such as the Cornerstone Report, she cannot escape liability because she actively and repeatedly decided to vouch for repairs performed by a handyman to conceal the damage, to hide the impropriety and failure of the prior repairs, and to conceal and scheme to cover up ongoing repairs.

The Supreme Court of this State "has consistently rejected caveat emptor and adopted the civil law rule of caveat venditor [i.e., *Seller Beware*!] as part of the common law of South Carolina" in connection with the sale of houses. *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 502, 229 S.E.2d 728, 730 (1976); *See also Gov't Emps. Ins. Co. v. Chavis,* 254 S.C. 507, 525, 176 S.E.2d 131, 140 (1970)(*citations omitted*). The law should not orphan the purchasers of a house, who are likely investing their life savings. *Lane*, 267 S.C. at 503. In South Carolina, the seller of real property must disclose material facts to the purchaser "[w]here material facts are accessible to the [seller] only and he knows them not to be within the reach of the diligent attention, observation and judgment of the purchaser." *Lawson v. Citizens & S. Nat'l Bank of S.C.*, 259 S.C. 477, 485, 193 S.E.2d, 124, 128 (1972). Non-disclosure becomes fraudulent concealment when it is the duty of the party having knowledge of the facts to make them known to the other party to the transaction. *Lawson v. Citizens & S. Nat'l Bank of S.C.*, 259 S.C. 477, 481-82, 193 S.E.2d 124, 126 (1972). The seller of real property must disclose material facts to the purchaser where material facts are accessible to them. *Lawson*, 259 S.C. at 485, 193 S.E.2d at 128.

Indeed, an overwhelming majority of jurisdictions require that licensees disclose material facts known to them about a property. This is an area where bright-line rules do not exist and

presumably a licensee should be held to a higher standard in observing defects than would be expected of the average home buyer.[10]

7. THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT WHERE DEFENDANTS' MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT WAS SUBMITTED AFTER THE DEADLINE ESTABLISHED BY THE SUPREME COURT.

The Supreme Court of South Carolina set forth specific rules concerning the filing of Motions in the Fifteenth Judicial Circuit by way of Order issued on September 10, 2015, providing in pertinent part:

> A written motion shall be filed and served with a supporting memorandum of law. A supporting memorandum of law is not required if a full explanation of the motion is contained within the motion and a memorandum would serve no useful purpose. Affidavits and other materials supportive of the motion shall be filed and served with the motion.

Kopchynski's July 8, 2019 Motion only provided notice of three (3) bullet point citations as grounds for Summary Judgment, and after that, attempted to preserve the right to introduce last-minute information in direct violation of the Supreme Court's Order. Defendant's Memorandum was not filed until July 24, 2019, just two days before the hearing on Defendant's Motion.

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[10] 10 REAL ESTATE BROKERAGE LAW AND PRACTICE § 3A.10 (2018)(*Citing e.g., Williams v. Wells & Bennett Realtors*, 52 Cal. App. 4th 857, 863, 61 Cal. Rptr. 2d 34, 37 (1997) (broker has a duty to disclose known material facts); *Baumgarten v. Coppage*, 15 P.3d 304, 307 (Colo. Ct. App. 2000) (citing statute and discussing broker's duty to disclose adverse material facts actually known by broker); *Zimmerman v. Northfield Real Estate, Inc.*, 156 Ill. App. 3d 154, 162, 109 Ill. Dec. 541, 510 N.E.2d 409, 413–414 (1987), appeal denied, 116 Ill. 2d 578, 113 Ill. Dec. 320, 515 N.E.2d 129 (1987) (brokers had duty to speak regarding known material information); *Bazal v. Rhines*, 600 N.W.2d 327, 329 (Iowa Ct. App. 1999) (finding duty to disclose material facts); Binette v. Dyer Library Ass'n, 688 A.2d 898, 905 (Me. 1996) (citing regulations and stating that broker has duty to disclose known material defects); *Weintraub v. Krobatsch*, 64 N.J. 445, 453–454, 317 A.2d 68, 74 (1974) (noting rule that broker is liable for nondisclosure of defects known to him but unknown to buyer); *Gordon v. Skopos*, 2005 Ohio 4900, 2005 Ohio App. LEXIS 4414, at *7 (Sept. 16, 2005) (a real estate agent has a statutory duty to disclose any material defects of which the agent has knowledge); *Stebbins v. Wells*, 766 A.2d 369, 373 (R.I. 2001) (holding broker had duty to disclose known deficient conditions); *Teter v. Old Colony Co.*, 190 W. Va. 711, 441 S.E.2d 728, 734–35 (1994) (agreeing that broker may be liable for failure to disclose known material defects); *Eddy v. B.S.T.V., Inc.*, 696 N.W.2d 265, 2005 WI App 78 (2005), review denied, 2005 WI 134, 282 Wis. 2d 722, 700 N.W.2d 274 (2005) (every real-estate broker has a duty to disclose to each party all material adverse facts that the broker knows and that the party does not know or cannot discover through reasonably vigilant observation, unless the disclosure of a material adverse fact is prohibited by law).

Failing to strike the late Memorandum from the record was manifestly unjust because it facilitated the presentation of misleading deposition testimony from the Isaacs' realtor, Ed Kimbrough, to suggest the Isaacs' did not care about the first CL-100 report from Defendant Lanes. Subsequent deposition testimony from Kimbrough clarified his reliance upon Petitioner Kopchynski's statutory duty to correct her misstatements about the contents of the report.

The lower court's Order also fails to comply with SCRCP, Rule 54(b) which provides:

> (b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties **only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.**

The dismissal of Laura Kopchynski forced the Isaacs to file this appeal and a stay upon the underlying action. Opportunistic and procedural irregularities should not have been allowed to render Supreme Court Orders meaningless and prevent the Isaacs from timely presenting their entire case to the trier of fact.

8. THE LOWER COURT ERRED IN GRANTING SUMMARY JUDGMENT WHERE DISCOVERY AS TO PETITIONER KOPCHYNSKI WAS NOT COMPLETE

The Isaacs had requested documents from Mr. & Mrs. Onions, Emery Custer, Lane's Professional Pest Control, and Laura Kopchynski after their respective depositions. As to Petitioner Kopchynski, the Isaacs requested the policy and procedure manual of her employer. These documents will show Kopchynski violated her employer's policies and procedures as to how the company's employees are to handle material adverse information, and would further contradict her sworn testimony as to how to properly advise clients in filling out property condition disclosure statements in South Carolina. Additionally, the Isaacs seek additional discovery from Laura Kopchynski, which could prove she has made other misrepresentations. All of this

information would provide additional information that would justify the trier of fact in concluding that she was complicit in fraud, concealment, and conspiracy. Indeed, information very prejudicial to the Petitioner and Sellers was actually obtained in discovery after Kopchynski's Motion for Summary Judgment was granted, outside of the record of this appeal and not discussed herein.

Summary judgment should not have been granted because the Isaacs had not yet had a full and fair opportunity to complete discovery. *Baird v. Charleston Cty.*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999).

CONCLUSION / PRAYER FOR RELIEF

The Isaacs pray this Honorable Court will note the Court of Appeals' thorough review of the factual record in this case and affirm the Court of Appeals' reinstatement of the Buyers' claims for negligent misrepresentation and violation of the Residential Property Condition Disclosure Act. A Realtor in South Carolina may not claim truthful disclosure where they have knowingly forwarded information which is false, incomplete, or misleading.

Respectfully submitted,

BELLAMY, RUTENBERG, COPELAND, EPPS, GRAVELY & BOWERS, P.A.
P.O. Box 357
Myrtle Beach, SC 29578
(843) 448-2400
Attorneys for Respondents, Rory & Kim Isaac

/s George W. Redman, III
George W. Redman, III, Esq., SCB # 72365
GRedman@BellamyLaw.com

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