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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
Fifteenth Judicial Circuit

Honorable Benjamin H. Culbertson
Circuit Court Judge

Appellate Case No.: 2023-001462

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

v.

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

REPLY BRIEF

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INTRODUCTION

Pursuant to **Rule 208(a)(3)** of the South Carolina Appellate Court Rules, Petitioner Laura Kopchynski ("Kopchynski") submits this reply to the arguments raised by Respondents Rory M. Isaac and Kimberly J. Isaac (collectively, "the Isaacs") in their Respondents' Brief. Kopchynski incorporates all arguments she raised in her Initial Brief as well as those raised before the Court of Appeals.

ARGUMENT

In the subject real estate transaction, it is undisputed that Ms. Kopchynski disclosed to the Isaacs (1) a report identifying moisture in the crawlspace; (2) the name, license number, and scope of repairs performed by a contractor the homeowners hired to address property condition issues, including moisture in the crawlspace; and (3) the existence of a CL-100 report performed by prior purchasers, which the Isaacs' realtor declined to receive despite Kopchynski offering to obtain it. These facts alone demonstrate there was no active concealment of property conditions by Kopchynski, and thus, there is no genuine issue of material fact that the Isaacs' surviving claims against Kopchynski were properly dismissed at the summary judgment stage by the Circuit Court.

1. The Court of Appeals' applied the incorrect "scintilla" standard

In their Brief, the Isaacs argue that the Court of Appeals applied to correct standard of review on a motion for summary judgment. This contention is supported only by a reference to string-citations in the Court of Appeals opinion reciting the language of Rule 56(c), SCRCP. This, however, has no relevance to *how* the Court of Appeals applied Rule 56(c) in this case. Here, the Court of Appeals unquestionably applied a "mere scintilla" standard, which was deemed incorrect by this Court. *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 892 S.E.2d 297 (2023).

This error is evidenced by the Court of Appeals' statement that it "need not find the evidence presented so far is determinative; simply that it is *either* a scintilla or more than a scintilla." (Appx. p. 716) (emphasis added). The Court of Appeals' Opinion continues: "considering the claims related to the Onionses' disclosure, ***we find there is at least a scintilla of evidence*** supporting a theory that Kopchynski '[knew] or [had] reasonable cause to suspect the information was false, incomplete, or misleading[.]" (Appx. p. 716) (emphasis added; alterations in original). As is clear from this statement, the Court of Appeals looked only for a "mere scintilla" of evidence, not a genuine issue of fact based upon reasonable inferences as required by *Kitchen Planners*.

As further proof the Court of Appeals applied the incorrect standard of review, with respect to claims that the Court of Appeals determined required *more* than a mere scintilla of evidence to survive summary judgment, the Court of Appeals correctly held that the Isaacs had not met their burden.

In affirming the Circuit Court's grant of summary judgment on the civil conspiracy and fraud causes of action[1], the Court of Appeals opinion stated:

> [w]e struggle to find a 'verifiable spark' that Kopchynski knew the statements she made regarding the June 18 CL-100 were false or that she *recklessly* disregarded their falsity."

(Appx. p. 716)(emphasis in original).

[1] No cross-petition of the Court of Appeals' decision was filed by the Isaacs. Therefore, this conclusion is the law of the case. *See Moseley v. All Things Possible, Inc.*, 395 S.C. 492, 495 n. 4, 719 S.E.2d 656, 658 n. 4 (2011) (explaining that the Court of Appeals' finding that the facts did not warrant relief against a party was the law of the case where the party seeking relief did not seek certiorari on that issue); *Reiss v. Reiss*, 392 S.C. 198, 206-07, 708 S.E.2d 799, 803 (Ct. App. 2011) (citing *In re Morrison*, 321 S.C. 370, 372 n. 2, 468 S.E.2d 651, 652 n. 2 (1996) (noting that "an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal").

In other words, the Court of Appeals found that there was *not* more than a scintilla of evidence creating a genuine issue of fact as to whether Kopchynski knew statements she made were allegedly inaccurate. Therefore, the Court of Appeals erred in reinstating the negligent misrepresentation and South Carolina Real Property Condition Disclosure Act causes of action.

2. The Isaacs' Brief misstates or misapprehends several key facts in the Record.

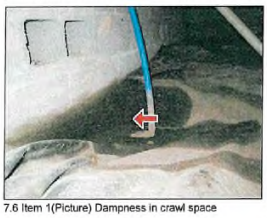
a. Kopchynski provided seven hundred pages of information on the Property, including a prior report identifying moisture issues at the Property and steps taken by a contractor to rectify the problems.

The Isaacs' Brief acknowledges that Kopchynski sent the Isaacs approximately 700 pages of documents pertaining to the Property, including a report performed by Cornerstone Home Inspections on May 10, 2018 ("the Cornerstone Report"). (R. 197-204).[2] Likewise, Rory Isaac testified that he saw the Cornerstone Report prior to putting in the offer. (R. p. 511, lns. 10-17).

The Cornerstone Report put the Isaacs on notice that the Property had, at least as of the date of the inspection, moisture issues in its crawlspace. The relevant portions are copied below:

7.6 **Vapor Retarders (in Crawlspace or basement)**

There are areas of ground that are not covered by a vapor barrier and the ground is damp. Recommend further inspection and any needed corrections by a crawl space specialty company. Item 1(Picture) Item 2(Picture) Item 3 (Picture) Item 4(Picture) Item 5(Picture) Item 6(Picture)



7.6 Item 1(Picture) Dampness in crawl space

7.6 Item 2(Picture) Dampness in crawl space - missing vapor barrier

Plaintiffs 000278

200

[2] The Cornerstone Report was completed roughly a week prior to the Stark Report that the Isaacs allege the Onions' failed to disclose.

(R. p. 200-201).

Accordingly, it is undisputed that the Isaacs had notice of prior moisture issues at the Property at the time they received the Onions' Disclosure Statement.

b. Kopchynski never affirmatively stated that the June 18 CL-100 was "good," and there is no genuine issue of material fact that the Isaacs did not rely on any of Kopchynski's representations regarding the June 18 CL-100.

The Isaacs' primary argument revolves around an email sent by Kopchynski on June 19, 2018, referencing a CL-100 that was completed the day before for a prior prospective purchaser. In that email, Kopchynski stated a "CL-100 was done yesterday and from what I understand it was good, but I can obtain the report if/when necessary as the seller's paid for it." (R. pp. 179-180).

As is clear from the plain language of the email itself, and contrary to the Isaacs' assertions, Kopchynski only relayed what she "understood" and made clear she had not yet obtained a copy of the CL-100. In other words, Kopchynski did not affirmatively state that the June 18 CL-100 was "good."

Moreover, it is clear that the Isaacs did not rely on the subject email from Kopchynski. Indeed, they had their own CL-100 performed and relied upon their own CL-100 only. This is evidenced by testimony from the Isaacs' realtor, who testified that he did not care to see the June 18 CL-100 because the Isaacs needed to have their own CL-100 inspection performed, as CL-100s

are only applicable for thirty days. (R. 584 ln. 22- p. 585, ln. 12). Likewise, Rory Isaac's own testimony confirms that it was the CL-100 inspection he commissioned (performed on July 11, 2018) that he "depended upon." (R. p. 512, ln. 21- p. 513, ln. 2).

c. The Isaacs' Brief misapprehends the factual record in suggesting that the contractor hired by the Onions', Emery Custer, is unlicensed and improperly seeks to hold Kopchynski liable for his work

As described further in Petitioner's Initial Brief, Emery Custer, the contractor hired by the Onions' to perform repairs in the Property's crawlspace, was a licensed specialty contractor under license number 56957.[3] (R. p. 175). It is undisputed that Kopchynski provided the Isaacs with repair verification forms that identified the work Mr. Custer had performed on the Property and that it was Mr. Custer who performed the work.[4] (R. pp. 175, 297).

Kopchynski disclosed the repairs performed by Mr. Custer and had no reason to suspect the information contained in the repair verifications was false or misleading, as the repairs had actually been performed. *See* S.C. Code Ann. § 40-57-350(G)(3) ("[a] licensee… [is] 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[]").

Under South Carolina law, the burden was on the Isaacs to inspect the physical condition of the Property, not Kopchynski, as real estate licensees lack the expertise necessary to evaluate

[3] It is undisputed that Kopchynski disclosed this license number to the Isaacs, and that nothing prevented them from reviewing his license and investigating the quality of his work for themselves.
[4] Additionally, the Onions' Disclosure Statement also referred the Isaacs to Mr. Custer's repair verification. (R p. 41). To the extent the Onions' disclosure statement ever became inaccurate, South Carolina law permitted the Onions' to make reasonable repairs to the Property rather than delivering a corrected disclosure statement. *See* S.C. Code Ann. § 27-50-60.

the effectiveness of Mr. Custer's repairs. *See* S.C. Code Ann. § 40-57-350(H); *Chastain v. Hiltabidle*, 381 S.C. 508, 519-21, 673 S.E.2d 826, 832 (Ct. App. 2009).

Although the Isaacs suggest in their Brief that Mr. Custer's "repairs were improper and only served to temporarily cover up and hide issues," (Respondents' Brief, p. 13), they fail to acknowledge that they were also on notice of the specific repairs done and had every opportunity to perform their own due diligence as to whether Custer's work was effective.

Accordingly, it is undisputed that the Isaacs were aware of the repairs performed by Custer prior to closing and had a duty to investigate the propriety prior to closing. S.C. Code Ann. §§ 27-50-80, 40-57-350(H). Thus, the Isaacs fail to demonstrate a genuine issue of material fact as to whether Ms. Kopchynski was aware Mr. Custer's repairs were unsuccessful and concealed such repairs from the Isaacs.

d. The affidavits relied on by the Isaacs have no relevance to Kopchynski.

In their Brief, the Isaacs cite to affidavits of Henry Moore, Andy Ward, and Brad Cromartie in an attempt to feign an issue of fact as to Kopchynski's knowledge of adverse property conditions that were concealed. However, none of the Affidavits offered by the Isaacs provide any testimony that creates a genuine issue of fact as to Kopchynski, and at best relate only to the Onions' knowledge, not Kopchynski's.

Mr. Moore describes himself as a "consulting Entomologist" and does not identify any familiarity or expertise in real estate transactions. (R. p. 425-427). There is no evidence Mr. Moore is qualified to opine upon the real estate agent's standard of care in a given scenario. Accordingly, Mr. Moore's Affidavit fails to create an issue of fact sufficient to survive summary judgment.

Likewise, Mr. Ward's Affidavit fails to create a genuine issue of fact as to whether Kopchynski knew the statements in the Onions' disclosure statement were false. Mr. Ward describes himself as a "registered pest control technician"[5] who performed an inspection of the Property's crawlspace on the Sellers' behalf on May 16, 2018. (R. p. 433). He stated that he examined the Property on May 16, 2018 and observed, among other things, excessive moisture conditions in the crawlspace. (R. pp. 433-34). Notably, this was less than a week after the Cornerstone Report identified similar issues, which the Isaacs do not dispute Kopchynski provided to them. Likewise, Mr. Ward's visit to the Property was *prior* to Mr. Custer performing the repairs at the Property. (R. p. 433-434). Thus, Mr. Ward's affidavit does not create a genuine issue of fact as to whether Kopchynski was aware that the Onions' disclosure statement was inaccurate or misleading.

As to the affidavit of the Onions' former neighbor, Brad Cromartie, Mr. Cromatie makes no mention of Kopchynski. Mr. Cromartie alleges that the Property had flooded several times while the Sellers' owned it, but he does not allege Kopchynski was aware of this. (R. p. 414, ¶ 3). The Isaacs assert that because the "Property is located at the front gate of the community," Kopchynski would somehow be on notice of flooding at the Onions' Property.[6] (Respondents' Brief, p. 10.). However, such conjecture does not create an issue of fact.

[5] As described in detail in Petitioner's Initial Brief, "registered pest control technician" is not a recognized category of licensing in South Carolina.

[6] This argument also contradicts S.C. Code Ann. § 40-57-740(A)(3) which provides that "[n]o cause of action may arise against… [a] licensed real estate agent…for failure to disclose in a transaction *any off-site condition or hazard* that does not *directly* impact the property being transferred[]" (emphasis added). Under the plain language of the statute, flooding and drainage issues elsewhere in the community, such as at the front gate, would constitute an "off-site condition or hazard" for which Kopchynski cannot be liable.

Finally, the Isaacs also suggest that Kopchynski was aware that the HOA had hired an engineer to study flooding and drainage issues in the community. (Respondents' Brief, p. 10.) However, this does not create a genuine issue of fact as to whether Kopchynski was aware of flooding at any specific property, much less the Property that is the subject of this litigation. Indeed, Kopchynski testified: "I think that they were evaluating a drainage problem on the other side of the plantation." (R. p. 467, lns. 11-13). Accordingly, Mr. Cromartie's affidavit does not create a genuine issue of fact as to whether Kopchynski was aware of flooding at the Property.

e. Kopchynski cannot be liable for statements or inaccuracies in the Isaacs' July CL-100 under S.C. Code Ann. § 40-57-350(G)(2).

Contrary to The Isaacs' assertion, and as addressed in detail in Petitioner's Initial Brief, Kopchynski cannot be held liable for information contained in the July CL-100 performed on the Isaacs' behalf. Throughout their Brief, the Isaacs argue, without any support, that Kopchynski knew the July CL-100 was inaccurate and that Kopchynski knew the CL-100 was "materially incomplete and misleading." (Respondents' Brief, p. 9). However, S.C. Code Ann. § 40-57-350(G)(2) makes clear that no cause of action can be brought against a real estate licensee for information contained in a report by a wood destroying organism control expert or termite inspector.[7] In arguing that Kopchynski knew the moisture readings identified in the July CL-100 were inaccurate, they seek to hold her liable for the *information* contained in the report, in direct violation of the statute. Thus, the July 11, 2018 CL-100 does not create a genuine issue of fact as to Kopchynski's liability.

[7] As the trial court correctly held, "[t]o the extent that the Isaacs allege the July 11, 2018 CL-100 showing acceptable moisture readings was inaccurate, a plain reading of the statute bars a cause of action against Kopchynski for the information contained in the allegedly inaccurate July 11, 2018 CL-100 report." (R. p. 10).

3. The Isaacs misapprehend and misapply the Court of Appeals' Decision in *Chastain v. Hiltabidle* to the facts before the Court.

The Isaacs argue that Kopchynski "filled out" the Onions' disclosure statements. (Respondents' Brief, p. 25). This is inaccurate. As the testimony shows, Kopchynski merely provided the Onions' with the disclosure statement and instructed the Onions' to read the instructions and each section very carefully and then fill out the form. (R. p. 468 ln. 20 – p. 469, ln. 22).

Regarding the *Chastain* case, the Isaacs attempt to distinguish the case by noting that the sellers in that case had checked "yes" next to "flood hazards" on their disclosure statement. However, this distinction is immaterial to the present matter.

Like the buyers in the *Chastain* case, The Isaacs were on notice that the Property had some history of moisture problems through the Cornerstone Inspection Report, which the Isaacs do not dispute Kopchynski disclosed and provided to them. (R. pp. 197- 204; R. p. 513 lns. 8-10); (Respondents' Brief, p. 14). The Isaacs also do not dispute that Kopchynski disclosed the identity of the contractor who performed repairs and a summary of the repairs he performed, including that Mr. Custer installed a fan in the crawlspace to address elevated moisture levels. (R. p. 513 lns. 11-14).

Thus, the Isaacs were put on notice by the Cornerstone Report and the Repair Verifications that the Property had "some history" of moisture issues, and accordingly, The Isaacs, not Kopchynski, had the burden of further investigating the accuracy of the Onions' statements regarding the physical condition of the Property. *Chastain* at 519-20, 673 S.E.2d at 832.

4. The Doctrine of *Caveat Venditor* is inapplicable to the Isaacs' claims against Kopchynski.

The Isaacs argue that South Carolina has adopted the general rule of *caveat venditor* (Latin for "let the *seller* beware," not "let the realtor beware") in real estate transactions. (Respondents'

Brief, p. 26). However, (1) this doctrine is concerned only with the Isaacs' claims against the Onions', not their realtor, and (2) it is inapplicable in a situation like this where it is undisputed the complained of property condition was disclosed to the buyer.

The Isaacs also assert, without support, that a licensee should be held to a higher standard in "observing defects" than a potential purchaser. Respondents' Brief, p. 26-27. The Isaacs offer no explanation for why a real estate licensee such as Kopchynski would be in a better position to evaluate problems with a property that are beyond her expertise. Moreover, this contention is expressly rebutted by South Carolina law. *See* S.C. Code Ann. § 27-50-80[8] (a real estate licensee "has no duty to inspect the onsite or offsite conditions of the property" and noting the "obligation of the purchaser to inspect the physical condition of the property"); *see also* S.C. Code Ann. § 40-57-350(G)(1) ("[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"); *Chastain* at 519, 673 S.E.2d at 832 ("the Legislature places the duty of performing such an inspection or investigation squarely on the shoulders of the buyer[]").

Thus, *Caveat Venditor* has no application in the case at bar and does not create an issue of fact on the causes of action asserted against Kopchynski.

[8] It is worth noting that in the very same statute in which our Legislature obligated purchasers to inspect the physical condition of a property, the Legislature also makes clear that real estate licensees do not have any obligation to inspect the physical condition of the property. As the Court of Appeals explained in *Chastain*, this demonstrates the Legislature's intent to "place[] the duty of performing such an inspection or investigation squarely on the shoulders of the buyer[]"). *Chastain* at 519, 673 S.E.2d 826. *See also Id.* at 520, 673 S.E.2d at 832 (explaining that "[t]o place on… real estate licensees the burden of further investigating the accuracy of [statements in the disclosure statement regarding the property's history of flooding] would require them to have an expertise in plumbing, electrical and construction codes. Because we do not believe this was the intent of the Legislature, we affirm the trial court[]") (emphasis added).

CONCLUSION

For the reasons stated herein, and in Petitioner's initial brief, the Court of Appeals' reinstatement of the Isaacs' claims for negligent misrepresentation and violation of the Residential Property Condition Disclosure Act should be reversed, and the Circuit Court's order granting summary judgment to Kopchynski should be affirmed in full.

Respectfully submitted,

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