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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

H. Steven DeBerry, IV, Circuit Court Judge

Case No. 2020-CV-21-01817

Appellate Case No. 2023-001713

Barbara Sarb.....Respondent/Appellant,

v.

Julie W. Phillips and Joseph M. Phillips.....Appellants/Respondents.

APPELLANTS/RESPONDENTS' FINAL REPLY BRIEF AS APPELLANTS

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In their initial brief, Sellers, in essence argue that 1) Buyer failed to prove her claim under the Act because Sellers had no actual knowledge of water intrusion into the basement of the Property sufficient to constitute a "problem" requiring disclosure on the Disclosures; 2) even if this Court finds that the Sellers had actual knowledge warranting disclosure, such failure to disclose was not "material" in that Buyer was not entitled to rely on the Disclosures given the information contained in the CL-100 and the Housemaster inspection report; and lastly 3) the trial court erred in awarding the Buyer fees and costs. (*See generally,* Initial Brief of Appellants/Respondents as Appellants.)

Buyer, in response, in essence argues that 1) Sellers did not preserve the issue of "actual knowledge" for appeal; 2) that the Sellers did, in fact, have knowledge of "problems" concerning basement water intrusion, sewage backup, and pest infestation; 3) that the failure to disclose was "material" and 4) that the trial court properly awarded fees and costs to Buyer. (*See generally,* Initial Response Brief of Respondent/Appellant as Respondent.)

I. THE ISSUES ON APPEAL RAISED BY SELLERS WERE FIRST RAISED AT TRIAL AND RULED UPON BY THE TRIAL COURT.

Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Atl. Coast Builders & Contrs., LLC v. Lewis, 398 S.C. 323, 329 (*quoting Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.,* 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). This is not a "gotcha" game. *Id*. Buyer argued at every stage of pre-trial, trial and post-trial that Buyer failed to prove intentional (knowing) misrepresentation required under the Act and her other causes of action. (See T2 at 386, 395, 462.) The Court considered and ruled on all motions including whether actual knowledge was the appropriate standard. (See T2 at 447:1-4; 461:4 - 462.) Counsel

for Buyer is well aware of same (T2 at 458:17:20.)

II. THE SELLERS, NOR ANY OTHER WITNESS AT TRIAL, TESTIFIED THAT THEY HAD ACTUAL KNOWLEDGE OF WATER INTRUSION IN THE BASEMENT SUFFICIENT FOR A LAY PERSON TO DISCLOSE AS A PROBLEM ON THE DISCLOSURES.

First, it is clear from reviewing the Contract and the Disclosures that actual knowledge is the requirement when completing the Disclosures. (*See* R. pp. 1061-1067, *passim*.) On June 13, 2019, Sellers (neither one a realtor nor a lawyer) were faced with answering a series of generalized questions that asked about "problems" with various items/functions with the Property. *Id*. The Disclosures ask for "actual knowledge" of problems with problems being defined as "defects, malfunctions, damages, conditions, or characteristics." (R. pp. 1062, 1063, 1065.)

While Buyer argues that Sellers lied in completing the Disclosures concerning flooding in the basement, Buyer fails to point out exactly what question(s) Sellers lied about/on. (*See generally* Initial Response Brief of Respondent/Appellant as Respondent; *see also* Record on Appeal.) Is it section II, question 7 which asks about "structural components and modifications" and lists the basement amongst twenty-one other house parts? (R. p. 1062.) Is it section V, question 20 which asks about problems to the structure caused by water? (R. p. 1063.) Is it section V, question 21 which speaks to water runoff and soil stability? (R. p. 1063.) The mystery remains because Buyer understands that nowhere on the Disclosures is there a question regarding disclosing water entering a basement during two catastrophic weather events. (R. pp. 1061-1067.) Nowhere is there a question that would cause the Sellers to think to disclose those two isolated events as a "problem." (*Id*.) Therefore, the record below and briefs on appeal remain void of any reference to which specific questions the Sellers lied about.

Other than the two catastrophic weather events, not a single witness at trial, Buyer included, testified that there was so much as a drop of water in the basement of the Property during Sellers'

ownership. (*See* testimony of Buyer (R. p. 639, lines 15-18; R. p. 640, lines 3-5; R. p. 648, line 24 – p. 649, line 14; R. p. 652, lines 3-9; R. p. 654, line 11 – p. 655, line 15; R. p. 656, line 1; R. p. 666, lines 2-5; R. p. 669, lines 2-21; R. p. 670, line 2- R. p. 672, line 19); John Ethridge (Buyer's real estate agent) (R. p. 748, line 2 – R. p. 749, line 5) , Adam Crosson (Sellers' real estate agent)(R. p. 885, lines 16-18; R. p. 893, lines 18-24); Paul Dodd (R. p. 910, line 23 – p. 911, line 15), David Wimberly (former agent for Sellers)(R. p. 875, lines 8-9; R. p. 875, lines 17-23); Leigh Dodd (R. p. 907, lines 8-24), Tara Blair (employee of Buyer)(R. p. 761, line 19 – p. 762, line 13), Heath McCullom (R. p. 778, lines 2-6).)

As to the issue of sewage backups, as Buyer acknowledges, Sellers were aware of the toilets being stopped three or four times over the period of ten years of ownership. (See Initial Response Brief of Respondent/Appellant as Respondent at 5.) Again, Buyer fails to point to the specific question on which she relies when accusing Sellers of lying in the Disclosures. (*See generally* Initial Response Brief of Respondent/Appellant as Respondent; *see also* Record on Appeal.) Presumably the question is section I, question 4 seeking actual knowledge of "problems" concerning "sanitary sewage disposal system for waste water." (*See* Pl Trial Exhibit 3 at 2.) Not a single witness at trial, Buyer included, indicated knowledge of any sewage issue at the Property at any point prior to Closing. (*See* testimony of: Buyer (R. p. 640, lines 17-19; R. p. 649, lines 20-23; R. p. 653, lines 1-2; R. p. 655, lines 16-18; R. p. 672, lines 6-10), John Ethridge (Buyer's real estate agent) (R. p. 747, lines 23-24), Adam Crosson (Sellers' real estate agent)(R. p. 885, lines 10-12); Paul Dodd (R. p. 911, lines 21-23), David Wimberly (former agent for Sellers)(R. p. 875, lines 1-3); Leigh Dodd (R. p. 432, line 25 – p. 433, line 8); Tara Blair (employee of Buyer)(R. p. 762, lines 4-6); John Sims of Sims Construction (Buyer's preferred home repair company). (R. p. 840, lines 1-4).) Buyer then argues that the sewage pipe (which runs anywhere from two to eight

feet under the ground (R. p. 848, lines 12-25) was reverse-sloped. (*See* Initial Response Brief of Respondent/Appellant as Respondent at 6.) There was no evidence that the Sellers ever repaired, replaced or even curiously dug into the ground to take a look at the sewage pipe to see whether it was reverse sloped; making disclosure of its slope impossible (*See* Record on Appeal.)

Finally, Buyer turns her attention to the severe pest infestation alleged at the Property. (*See* Initial Response Brief of Respondent/Appellant as Respondent at 6.) For this issue alone, Buyer pointed the jury to a question on the Disclosures. (*See* R. p. 417, lines 11-14.) Buyer relied on section IV, question C. (R. p. 1063.) Unfortunately, a) that question deals with termites and wood infestations but was strategically taken out of context (see R. p. 680, lines 9-19) and b) the Sellers indicated that they had no contract for pest treatments. (*Id.*; *see also* R. p. 1063.) Buyer could not have been more informed on the topic of pests. Not a single witness at trial, including Buyer, indicated they saw roaches scurrying across the floor at any point prior to the Closing; so either there was no "severe pest infestation" or the Sellers convinced them to stay hidden from all guests. (*See* testimony of Buyer (R. p. 640, lines 23-24; R. p. 649, lines 24-25; R. p. 653, lines 3-4; R. p. 655, lines 18-19; R. p. 666, lines 10-11; R. p. 668, lines 17-19; R. p. 669, lines 19-21; R. p. 671, lines 15-20; R. p. 672, lines 3-10; R. p. 681, lines 14-19); John Ethridge (Buyer's real estate agent) (R. p. 740, line 24 – p. 741, line 9; R. p. 746, line 14; R. p. 747, line 17; R. p. 749, line 16) , Adam Crosson (Sellers' real estate agent)(R. p. 885, lines 6-9; R. p. 893, lines 8-24); Paul Dodd (R. p. 911, lines 18-20), David Wimberly (former agent for Sellers)(R. p. 874, lines 22-25; R. p. 875, lines 17-23; R. p. 880, lines 5-8); Leigh Dodd (R. p. 908, lines 9-22; R. p. 909, lines 14-17); Robin Hatchell (longtime neighbor)(R. p. 787, lines 17-20), Tara Blair (employee of Buyer)(R. p. 762, lines 1-3).)

In fact, some witnesses testified that the Sellers were not the kind of people who would

raise their young children in the type of home Buyer describes as 550 Wisteria Dr. (R. p. 889, lines 4-8; R. p. 787, lines 17-20; R. p. 898, line 11 – p. 900, line 18.) Some witnesses even testified, if the Property was in such disrepair, they would not have permitted their child to spend the night with the Sellers' young children. (R. p. 905, lines 7-17.)

III. MCLAUGHLIN IS NOT "WHOLLY IRRELEVENT" BUT RATHER, IS CONTROLLING AUTHORITY FOR THE VERY ISSUES PRESENTED IN THIS MATTER.

In her response brief, Buyer focuses solely on Sellers and their role in the closing/Contract while failing to address arguments germane to her own role. (*See* Initial Response Brief of Respondent/Appellant as Respondent at 9-12.) In fact, one must look deep within the Response Brief to find where Buyer finally addresses McLaughlin, the single-most controlling case relied upon by Sellers. *See id.*; *see also* McLaughlin v. Williams, 379 S.C. 451, 665 S.E.2d 667, (Ct. App. 2008) In so doing, Buyer almost completely ignores her own role in the transaction at issue as it relates to the holding(s) in McLaughlin. For example, Buyer draws a distinction based on whether the SELLER said "yes," "no" or "maybe" on the Disclosures. (See Response Brief of Respondent/Appellant at p.10.) However, the issue in McLaughlin was not what the SELLER indicated on the disclosures, but rather, McLaughlin centered on whether the BUYER was entitled to RELY on the disclosures; regardless of the manner in which seller answered the disclosures. *See generally* McLaughlin v. Williams, 379 S.C. 451.

The court relied on the information available to the buyer; which included the CL-100 and the inspection report. *Id.* at 457. The court reasoned that certain findings and comments in those two reports were sufficient to put BUYER on notice of water intrusion and therefore ruled Buyer had no right to rely on anything the Seller may or may not have said in the disclosures. *Id.* The court in McLaughlin implicitly finds that sellers of homes are lay people who have vastly differing

opinions on what "problem" means as it is defined on the Disclosures form. For this very reason, under the disclosures, the contract, the inspection reports, the repair addendum and McLaughlin, the burden of adequate inspection rests with the buyer and his/her idiosyncrasies; not the seller. (*See* Pl. Trial Exhibit 2, p.4; Pl. Trial Exhibit 3, p.5; Pl. Trial Exhibit 4, pp. 1-2; Pl. Trial Exhibit 6, *passim.*; Pl. Trial Exhibit 7, pp. 1-2); s*ee also generally* McLaughlin v. Williams, 379 S.C. 451. Disclosures are not a warranty. (*See* Pl. Trial Exhibit 3, p.5.) Under McLaughlin, the question we should be asking is: what did the buyer know or have the ability to know.

Here, the Seller knew the CL-100 provided Seller the following knowledge: "at the time of of our inspection, there were visibly damaged wooden members" … "recommended that evaluation of damage and any corrections be performed by a licensed contractor or structural engineer" … "wood decay/damage is evident to window trim and window stool at the rear right side of basement" (not just the sub-fascia as Seller would have the court believe) … "heavy condensation causing standing water throughout various locations of sub-structure" and "dry staining is evident to wood members around plumbing in sub-structure." (*See* R. p. 1069.) As an aside, Buyer argues that she asked Sellers about flooding in the basement through an all-verbal communication from her, to her agent, to Sellers' agent, to Sellers … then back to Sellers' agent, to Buyer's agent, then to Buyer and that the Sellers indicated there had never been flooding in the basement; the Sellers were never asked about flooding in the basement (*See* R. p. 796, lines 14-20; R. p. 897, line 25 – p. 898, line 5.)

As for the Housemaster report, the most impactful report in this matter for both parties, Buyer gives this report one sentence arguing it merely shows incidental damage but only the exterior soffit of the Property ignoring the actual facts of McLaughlin and the actual contents of the remainder of the Housemaster report. First, as to McLaughlin, the court specifically discussed

and held that an inspection report that showed NO evidence of water damage to the interior of the home, but showed ONLY water damage to the exterior of the home was sufficient to alert buyer to the issue of water intrusion in the basement and strip buyer of the ability to rely on the disclosures. McLaughlin v. Williams, 379 S.C. at 458. Second, as to the words found in the Housemaster report, Buyer ignores: "rotten or decayed wood in the **basement** windows" … "rotten or decayed wood in the **basement** doors" … "dampness in the **basement**, evidence of prior water intrusion into the **basement**" … "evidence of prior water intrusion into the **crawl space**" … "loose threshold not preventing water intrusion." (R. p. 656, lines 10-13; *see also* R. pp. 1100-1102.)

Buyer ignores both reports and concludes there was no information contained in her inspection reports that would suggest a drop of water had ever been in the Property basement. (*See* Initial Response Brief of Respondent/Appellant as Respondent at 10.) Buyer argues McLaughlin is "wholly distinguishable from the case at bar" yet McLaughlin involved disclosures … water intrusion … knowledge of the Buyer given information contained in the CL-100 and inspection report. McLaughlin is not only on point, but it is outcome determinative in favor of Sellers.

IV. THE SELLERS, NOT THE BUYER, WERE THE PREVAILING PARTY AT TRIAL AND THEREFORE, AWARDING THE BUYER FEES AND COSTS WAS IN ERROR.

In her response, Buyer relies upon Seckinger v Vessel Excalibur to argue she is the "prevailing party." *See* Seckinger v. The Vessel "Excalibur", 326 S.C. 382, 386, 483 S.E.2d 775 (Ct. App 1997) (*citing* Heath v. County of Aiken, 302 S.C. 178, 182, 394 S.E.2d 709 (1990)). However, the Seckinger court was faced with one issue; the granting or denial of a mechanic's lien by the trial court (making the prevailing party fairly easy to identify). In looking at Heath, the appeal stemmed from a hearing to determine control of the communications division of that county as between the sheriff and the county council (where the trial court awarded the sheriff his

attorneys fees). In determining whether the sheriff was indeed the prevailing party, the Supreme Court looked for who "successfully prosecutes the action or successfully defends against it,." Heath, 302 S.C. at 182. While it is true, the "prevailing party" does not have to be successful on all issues, the court in Heath found that the sheriff prevailed on all three of his "main issues" and lost only one "minor" issue. Id.

Here, the Buyer is asking this court to consider the "prevailing party" the party who received a favorable verdict on one out of eight causes of action (including counterclaims) rather than the party who received a favorable verdict in seven out of eight causes of action (including damages under a counterclaim). Receiving a favorable verdict on seven out of eight causes of action seems like a successful defense much more in line with the reasoning in Heath. As such, it was in error for Buyer to be awarded attorney fees on the basis of being a "prevailing party."

CONCLUSION

The trial court erred in denying Sellers' Motion for Judgment Notwithstanding the Verdict. Buyer failed to prove at trial that the Sellers had actual knowledge of a "problem" sufficient to state and prove a cause of action under the Act. But even if the Sellers made a false or misleading disclosure, Buyer was not entitled to rely on the disclosure as she had information as to the truth of the statement. Lastly, Buyer should not have been awarded fees as she was not the prevailing party. This Court must reverse the decision of the trial court and find that Sellers did not violate the Act and, therefore, Buyer is not entitled to an award of damages nor of fees and costs.

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