THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas,

Robert Bonds, Circuit Court Judge in

Case No. 2022-CP-07-2483

Appellate Case No. 2025-00384

Roland Bernardon and Louise Bernardon,

Appellants

v.

Mark Damiano, Ellery K. Damiano, Sea Pines Real Estate at the Beach Club, Robert Reichel, and John McMahon,

of whom Mark Damiano, Ellery K. Damiano, Sea Pines Real Estate at the Beach Club, and Robert Reichel are

Respondents

APPELLANTS INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Did The Trial Court Err In Granting Respondents' Motions for Summary Judgment on all Causes of Action against all Respondent parties?

STATEMENT OF THE CASE

This matter is before the Court on Appellants' appeal of the trial court's Order granting Respondents' Motions for Summary Judgment on all causes of action alleged against Respondents, whom are Defendant parties in the case before the Court of Common Pleas. Prior to appeal, Appellants filed a Rule 59 Motion to Alter and Amend, which after oral argument was denied. A component of the underlying case, being Appellants' claims against Defendant John McMahon, was not subject to the Motions for Summary Judgment and those claims are not before the Court of Appeals presently. This Appeal seeks to reverse the Order of the Court of Common Pleas granting summary judgment in favor of Respondents on all causes of action.

STATEMENT OF THE FACTS

Roland and Louise Bernardon, whom are Appellants herein (also sometimes referred to herein collectively as the "Bernardons") are residents of Florida whom purchased 10 Oyster Catcher Lane, the subject property in this case, from Defendants/Respondents Mark and Ellery Damiano in February of 2022. 10 Oyster Catcher Lane (also referred to herein as the "Property") is in the Sea Pines community on Hilton Head Island. Defendant/Respondent Robert Reichel was the listing real estate agent for the Property at the time of purchase. Reichel is and was at all times material hereto a part owner of and broker for Defendant Sea Pines at the Beach Club.

The Bernardons engaged Peter Geary, who was then a real estate agent with ReMax Hilton Head, to assist with their purchase. Geary worked under Defendant John McMahon

whom at the time was a broker at ReMax. In connection with his role, Geary presented the Bernardons with a number of listed properties to review and financial data which included a price per square foot analysis using data stated in the MLS listings for the properties. [Depositon of Roland Bernardon at pp 11-16, Record on appeal at __]. Geary emailed the listing for 10 Oyster Catcher to the Bernardons on approximately January 19, 2022 and supervised a video tour of the property which the Bernardons reviewed remotely. The Bernardons made their first offer on the Property in on approximately January 21, 2022. [Deposition of R. Bernardon Exhibit 6, Record on Appeal Exhibit ___]

The Bernardons were next informed that their offer was not accepted and learned that the Property was under contract to another purchaser. That Purchaser, whom is not a party to this lawsuit, was collectively Claudine and Stuart Mills, hereinafter referred to as the "Mills".

Approximately 2 weeks later, on February 5, 2022, the Bernardons were informed by Geary that the Property was back on the market because the pending Mills contract had terminated. Geary learned that the property was back on the market from his broker, McMahon, after McMahon had conversations with Reichel and Jill Murphy, the Mills' agent, regarding why the Property was back on the market and the terms the Damianos might accept. [Deposition of R. Bernardon at pp 16 -26, Record on Appeal at ____, Deposition of R. Reichel at pp 23-25, Record on Appeal Exhibit __]. That same afternoon, Geary caused a professional inspection of the Property. The following day, being a Sunday, the Bernardons' tendered a second offer for the property through Geary and his broker McMahon. [Depositions of L. Bernardon at pp 22-30, Deposition of R. Bernardon at pp 16-26, Record on Appeal at ____], McMahon had a relationship with Reichel and was the point of communication with Reichel. The Bernardons' second offer was for a purchase price of $2,275,000 and was accepted later that same day (the "Contract"}. [Deposition of L. Bernardon, Exhibit 13, Record on Appeal at

__, Exhibit A to Complaint, Record on Appeal at ____]. The Bernardons asked their agent, Geary to confirm square footage for the property after making their revised offer, but before closing. Geary confirmed the square footage based on the information available to him. [Deposition of R Bernardon at pp 29-32, Record on Appeal at ___]. There is no dispute that the parties agreed to move forward the closing date to an earlier date to accommodate the Damiano's request such that they could close on a property they were intending to purchase with funds from the sale of 10 Oyster Catcher. The contract addendum entered into by the parties does not address any discrepancy in the property's square footage. Thus, the Bernardons' purchase of 10 Oyster Catcher closed on February 22, 2022, fifteen days after their offer was accepted. The transaction closed without a loan due to there being insufficient time within the contract purchase window, as modified, to complete financing,.

In March, 2022 the Bernardons planned to refinance the Property. In connection with the refinance an appraisal was issued March 2, 2022 which ultimately revealed that the Property was not 3362 s.f. as represented in the listing, but rather was 2462 s.f. [Deposition of R. Bernardon at pp 36-38, Record on Appeal at ___].

This nearly 870 s.f discrepancy in size between of the Property as represented and the Property as purchased is the subject matter of the lawsuit and the basis for the Bernardons' demand for damages therein.

After learning that the Property was in fact materially smaller than represented, Geary reviewed the Multiple Listing Service ("MLS") entries history for the Property. [Affidavit of Geary Record on Appeal at ___]. MLS confirmed at the deposition of its representative Adam Beck that the data for the subject listing was manually entered by Reichel or his assistant Amy Thomas . The square foot data was manually entered by Reichel and/or Thomas and not extracted from the Beaufort County tax records. [Deposition of Adam Beck at p 12-33, Record

on Appeal at __]. In fact, the Beaufort County tax assessment data, which itself was in error, stated the property as 3324 s.f. which is a different size than entered into the listing by Mr. Reichel. Mr Reichel and his staff did not copy the tax assessor information into the listing.

The MLS history for the Property commences on January 18, 2022, when the property was listed by Reichel, presumably before the Mills offer. After a number of amendments between January 21 and January 24, the MLS history further reflects that the listing was further amended on January 24 to reflect that the Property was under contract as of January 21. The MLS history further reflects that on February 2, 2022 Reichel amended the public comments section of the listing, which is a separate section at the bottom of the listing, to reflect a new statement that was not in the prior listing that the "Home heated square feet is approximately 2,400". [Defendant's Exhibits 9 and 12, Plaintiffs Exhibit 1 to Depositon of Robert Reichel, Record on Appeal at___]. It is important to highlight that although the public comment section was amended by Reichel, the standard data field demonstrating the square footage of the property was not amended simultaneously and remained at 3362 s.f. The MLS history further reflects that on February 7th the listing was again amended to show that the property was under a pending contract, which was the Bernardons' contract. On that same day, being February 7th, 2 weeks before closing, the reference in the public comment section noting "Home heated square feet was is approximately 2,400" was deleted by Reichel. Reichel admitted his role in this series of events in an email to Attorney Mogil and states that he regretted manipulating the MLS data. [Defendants Exhibit 2 to Deposition of R. Reichel, Record on Appeal at ____]. MLS chief technical officer Adam Beck explained these entries at his deposition. [Beck Deposition at p. 12-33,, Record on Appeal at __]

Based on a price per square foot analysis, Geary and the Bernardons determined that they had overpaid approximately $620,000 for the Property. After negotiations failed to resolve

the matter, this lawsuit followed.

Although not a party to this Appeal, John McMahon was added as a Defendant in this case after Jill Murphy, another Sea Pines agent and the Mills' agent, testified at deposition that she specifically informed McMahon that the Mills contract had terminated due to the square footage error.

STANDARD OF REVIEW

In reviewing the grant of a summary judgment motion, the appellate court applies the same standard as the trial court under South Carolina Rules of Civil Procedure, Rule 56 (c) . Summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003). In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party.

The South Carolina Supreme Court decision in Kitchen Planners v Friedman, 440 SC 456, 892 S.E.2d 297 (SC 2023) modified the "mere scintilla" standard previously applied in deciding summary judgment motions under Rule 56 (c) by stating:

> "We now clarify that the "mere scintilla" standard does not apply under Rule 56(c). Rather, the proper standard is the "genuine issue of material fact" standard set forth in the text of the Rule. As we stated in *Town of Hollywood v. Floyd* , "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." 403 S.C. at 477, 744 S.E.2d at 166.

Appellants herein argue that the facts as pled and discovered in this case to date create numerous genuine issues of material fact regarding what the parties knew or should have known, when they obtained their knowledge, and whom they communicated their knowledge with, which if interpreted in a manner most favorable to the non moving party, being the

Appellants, would permit the Appellants to prevail on the claims and causes of action herein as a matter of law.

ARGUMENT

Appellants address the alleged, reversible error in the sequence stated in the Order and not in the order of priority that counsel argued at the hearing below. Plaiintiffs' claims for breach of contract and fraud in the inducement to enter contract are interconnected and addressed first herein to facilitate the Court's review, followed by Appellants' causes of action for unjust enrichment and Appellants' causes of action for breach of fiduciary duty.

A. Summary Judgment on Appellants' Claims for Breach of Contract and Fraud in the Inducement against all Respondents was in error.

Appellants entered into the Contract with the Damianos through communication with their agent Reichel and based on the information that the Damianos and Reichel supplied in their listing on MLS. At deposition, and in their Motion, the Damianos argued that they had no knowledge that the square footage stated in their listing was incorrect, and thus that they did not breach their contract or commit fraud, testifying that the appraisals and documents that revealed the accurate square footage were not in the possession of Damianos at the time of closing. This averment is incorrect and conflicts with the evidence discovered in the case to date. In fact, the Damianos had an appraisal in their possession that documented the lower square footage {Deposition of Ellery Damiano at pp 23-27, Record on Appeal at ___]. At her deposition Mrs. Damiano claimed that she did not read that specific page of the appraisal that accurately disclosed the reduced square footage. The Damianos' agent, Reichel, had the same appraisals in his possession prior to the binding of the Contract. At deposition, Reichel claimed

he did not read the entire appraisal document and notice the sketch and disclosure that demonstrated the lower square footage. Deposition of Reichel at pp 49-56 and Exhibit 2 thereto, Record on Appeal at ___]. Reichel further testified that he also learned of the reduced square footage in his communications with Matt Topping, a mortgage broker working for the Mills, and/or the appraiser after the Mills transaction terminated. As a result, Reichel admitted that he added the information in the public comments section of the listing mentioning "2400 square feet", which Reichel caused to be later deleted after the Bernardons' offer was bound.

Thus, whether the Daminos actually knew their listing was incorrect or not, their agent Reichel had actual knowledge that the square footage was inaccurate. He knew or should have known of this fact based on the information he received. Mr. Reichel did not inform the purchaser side. He knew it would cause the transaction to fail, and in turn delay the Damianos purchase of their replacement home on Calibogue Cay, which they purchased almost immediately after 10 Oyster Catcher closed. [Deposition of Reichel at pp 55-59. Record on Appeal at ____]. Mr. Reichel did not directly admit this motive at deposition, but it can be implied from this testimony and his knowledge and motive is an issue for the trier of fact.

It is settled that knowledge of an agent is imputed to its principal. Reichel's intentional omission of correct information is imputed to the Damianos. Further, the Bernardons had a right to rely on Reichel's representations made for the Damianos under the doctrine of apparent authority, because Reichel was acting in the scope of his employment when preparing and altering the listing and throughout the contract negotiations. Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 468 S.E.2d 292 (S.C. 1995). As a result of their listing providing incorrect information, the Damianos breached their contract with the Appellants, and both the Damianos and Reichel induced the Bernardons to enter into the contract via fraud in the inducement.

Respondents argue that the Appellants were not entitled to reasonably rely on the

inaccurate information provided by Respondents citing the Court of Appeals decision in Schnellmann v. Roettger, 627 SE 2d 742 (SC Ct. App. 2006). However, the listing disclaimers which formed the basis of the Court's decision in Schnellmann were materially different than the disclaimers stated in the Damianos' MLS listing for 10 Oyster Catcher and thus Schnellmann is distinguishable and not controlling herein.

In Schnellmann, the listing in question stated: "IF EXACT SQUARE FOOTAGE IS IMPORTANT TO YOU, MEASURE, MEASURE!" The Schnellmann listing also included standard MLS disclaimers similar to those found in the boilerplate language of the 10 Oyster Catcher listing, including the standard disclaimer the information is "deemed reliable but not guaranteed."

The Court's Order granting summary judgment in the case *sub judice* also cites the unpublished opinion of Alpha Contracting v. Household Finance, II, Unpublished Opinion No. 2011-UP-289, in support of summary judgment on the fraud in the inducement issues. However, Alpha is not binding precedent and is distinguishable because while the decision in Alpha appears to have focused on the conduct of the purchaser and seller therein, there was no evidence in the reported decision that the real estate agent involved in the Alpha case had actual knowledge of the misstated square footage. In this case sub judice, the trier of fact could reasonably find that Reichel had actual knowledge that the listing he prepared contained false information as to the square footage, both from the appraisal he had in hand, and from his conversations with the mortgage broker Mr. Topping, the purchasing agent Ms. Murphy, and the appraiser employed by the Mills. [Deposition of Reichel at pp23-25 , Deposition of Murphy at pp 16-22, Record on Appeal at __]. Reichel's knowledge is further confirmed by the series of MLS adjustments he made and admitted to. [Deposition of Reichel, Defendants' Exhibit 12, Record on Appeal at ___]. Further, the fact pattern in Alpha did not involve the

time constraints and demands imposed by the Damianos who requested that the closing date be moved up, which effectively prevented the Bernardons from fully measuring the property before closing.

The Damiano's listing, which the Bernardons relied on in making their initial and subsequent offer, did not include any reference that the square footage was or may have been inaccurate. The Damiano listing only contained at the bottom of the listing two MLS boiler plate disclaimers, being "Information is believed accurate but not warranteed," and "Information Deemed Reliable But Not Guaranteed." [MLS Listing Agreement and MLS data, Record on Appeal at ___].

These disclaimers, which Respondents argue excuse their conduct, are not and were not intended to protect a fraudulent or negligent Seller or Agent. Rather, as evidenced by the MLS service mark and/or "©" immediately adjacent to each disclaimer, these disclaimers are logically intended to protect the MLS from liability associated with inaccuracies in its listings. The disclaimers are designed to address information that is or was inserted erroneously without actual knowledge that it is false. The instant case is distinguished because Reichel, and thus his principals, had actual knowledge and implied knowledge that the square footage was incorrect, yet proceeded with the listing and sale without disclosing this information.

At the proceedings below, Respondents emphasized that Schnellmann and Alpha Contracting shifted the burden of discovery of material defects in information to the Plaintiff victims. Schnellmann and Alpha are distinguishable as noted above. Moreover, neither Schnellmann nor Alpha involve instances where the Selling party and/or their agent had actual knowledge of incorrect information and also failed to disclose that information in any meaningful way. The standard boilerplate disclaimers found in the MLS form Offer and Contract and Sale between the Damianos and Bernardons and the listing agreement published

by Reichel and the Damianos are not intended to relieve the parties obligations to be truthful and to disclose accurate information. These standard disclaimers are not intended to forgive fraud, nor do they. A contrary interpretation encourages fraud and non disclosure and conflicts with well settled concepts of conscionability.

Further, the trier of fact could find reasonable justifications for the Bernardons conduct and reliatnce. First, they had no reason to believe that the Sellers or Mr. Reichel were providing information known to be inaccurate. The false information provided matched the tax assessment records, which records were incorrect, as known only to the Damianos and Reichel. Additionally, prior to making their second offer, the Bernardons obtained a standard property condition inspection which does not typically involving measuring exact square footage. [Deposition of R Bernardon at pp 17-25, Record on Appeal at ___]. When real property is purchased without a loan, it is not regular practice to hire an appraisal before closing. The Sellers' listing and contract acceptance form required that the closing be "as is" and within a tight time frame to accommodate their intended next purchase.

In sum, if the finder of fact determines that the Damianos or Reichel as their agent had actual knowledge, or should have had actual knowledge, that the square footage stated in their listing was incorrect, the element of intent is proven and elements for breach of contract and for fraud in the inducement fall in line. To wit, evaluating the facts that have been determined in the case thus far in a light most favorable to the Appellants, there was 1) a representation, being the square footage stated in the listing, being different than the square footage stated in the Damianos prior appraisal and despite the Mills contract terminating due to the discrepancy in square footage; 2) the representation was false, which is not disputed; 3) the representation was material—both the Bernardons and Geary testified that the square footage analysis was material to their decision to purchase; 4) the trier of fact could find that the Damianos had

knowledge of the falsity, despite their deposition testimony; 5) The Damianos and their agent intended that the representation be relied upon—indeed, the Bernardons would not have offered $2,275,000 had the square footage been properly stated, and quite possibly no other party would have paid that much either and Mr. Reichel acknowledged that had he disclosed the issue to Mr. McMahon, the offer and sale would not likely have happened; {Deposition of L. Bernardon at p 38, Record on Appeal at ___]; 6) The Bernardons were ignorant of the misrepresentation and falsity, primarily because Mr. Reichel, whom had actual knowledge of the misstatement, failed to inform any of the parties to the transaction; 7) the Bernardons relied on the truthfulness of the representation—they have testified that they made their offer based on a square footage analysis [Deposition of Roland Bernardon at pp 59-60 Record on Appeal at __]; 8) the Bernardons had the right to rely on the representation. It was stated at the top of the listing agreement and also confirmed by the erroneous tax records. The Damianos desire and requirement to expedite the closing, which was agreed to by the Bernardons whom were unsuspecting, rendered measurement of the property or a full appraisal not practical within the timeline of the contract; and 9) the Bernardons suffered a consequent and proximate injury due to the fraud---they paid in excess of $600,000 more for the property than it was worth to them based on the representation of square footage.

In addition, Defendant Reichel claimed at deposition that he did not regularly communicate by email and was unable or unwilling to produce emails regarding the transaction to date. However, third party witness Jill Murphy produced emails from Reichel addressing the subject Property response to a subpoena herein. This discrepancy, along with multiple statements by the parties that they did not remember if, when or how information was communicated, or the substance of those communications all are relevant to the finder of fact's credibility determinations. Summary judgment would preclude finder of fact from making

these witness credibility determinations.

B. Summary Judgment on Appellants' Causes of Action for Unjust Enrichment was in Error.

A claim for unjust enrichment is an equitable remedy which can be plead and proven as an alternative to a contract claim and is routinely included in complaints alleging breach of contract, as an alternative remedy. If the Appellants do not prevail under their contract claims, they are entitled to seek alternative relief in the nature of unjust enrichment. In this case, whether the Damianos had actual knowledge, implied knowledge or even no knowledge regarding the actual square footage of the Property, they were clearly and unjustly enriched by their erroneous representations and omissions. The Bernardons paid, based on their own calculation $620,000, more for the Property based on its square footage as represented, and the Damianos thus received more money than was just.

The Order reasons that Appellants unjust enrichment claim fails against Respondents Reichel and Sea Pines because Reichel had no direct relationship or communications with the Appellants. This interpretation ignores the express duty of a broker to disclose all material information to all parties as mandated by statute Code of Laws Section 40-57-350 which is addressed in more detail in section C below . Reichel and Sea Pines earned a substantial commission, believed to be in excess of $65,000 on the sale, solely because Reichel did not disclose the information he knew, as admitted by Reichel. [Deposition of Reichel at p. 55-59 and Defendants' Exhibit 12, Record on Appeal at ___].

Appellants' claim for unjust enrichment against the Damiano Respondents as an alternative theory to breach of contract should survive summary judgment because the Contract could be invalidated under the equitable doctrine of mutual mistake. See Alderman v. Bivin, 233 S.C. 545 (1958) and Restatement Second of Contracts § 152. The historical remedy upon a finding of mutual mistake is rescission or reformation. See Smothers v. United States Fidelity

and Guaranty Co. 322 SC 207, 470 S.E.2d 858 (Ct. App 2011). In the instant case, this remedy would include either voiding the contract or an adjustment of the price term.

At deposition the Bernardons confirmed that had they been properly informed of the correct square footage, they would not have proceeded. They entered into the contract based on mistaken information. [Deposition of L. Bernardon at 38, Record on Appeal at ___]. Accepting the Damianos deposition testimony as truthful, which was that they did not know the square footage they stated was incorrect, then the Damianos entered into the subject Contract under mutual mistake regarding a material fact. [Deposition of E. Damiano at 23,24, Record on Appeal at __]. Appellants' alternative theory of unjust enrichment survives summary judgment against the Damianos.

C. Summary Judgment on Appellants' Causes of Action for Breach of Fiduciary Duty against Respondents Reichel and Sea Pines was in Error.

To establish a claim for breach of fiduciary duty a party must prove a) the existence of a fiduciary duty; b) breach of that fiduciary duty owed to the plaintiff by the defendant; and c) damages proximately resulting from the wrongful conduct of the defendant. RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 399 S.C. 322, 732 S.E.2d 166 (2012).

South Carolina law imposes a per se fiduciary duty between a licensed agent and all parties to a real estate transaction. S.C. Code § 40-57-350 Real Estate Brokerage Firm Duties to Client; Agency Relationship; Applicability of Common Law states in pertinent part:

SECTION 40-57-350. Real estate brokerage firm duties to client; agency relationship; applicability of common law.

(A) A real estate brokerage firm that provides services through an agency agreement for a client is bound by the duties of loyalty, obedience, disclosure, confidentiality, reasonable care, diligence, and accounting as set forth in this chapter. The following are the permissible

brokerage relationships a real estate brokerage firm may establish:

(1) seller agency;

(2) buyer agency;

(3) disclosed dual agency;

(4) designated agency; or

(5) transaction brokerage.

Thus, the statute itself creates and defines fiduciary duties of loyalty and disclosure.

Section 40-57-350 further states:

G)(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. [Emphasis added by author herein].

(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.

Appellants herein emphasize that the statutory mandate to disclose owed by Reichel applies to all parties, and is not limited to sellers or the clients of the agent. The statute states

this specifically. Indeed, Reichel admitted at deposition that he knew or should have known that the square footage was incorrect. His own actions by manipulating the public comments in the listing notes, and then deleting them, confirm this knowledge. Reichel also admitted at deposition that had he informed the Bernardons' agents of this information, the transaction would not likely have closed, and certainly not at the subject purchase price. [Deposition of Reichel at p 55-59, Record on Appeal at ___]. The Bernardons testimony confirmed that they would not have purchased at the subject price had the information been disclosed, and likely would not have purchased at all. [Deposition of R. Bernardon at p 60, Deposition of L. Bernardon at p 38, Record on Appeal at ___]. Reichel's failure to disclose his knowledge to all parties regarding the inaccuracy of the square footage represented in the listing is a per se breach of his fiduciary duty which was relied upon by the Plaintiffs herein.

The limited exceptions to the fiduciary duty stated in the statute arise in instances not applicable to this case—a) where the licensee has truthfully disclosed the material defect or b) where the licensee did not know the information to be false. Reichel admitted that he knew the information was materially defective—he was told by the mortgage broker and/or appraiser that the property would not appraise due to a discrepancy in the stated square footage, and yet he chose to not disclose this information to the Bernardon's agents. That is not disputed. Regarding whether knew that the information he inputted into MLS was actually false is a genuine issue of material fact for which the trier of fact could reasonably find against Reichel. While Reichel's testimony at deposition and emails and letters reflect that he understood there was a problem but was not certain regarding what the actual square footage was, Reichel also produced a copy of the appraisal the Damianos had purchased a month prior to entering into the Contract which included a diagram and statement that the actual square footage was in fact less than 2650 square feet. The trier of fact in this case could reasonably infer that whether or

not Reichel was specifically told about the actual square footage by the mortgage broker or appraiser or a third party or that he could have and should have checked the appraisal in his file and confirmed that the square footage was incorrect. Reichel's actions, temporarily inserting a sentence in the public comments that "Home heated square feet is approximately 2,400", which he deleted the day the second offer came in, confirms his belief and knowledge.

Further, Reichel clearly owed the Damianos the duty to disclose to them the material information regarding his knowledge of the actual square footage. Whether he did disclose this information to the Damianos is an issue for the finder of fact to determine. At deposition Reichel testified he did not recall informing the Damianos that there was an issue regarding the size of the home and the Damianos testified that they were not informed that the Mills deal fell through due to a square footage issue—they unbelievably claim they did not ask why the earlier offer terminated. [Deposition of Reichel, Deposition of E. Damiano, Record on Appeal at ___]. Whether the Respondents' testimony is credible or not, accepting their testimony as truthful for the purpose of this motion, Reichel owed all parties a duty and had he informed them of the actual state of affairs, his clients the Damianos would have either caused a correction to the listing on their own or otherwise disclosed this information to the purchaser side. Reichel's failure to disclose to his clients is breach of duty, which in turn caused the Damianos to breach the contract and also supports a claim for a claim for negligent misrepresentation, which was not separately plead but which is available through amendment at or before trial as it is based on the same set of facts.

CONCLUSION

There are numerous fact issues in dispute which require determination by the finder of fact regarding the parties knowledge, intent, motivation and communication which bar summary judgment as a matter of law in this matter. For the reasons stated, Appellants request

that the Honorable Court reverse the trial court's Order granting Respondents' Motions for Summary Judgment and remit this matter for further proceedings on the merits and trial.

September 8, 2025

Respectfully Submitted,

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PROOF OF SERVICE

I certify that on this 8th day of September, 2025, I served Appellants' Initial Brief on counsel for the parties hereto by Email to:

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Respectfully Submitted,

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