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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS
THE HONORABLE ROBERT J. BONDS
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2025-000384
CIVIL ACTION NO. 2022-CP-07-2483

Roland Bernardon and Louise Bernardon,

APPELLANTS,

versus

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

DEFENDANTS,

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

RESPONDENTS.

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COUNTERSTATEMENT OF ISSUES ON APPEAL

I. The Trial Court's grant of summary judgment on the purchasers' claims for fraud in the inducement against the sellers, the real estate agency, and the real estate agent arising out of a square footage representation in the MLS listing should be affirmed because (1) the purchasers did not have a right to rely upon the representation in light of disclaimers contained in the listing; and (2) the purchasers failed to conduct any due diligence to verify the square footage of the property.

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III. The Trial Court's grant of summary judgment on the purchasers' claims for unjust enrichment should be affirmed because (1) an express contract exists between the purchasers and the sellers; and (2) the purchasers did not confer any benefit upon the real estate agency or the real estate agent and assuming a benefit was conferred, it was not inequitable under the circumstances for the agency and agent to retain any benefit.

IV. The Trial Court's grant of summary judgment on the purchasers' breach of fiduciary duty claims against the real estate agency and the real estate agent should be affirmed because as the seller's agent, the agency and the agent owned no fiduciary duty to the purchasers.

COUNTERSTATEMENT OF THE CASE

This action arises out of Appellants Roland and Louise Bernardons' dissatisfaction with their size of their newly purchased home after they bought it sight unseen, under an "as-is" and no right to terminate contract, with no efforts made to verify or measure the square footage of the home prior to purchase.

On December 30, 2022, the Bernardons filed a complaint in the Court of Common Pleas for Beaufort County against the sellers of the home at issue, Mark and Ellery K. Damiano, as well as the real estate agency and agent for the sellers, Sea Pines Real Estate at the Beach Club ("Sea Pines Real Estate") and Robert Reichel. [R.pp. ___; Compl.] The Bernardons brought causes of action for (1) fraud in the inducement against all defendants; (2) unjust enrichment against all defendants; (3) breach of contract against all defendants; (4) recission against all defendants; and (5) breach of fiduciary duty against Sea Pines Real Estate and Robert Reichel. [R.pp. ___; Id. at ¶¶ 12-35.] In general, the Bernardons claimed that the home they purchased was listed as having approximately 3,372 heated square feet but, as they discovered after purchasing the home sight unseen with no due diligence conducted, the home had only approximately 2,462 heated square feet.

On February 9, 2023, Sea Pines Real Estate and Robert Reichel answered the complaint, denying its material allegations. [R.pp. ___; Agent Answer.] On March 10, 2023, the Damianos answered the complaint as well, also denying its material allegations. [R.pp. ___; Seller Answer.]

On January 29, 2024, Sea Pines Real Estate and Robert Reichel moved for summary judgment on all claims. [R.pp. ___; Agent Mtn. and Memo. for SJ.] On January 30, 2024,

the Damianos also moved for summary judgment on all claims. [R.pp. ___; Seller Mtn. and Memo. for SJ.]

Thereafter, on April 30, 2024, the Bernardons filed an amended complaint to add John P. McMahon as a party. [R.pp. ___; Amended Compl.] John McMahon is not involved in this appeal. On May 6, 2024, Sea Pines Real Estate, Robert Reichel, and the Damianos each again answered, denying all material allegations. [R.pp. ___; Answers.]

The motions for summary judgment were heard before The Honorable Robert J. Bonds on December 12, 2024. [R.p. ___; Tr.] Following the hearing, the Trial Court issued a Form 4 order granting the motion for summary judgment in favor of Sea Pines Real Estate, Robert Reichel, and the Damianos. The Form 4 order requested a formal order to be prepared. [R.pp. ___; Form 4 order.]

Before the formal order was filed, the Bernardons filed a motion to alter, amend, and reconsider. [R.pp. ___; Mtn. to Reconsider.] The formal order granting summary judgment was issued by the Trial Court on December 31, 2024. [R.pp. ___; Order.] The Bernardons thereafter filed a memorandum in support of their motion for reconsideration on January 14, 2025, which the Trial Court denied January 20, 2025. [R.pp. ___; ___; Memo. in Support of Mtn. to Reconsider; Form 4 Order.] On January 30, 2025, the Trial Court issued an amended Form 4 order denying the motion for reconsideration to clarify that summary judgment was not granted as to Defendant John McMahon. [R.pp. ___; Form 4 Order.]

The Bernardons filed and served their Notice of Appeal on or about February 28, 2025.

COUNTERSTATEMENT OF FACTS

At the center of this lawsuit is the Bernardons' purchase of a second home located at 10 Oyster Catcher Road, Hilton Head Island, South Carolina ("10 Oyster Catcher"). The Bernardons purchased 10 Oyster Catcher in February 2022 sight unseen and "as-is," under a no right to terminate contract, for a purchase price of $2,275,000.00. After the Bernardons purchased 10 Oyster Catcher, they were dissatisfied with the size of the home because they discovered it only measured 2,462 heated square feet as opposed to the 3,372 heated square feet recited in the MLS listing.

The history of 10 Oyster Catcher shows that it has long been described as an approximate 3,300 square foot property. On January 10, 2011, Reed Team of Charter One Realty & Marketing listed 10 Oyster Catcher for sale, describing it as a 3,324 square foot residence. [R.p. ___; Prior MLS, p. 1 (SJ Ex. A).] The home sold to Richard L. Stein, and on September 8, 2016, Mr. Stein listed 10 Oyster Catcher with the assistance of Colleen Sullivan and Daniel Moskowitz of Dunes Real Estate, who described it as a 3,324 square foot living area and a 3,372 heated square foot residence. [R.p. ___; Id. at p. 2.]

In late 2016, the Damianos offered to purchase 10 Oyster Catcher from Mr. Stein. [R.pp. ___; ___; M. Damiano Aff., ¶ 5; E. Damiano Aff., ¶ 4.] Prior to closing, the Damianos had an appraisal conducted by Coastal Property Appraisals which recorded the home's gross living area as 3,378 square feet. [R.pp. ___; ___; ___; M. Damiano Aff., ¶ 7; E. Damiano Aff., ¶ 6; 2016 Coastal Appraisal, p. 3 (SJ Ex. B).] A January 2022 appraisal recorded the property as 3,324 square feet. [R.pp. ___; ___; ___; M. Damiano Aff., ¶ 8; E. Damiano Aff., ¶ 7; 2022 Coastal Appraisal, p. 3 (SJ Ex. C).] The Damianos paid property taxes for the years 2017, 2018, 2019, and 2020 to Beaufort County, who assessed the home

as a 3,324 square foot single family residence. [R.pp. ___; ___; ___; Beaufort County Tax Records (SJ Ex. D); M. Damiano Aff., ¶ 10; E. Damiano Aff., ¶ 9.]

In January 2022, the Damianos hired Robert Reichel to act as their agent for the sale of 10 Oyster Catcher. [R.pp. ___; ___; M. Damiano Aff., ¶ 11; E. Damiano Aff., ¶ 10.] Mr. Reichel is part-owner and operator of Sea Pines Real Estate, a boutique real estate agency serving Bluffton and Hilton Head Island.

On January 19, 2022, Robert Reichel listed 10 Oyster Catcher for sale. True to every reliable resource regarding the property, the MLS listing identified the home as 3,372 square feet. The listing included the following disclosures: “INFORMATION IS BELIEVED ACCURATE BUT IS NOT WARRANTEED,” and “Information Deemed Reliable But Not Guaranteed.” [R.p. ___; January 19, 2022 MLS Listing (SJ Ex. E).] This MLS Listing also provided, “If there is an appraisal shortfall purchaser must make up the difference. Property being sold As-Is. All offers must be received by January 22 at 5:00 p.m.” [R.p. ___; Id.]

The Bernardons began searching for a second home in 2021 using real estate agent Peter Geary. [R.pp. ___; ___; ___; ___; L. Bernardon Dep., pp. 10, ll. 6-13; 11, ll. 9-14; R. Bernardon Dep., pp. 8, ll. 11-15; 9, l. 25 – 10, l. 8.] On January 19, 2022, Mr. Geary e-mailed Louise Bernardon the MLS listing for 10 Oyster Catcher. [R.p. ___; L. Bernardon Dep., p. 12, ll. 8-12]. Both Roland and Louise Bernardon testified the January 19, 2022, MLS listing is the only MLS listing they viewed for the property. [R.pp. ___; ___; L. Bernardon Dep., p. 13, ll. 20-25); R. Bernardon Dep., p. 12, ll. 12-15.]

On January 21, 2022, the Bernardons made an offer of $2,200,000.00 for the purchase of 10 Oyster Catcher. [R.pp. ___; ___; L. Bernardon Dep., pp. 17, l. 20 – 18, l. 1;

R. Bernardon Dep., p. 16, ll. 13-19.] Prior to making this offer, the Bernardons did not ask any inspector to inspect the property. [R.pp. ___; ___; L. Bernardon Dep., p. 18, ll. 20-23; R. Bernardon Dep., p. 17, ll. 11-13.] The Bernardons did not request copies of prior inspections or appraisals of the property. [R.pp. ___; ___; L. Bernardon Dep., p. 20, ll. 4-7; R. Bernardon Dep., p. 19, ll. 6-10.] They did not view the home in-person. [R.pp. ___; ___; L. Bernardon Dep., p. 18, ll. 2-4; R. Bernardon, p. 16, ll. 20-22.] They made no effort to verify the square footage of the home through their agent, or otherwise, and made no efforts to have the home measured. [R.pp. ___; ___; ___; ___; L. Bernardon Dep., pp. 18, ll. 14-19; 19, ll. 5-7; 19, l. 14 – 20, l. 3; R. Bernardon Dep., pp. 17, ll. 6-10; 18, l. 20 – 19, l. 5.] The Bernardons had no direct communication with Robert Reichel or the Damianos and did not ask any questions of either. [R.pp. ___; ___; ___; ___; ___; L. Bernardon Dep., pp. 18, l. 24 – 19, l. 4; 19, ll. 8-13; R. Bernardon Dep., pp. 17, l. 15 – 18, l. 16; M. Damiano Aff., ¶¶ 15-16; E. Damiano Aff., ¶¶ 14-15.]

The Bernardons' offer was not accepted, but they offered to match the offer that was accepted by the Damianos and requested to be the number one backup with no contingencies should that purchase fall through. [R.pp. ___; ___; ___; L. Bernardon Dep., pp. 20, l. 8 – 21, l. 8; R. Bernardon Dep., pp. 19, ll. 15-17; 19, l. 22 – 20, l. 18; January 22 Text Message (SJ Ex. G).]

After the Bernardons' January 21, 2022 offer was rejected, the property was under contract by another couple, Stuart and Claudia Mills. In the duration of the Mills' diligence period, Robert Reichel was informed by their mortgage agent that there was some confusion regarding the square footage of the home. [R.p. ___; Reichel Ltr. to Bernardons' Counsel (SJ Ex. H).] As a result of their conversation, Robert Reichel agreed to add "home

heated square feet is approximately 2600 sq. ft. to the "remarks" section of the MLS listing. [R.pp. ___; ___; Id.; February 5, 2022 MLS Listing (SJ Ex. I).] Records reflect that the Bernardons' real estate agent, Peter Geary, pulled the updated MLS listing at 11:16 a.m. on February 5, 2022. [R.p. ___; February 5, 2022 MLS Listing.]

The Bernardons testified that Peter Geary did not provide them with a copy of the February 5, 2022 listing, and they never reviewed the listing or relied upon it. [R.pp. ___; ___; ___; L. Bernardon Dep., pp. 35, l. 8 - 36, l. 14.; 37, ll. 23-25; R. Bernardon Dep., p. 57, ll. 18-22.] At all relevant times to this transaction, the MLS listing included the following disclosures: "INFORMATION IS BELIEVED ACCURATE BUT IS NOT WARRANTEED," and "Information Deemed Reliable But Not Guaranteed." [R.pp. ___; ___; January 19, 2022 MLS listing; February 5, 2022 MLS listing.]

The Mills' contract fell through in early February, 2022. Shortly thereafter Robert Reichel removed the language regarding 2,600 square feet. from the MLS, noting he only added it upon the request of a mortgage agent, which he felt he should not have done because he never had proof from a new appraisal of any change in square footage. [R.p. ___; Reichel Ltr.] A new appraisal was never prepared on behalf of the Mills, and therefore, Robert Reichel restored the listing to align with previous appraisals and historic MLS listings for the home. [R.p. ___; Id.]

The Bernardons were granted their request to be number one backup offer when the Mills' contract fell through in early February. On February 6, 2022, the Bernardons submitted a second offer for the purchase of 10 Oyster Catcher for a purchase price of $2,275,000.00. [R.pp. ___; Contract for Purchase (SJ Ex. J).]

The Bernardons' offer noted that the property would be sold "AS-IS" with "NO RIGHT TO TERMINATE." [R.p. ___; Id. at p. 2, ¶ 6.] The offer also provided that the brokers for the sellers and purchasers to the transaction "give no guaranty or warranty concerning any inspection or report concerning the Property or the accuracy of any published square footage of the Property." [R.p. ___; Id. at p. 4, ¶ 12(3).]

Prior to making this February 6, 2022 second offer for an "as-is" purchase with no right of termination, the Bernardons made no effort to verify the square footage of the residence through their agent, or otherwise. [R.pp. ___; ___; L. Bernardon Dep., pp. 27, l. 6 – 28, l. 21; R. Bernardon Dep., p. 23, ll. 21-24.] They did not tour the home in person. [R.pp. ___; ___; ___; L. Bernardon Dep., p. 27, ll. 6-9; R. Bernardon Dep., pp. 23, l. 25 – 24, l. 5; 32, ll. 19-23.] They did not have anyone measure the home prior to making the second offer. [R.pp. ___; ___; L. Bernardon Dep., p. 27, ll. 10-16; R. Bernardon Dep., p. 24, ll. 11-20.] They did not ask the Damianos' agent, Robert Reichel, any questions about the property before submitting the February 6, 2022 offer and did not ask him to verify the square footage of the home prior to submitting the second offer. [R.pp. ___; ___; L. Bernardon Dep., pp. 27, l. 17 – 28, l. 1; R. Bernardon Dep., p. 25, ll. 3-11.] They did not ask any questions of the Damianos or ask them to verify the square footage of the home prior to submitting the February 6, 2022 offer. [R.pp. ___; ___; ___; ___; L. Bernardon Dep., p. 28, ll. 2-8; R. Bernardon Dep., p. 25, ll. 12-21; M. Damiano Aff., ¶¶ 15-16; E. Damiano Aff., ¶¶ 14-15.] They did not ask their agent, Peter Geary, or anyone else at all to verify the square footage of the home prior to submitting the February 6, 2022 offer. [R.pp. ___; ___; L. Bernardon Dep., p. 28, ll. 12-21; R. Bernardon Dep., pp. 25, l. 19 – 26, l. 4.]

The Bernardons' second offer was accepted the same day by the Damianos. [R.p. ___; L. Bernardon Dep., p. 28, ll. 22-23; Contract of Sale, p. 6.] The Bernardons closed on the home on February 25, 2022. [R.p. ___; L. Bernardon Dep., p. 38, ll. 8-11.]

On March 2, 2022, after the Bernardons closed on the property, Morgan Stanley conducted an appraisal of 10 Oyster Catcher for the Bernardons. The appraiser noted the home to be 2,462 square feet and valued it at $2,100,000.00. [R.pp. ___; ___; ___; Morgan Stanley Appraisal, pp. 2-3; L. Bernardon Dep., pp. 38, l. 15 – 39, l. 5; R. Bernardon Dep., pp. 36, l. 15 – 37, l. 2.]

The Bernardons thereafter brought this lawsuit against the Damianos, Sea Pines Real Estate, and Robert Reichel for fraud in the inducement, unjust enrichment, breach of contract, rescission, and breach of fiduciary duty.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c) of the South Carolina Rules of Civil Procedure. Ellis v. Davidson, 358 S.C. 509, 517, 595 S.E.2d 817, 821 (Ct. App. 2004). Rule 56(c) provides a motion for summary judgment shall be granted 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 judgment as a matter of law." See Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 42, 747 S.E.2d 178, 181 (2013). "In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party

opposing summary judgment." Id. at 42, 747 S.E.2d at 181-82; Wachovia Bank, N.A. v. Coffey, 404 S.C. 421, 425, 746 S.E.2d 35, 38 (2013).

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (citations omitted). The party seeking summary judgment under Rule 56(c) has the initial burden of demonstrating the absence of a genuine issue of material fact. Ellis, 358 S.C. at 518, 595 S.E.2d at 822. "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. . . . Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Id. at 518-19, 595 S.E.2d at 822.

"[I]t is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." Kitchen Planners, LLC v. Friedman, 440 S.C. 456, 463, 892 S.E.2d 297, 301 (2023) (internal citation omitted). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Ellis, 358 at 518, 595 S.E.2d at 822.

ARGUMENT

I. The Trial Court's grant of summary judgment on the purchasers' claims for fraud in the inducement against the sellers, the real estate agency, and the real estate agent arising out of a square footage representation in the MLS listing should be affirmed because (1) the purchasers did not have a right to rely upon the representation in light of disclaimers contained in the listing; and (2) the purchasers failed to conduct any due diligence to verify the square footage of the property.

The Trial Court properly granted summary judgment to the Damianos, Sea Pines Real Estate, and Robert Reichel on the Bernardons' fraud in the inducement claims because the Bernardons did not have any right to rely upon the square footage represented in the MLS listing. The Bernardons were not entitled to rely upon the square footage recited in the MLS listing where the information contained in the MLS listing was not warranted or guaranteed for accuracy and reliability and the Bernardons conducted absolutely no due diligence to verify the measurements of 10 Oyster Catcher before they made an offer to purchase the home on an "as-is" and no right to terminate basis.

In order to establish a claim for fraud in the inducement to enter a contract, a party must establish the following by clear and convincing evidence: "(1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury." Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011); see also Darby v. Waterboggan of Myrtle Beach, Inc., 288 S.C. 579, 584, 344 S.E.2d 153, 155 (Ct.App.1986) ("To establish a claim or defense of fraud in the inducement, a plaintiff must prove [the nine elements of fraud as well as the following three elements]: "(1) that the alleged fraudfeasor made a false representation

relating to a present or preexisting fact; (2) that the alleged fraudfeasor intended to deceive him; and (3) that he had a right to rely on the representation made to him.").

Failure of a plaintiff to prove any one of these elements is "fatal to recovery." M. B. Kahn Const. Co. v. S.C. Nat. Bank of Charleston, 275 S.C. 381, 384, 271 S.E.2d 414, 415 (1980); McLaughlin v. Williams, 379 S.C. 451, 456, 665 S.E.2d 667, 670 (Ct. App. 2008) ("To survive a motion for summary judgment, [plaintiff] must offer some evidence that a genuine issue of material fact existed as to each element of fraud . . . .").

Critical to this appeal is whether the Bernardons had any right to rely upon the square footage contained in the MLS listing. A cause of action for fraud in the inducement contains "the necessary element that the hearer had the right to rely upon the misrepresentation or fraud." McLaughlin, 379 S.C. at 457, 665 S.E.2d at 670 (internal citation omitted). A failure to show a right to rely on an alleged misrepresentation defeats a claim for fraud. Bostick v. Orkin Exterminating Co., 806 F.2d 504, 509 (4th Cir. 1986) (citing King v. Oxford, 282 S.C. 307, 310, 318 S.E.2d 125, 127 (Ct. App. 1984)).

There is no liability for matters which a plaintiff could ascertain on his own in the exercise of due diligence. AMA Mgmt. Corp. v. Strasburger, 309 S.C. 213, 223, 420 S.E.2d 868, 874 (Ct. App. 1992). No cause of action will lie when a person fails to exercise reasonable diligence in protecting that person's own interests. J.B. Colt Co. v. Britt, 129 S.C. 226, 233, 123 S.E. 845, 848 (1924); see also Watts v. Monarch Builders, Inc., 272 S.C. 517, 519–20, 252 S.E.2d 889, 891 (1979).

While the courts discourage fraud, courts also seek to discourage "negligence and inattention to one's own interests." King, 282 S.C. at 312, 318 S.E.2d at 128. This Court has stated:

> It is the policy of the courts not only to discourage fraud, but also to discourage negligence and inattention to one's own interests. Courts do not sit for the purpose of relieving parties who refuse to exercise reasonable diligence or discretion to protect their own interests. A party must avail himself of the knowledge or means of knowledge open to him. The court will not protect the person who, with full opportunity to do so, will not protect himself.

Id. (internal citations omitted).

Under South Carolina law summary judgment may be granted on a home purchaser's claim for fraud for lack of reasonable reliance by the purchaser. In Watts, 272 S.C. at 517-19, 252 S.E.2d at 890, the purchasers of a home brought suit against the sellers to recover actual and punitive damages for alleged fraud in the inducement of a contract, claiming that the metes and bounds description of the property was fraudulently represented to them. In affirming summary judgment to the sellers, the Supreme Court observed that the purchasers viewed the property but failed to examine it closely and determine the location of the property lines. The Court further emphasized the failure of the purchasers to conduct their own investigation:

> This is not a case of fraudulent misrepresentation. This is a case where two purchasers ***chose to shut their eyes*** and contract for the purchase of a house and lot without first determining either the size or the boundaries of that lot. [The purchasers] viewed the property and employed an attorney to perform a title search of the property. If they failed to examine the property as closely as they should, or if they failed to request their attorney to provide them a metes and bounds description, these were matters of their own volition. There is no evidence of fraud, and there is no evidence that [the purchasers] were hindered in their investigation of the property.

Id. at 519-20, 252 S.E.2d at 891 (emphasis added).

In Schnellmann v. Roettger, 368 S.C. 17, 627 S.E.2d 742 (Ct. App. 2006), aff'd as modified, 373 S.C. 379, 645 S.E.2d 239 (2007), this Court affirmed the trial court's grant of summary judgment in favor of a real estate listing agent on the home purchasers' claims

for fraud and negligent misrepresentation where the purchasers' reliance on the listing agent's representation on square footage was unreasonable. 368 S.C. at 19-23, 627 S.E.2d at 744-45. The purchasers desired to purchase a home in excess of 3,000 square feet. The property they ultimately purchased was listed as having approximately 3,350 square feet. The listing, however, indicated the square footage given was an approximation "deemed reliable but not guaranteed." The listing also included a disclaimer warning that if exact square footage was important, "MEASURE, MEASURE!" Id. at 20-21, 627 S.E.2d at 744 (emphasis in original). The purchasers were therefore on notice that the listed square footage of the property might not be accurate.

The purchasers nevertheless proceeded with the purchase of the property without having someone to come to measure the property. Id. at 21, 627 S.E.2d at 745. After closing, the purchasers acquired information indicating that the home was only 2,987 square feet, and the lawsuit ensued. Id. at 20, 627 S.E.2d at 744. In light of the notice the purchasers had that the approximation of square footage in the listing was not guaranteed, this Court agreed with the trial court's conclusion that the purchasers' reliance on the square footage contained in the listing was unreasonable as a matter of law such that the claim for fraud could not lie:

> The Schnellmanns could have discovered the misstatement by simply requesting a copy of the appraisal or by having someone come in to measure the property. They were informed via the MLS listing that the measurements were not precise. The Schnellmanns viewed the house, and proceeded with the purchase without finally determining the exact square footage. In light of the evidence presented, we agree with the trial court's conclusion that if the Schnellmanns relied on the approximation of the square footage contained in the listing, such reliance was unreasonable as a matter of law.

Id. at 21-23, 627 S.E.2d at 745 (emphasis added).

Each of the above cases involved the failure of a purchaser to protect his interests through either further inspection or investigation of the property prior to closing on the purchase of the property. The instant case is no different.

As in Schnellmann, the MLS listing here contained explicit warnings that the "INFORMATION IS BELIEVED ACCURATE BUT IS NOT WARRANTEED," and "Information Deemed Reliable But Not Guaranteed." [R.p. ___; January 19, 2022 MLS Listing.] These disclaimers notified the Bernardons of the need to conduct their own due diligence. The Bernardons contend on appeal that the disclaimers in Schnellmann were materially different from the disclaimers contained in the MLS listing for 10 Oyster Catcher, but despite any differences in the language of the disclaimers, the effect is the same. The disclaimers put the Bernardons on notice that all information in the listing might not be accurate or reliable.

The Bernardons further contend, with no supporting authority, that the disclaimers in the MLS were only intended to protect MLS from liability but again, no matter any purported intent of the disclaimers, the disclaimers served as a warning to the Bernardons that all information contained in the listing was not guaranteed accurate or reliable.

The size of the home was, according to the Bernardons in their Appellant's Brief, material to their purchase and they would not have made the offer they did if they had known of the actual square footage of the property. [See also R.pp. ___; ___; ___; L. Bernardon Dep., pp. 40, l. 20 – 41, l. 14; R. Bernardon Dep., pp. 35, ll. 19-21; 42, ll. 23-24.] Yet, despite its materiality to their decision to purchase, the Bernardons conducted no diligence in determining the size of the home prior to making the offer to purchase 10 Oyster Catcher "as-is" and under a no right to terminate contract. The Bernardons chose

not to have the home measured or appraised. They chose not to ask the listing agent or the sellers any questions about the size of the property. They chose not to ask for prior appraisals or inspections. They even chose not to view the home in person. See supra pp. 6, 8.

Had the Bernardons exercised any diligence at all, including simply touring the home in person, they would have easily discovered that the size of the home did not meet their desired needs as Louise Bernardon admitted:

> Q: So you know a 3,300 square foot house?
>
> A: I know what to expect with a 3,300 square foot house.
>
> Q: What do you mean, what to expect?
>
> A: In other words, how comfortably my family can be, how we can put a couch here or put a chair there or be able to live within that.
>
> Q: Do you believe if you had seen the home in person that you would have known you weren't in a home that's 3,300 square feet since you can perceive it?
>
> A: I mean, if I would have – yes. I think that it would have felt smaller to me.

[R.p. ___; L. Bernardon Dep., p. 45, ll. 7-18.]

The size of 10 Oyster Catcher was not some sort of latent defect which the Bernardons could not have discovered. Through simple investigation, the Bernardons could have easily discovered the actual square footage of the home. Instead of exercising reasonable diligence to protect their interests, the Bernardons "chose to shut their eyes" and proceeded with the purchase of the property. See Watts, 272 S.C. at 519, 252 S.E.2d at 891. The Bernardons look to blame someone else for their failure to conduct any due diligence, but the law will not protect them for failing to protect themselves when they had

the full opportunity to do so. See King, 282 S.C. at 312, 318 S.E.2d at 128.

The Bernardons urge this Court to reverse the grant of summary judgment because a trier of fact could find that the Damianos or Robert Reichel had actual knowledge that the square footage stated in the listing was incorrect. In making this argument, the Bernardons ignore that the failure to prove any one element of the fraud in the inducement claim defeats their claim in its entirety. M. B. Kahn Const. Co., 275 S.C. at 384, 271 S.E.2d at 415.

Accordingly, because the Bernardons did not satisfy at least one of the elements of their fraud in the inducement claim – in particular, reasonable reliance – they are precluded from recovery on this cause of action. The Trial Court therefore properly granted summary judgment to the Damianos, Sea Pines Real Estate, and Robert Reichel on the Bernardons' claims for fraud in the inducement.

II. The Trial Court's grant of summary judgment against the purchasers on their breach of contract claims should be affirmed because (1) the purchasers have not appealed the Trial Court's rulings as to their breach of contract claims; (2) the real estate agency and the real estate agent did not have a contract with the purchasers; and (3) the contract between the purchasers and the sellers contained no clause regarding square footage of the property which the sellers could have breached.

The Trial Court ruled that the Bernardons' breach of contract claims against the Damianos, Sea Pines Real Estate and Robert Reichel failed as a matter of law because (1) no contract existed between the Bernardons and Robert Reichel or Sea Pines Real Estate; and (2) the Contract of Sale between the Bernardons and the Damianos did not contain any contractual provision regarding square footage. [R.pp. ___; Order, pp. 14-16.]

The Bernardons have not appealed these specific rulings by the Trial Court in their Appellant's Brief. Because the Bernardons have not challenged these two rulings by the

Trial Court, they have waived and abandoned the right to challenge the Trial Court's grant of summary judgment as to their breach of contract claims on appeal. "It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling." Lindsay v. Lindsay, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct. App. 1997); see also Biales v. Young, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993). Failure to challenge the ruling "is an abandonment of the issue and precludes consideration on appeal." Biales, 315 S.C. at 168, 432 S.E.2d at 484. The unchallenged ruling, "right or wrong, is the law of [the] case and requires affirmance." Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970).

Even if the issues are preserved for appellate review, the Trial Court correctly granted summary judgment on Bernardons breach of contract claims. Sea Pines Real Estate and Robert Reichel did not enter into a contract with the Bernardons. To recover for a breach of contract, a plaintiff must show the existence of a contract between the parties. S. Glass & Plastics Co. v. Kemper, 399 S.C. 483, 491-92, 732 S.E.2d 205, 209 (Ct. App. 2012). Where there is no contract between the Bernardons and Sea Pines Real Estate or Robert Reichel, there can be no breach. See Windsor Green Owners Ass'n, Inc. v. Allied Signal, Inc., 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004) ("Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract) (quoting Bob Hammond Constr. Co. v. Banks Constr. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994)); cf. Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005) (finding broker was not third-party beneficiary of sales contract).

If Sea Pines Real Estate and Robert Reichel are considered parties to the Contract of Sale, the Bernardons still cannot recover for breach of contract, whether against the Damianos, Sea Pines Real Estate, or Robert Reichel. The Bernardons contend that each of these defendants breached their contract with the Bernardons by allegedly "failing to inform and disclose [to] the Bernardons of the material errors in the listing" and misrepresenting the size of 10 Oyster Catcher. [Rpp. ___; Amended Compl., ¶¶ 25-27.]

These purported breach of contract claims fail because the Contract of Sale contains no provision stating the home's square footage. [R.pp. ___; Contract of Sale.] To the contrary, the Contract of Sale contains a broker disclaimer whereby the seller and purchaser acknowledge that the brokers "give no guaranty or warranty concerning any inspection or report concerning the Property or the accuracy of any published square footage of the Property." [R.p. ___; Id. at p. 4, ¶ 12(3).]

The Contract of Sale further includes an integration clause which provides, "This Contract constitutes the entire agreement between the parties hereto and may only be modified in writing." [R.p. ___; Id. at p. 5, ¶ 18.] Under this clause, the square footage representation in the MLS listing is not a part of the Contract of Sale and accordingly, there cannot exist a claim for a breach of contract of a non-existent contractual provision. See Gilliland v. Elmwood Props., 301 S.C. 295, 302, 391 S.E.2d 577, 587 (1990) ("The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument."); id. ("This is especially true when the written instrument contains a merger or integration clause."); see also Von Ancken v. 7 E. 14 L.L.C., 171 A.D.3d 440, 441, 98

N.Y.S.3d 32, 34 (2019) (holding any alleged representation in the listing cannot form the basis of a breach of contract claim because it is not a part of the purchase agreement).

For each of the above reasons, the Trial Court properly granted summary judgment to the Damianos, Sea Pines Real Estate, and Robert Reichel on the Bernardons breach of contract claims.

III. The Trial Court's grant of summary judgment on the purchasers' claims for unjust enrichment should be affirmed because (1) an express contract exists between the purchasers and the sellers; and (2) the purchasers did not confer any benefit upon the real estate agency or the real estate agent and assuming a benefit was conferred, it was not inequitable under the circumstances for the agency and agent to retain any benefit.

The Trial Court further correctly granted summary judgment on the Bernardons' claims for unjust enrichment against the Damianos, Sea Pines Real Estate, and Robert Reichel. Also known as quantum meruit, unjust enrichment is an equitable doctrine, which permits recovery of the amount that the defendant has been unjustly enriched at the expense of the plaintiff." Regions Bank v. Wingard Props., Inc., 394 S.C. 241, 256-57, 715 S.E.2d 348, 356 (Ct. App. 2011); see also Williams Carpet Contractors, Inc. v. Skelly, 400 S.C. 320, 325 734 S.E.2d 177, 180 (Ct. App. 2012). "One seeking to recover for unjust enrichment must show: (1) a benefit conferred by the plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value." Chase Home Fin., LLC v. Risher, 405 S.C. 202, 212, 746 S.E.2d 471, 476-77 (Ct. App. 2013) (internal citation omitted).

The Trial Court ruled that the Bernardons' unjust enrichment claim against the Damianos was barred because there was an express contract governing their relationship. "[I]f the tasks the plaintiff is seeking compensation for under a quantum meruit theory are

encompassed within the terms of an express contract, which has not been abandoned or rescinded, the plaintiff may not recover under quantum meruit." Williams Carpet Contractors, Inc., 400 S.C. at 328, 734 S.E.2d at 181 (internal citation omitted). "[I]t is a defense to an action in quantum meruit that there is an express contract covering the issue of compensation for services or materials furnished. Id. (citing 66 Am. Jur.2d *Restitution and Implied Contracts* § 81 (2001)).

The Contract of Sale between the Bernardons and the Damianos has been not abandoned or rescinded and sets forth the terms between the parties. The Bernardons cannot seek recovery outside of the provisions of this contract.

The Bernardons argue that the Contract of Sale can be invalidated under the doctrine of mutual mistake. First, this argument is not preserved for appellate review because the Bernardons did not raise this argument to the Trial Court until its motion for reconsideration. [R.pp. ___; ____; Plaintiffs' Memo. in Opp to Damianos' Mtn. for Summary Judgment; Plaintiffs' Memo. in Support of Mtn.to Reconsider.] It is well-settled that an issue may not be raised for the first time in a motion to reconsider for the issue to be preserved for appellate review. Repko v. Cnty. of Georgetown, 424 S.C. 494, 502, 818 S.E.2d 748, 749 (2018).

Nevertheless, no clear and convincing evidence, much less any evidence at all, has been presented of a mutual mistake by the parties. "A contract may be reformed on the ground of mistake when the mistake is mutual and consists in the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the contract, inconsistent with those of the parol agreement which necessarily preceded it." George v. Empire Fire & Marine Ins. Co., 344 S.C. 582, 590, 545 S.E.2d 500, 504

(2001). "A mistake is mutual whe[n] both parties intended a certain thing and by mistake in the drafting did not obtain what was intended. Before equity will reform a contract, the existence of a mutual mistake must be shown by clear and convincing evidence." Id. (citation omitted).

The record is devoid of any evidence that both parties to the Contract of Sale meant for any representation of square footage to be included as a term of the contract. In fact, the contract contains the exact opposite language - that the parties agreed the brokers would "give no guaranty or warranty concerning any inspection or report concerning the Property or the accuracy of any published square footage of the Property." [R.p. ___; Contract of Sale, p. 4, ¶ 12(3).] The Trial Court therefore properly granted summary judgment to the Damianos on the unjust enrichment claim.

The Bernardons also did not establish the elements of an unjust enrichment claim against Sea Pines Real Estate or Robert Reichel. First, a claim for unjust enrichment requires the plaintiff to show a benefit conferred by the plaintiff upon the defendant. Chase Home Fin., LLC, 405 S.C. at 212, 746 S.E.2d at 476-77. Here, there was no relationship between the Bernardons and Sea Pines Real Estate and Robert Reichel, who never spoke, met, or corresponded. As is customary, any commissions earned by Sea Pines Real Estate and Robert Reichel were paid by the Damianos under their agreement with each other. The Bernardons did not confer a benefit upon Sea Pines Real Estate and Robert Reichel.

In addition, to recover on a claim of unjust enrichment, the Bernardons must also establish that it would be inequitable for the defendant to retain the benefit without paying its value. Id. Here, the Bernardons entered into an arm's length transaction with a contractual provision disclaiming any guaranty or warranty by the brokers concerning the

accuracy of any published square footage of the property. [R.p. ___; Contract of Sale, p. 4, ¶ 12(3).] Sea Pines Real Estate and Robert Reichel also never guaranteed the accuracy of the square footage in the MLS listing as it also contained disclaiming language: INFORMATION IS BELIEVED ACCURATE BUT IS NOT WARRANTEED," and "Information Deemed Reliable But Not Guaranteed." [R.p. ___; January 19, 2022 MLS Listing.]

The Bernardons had no communications with Robert Reichel before making any offers on 10 Oyster Catcher and did not ask him to verify the square footage of the home. [R.pp. ___; ___; ___; ___; L. Bernardon Dep., pp. 18, l. 24 -19, l. 4; 27, l. 17 – 28, l. 1; R. Bernardon Dep., pp. 17, l. 15 – 18, l. 1; 25, ll. 3-11.]. Under these circumstances, it is not inequitable for Sea Pines Real Estate and Robert Reichel to retain their commission earned through their relationship as sellers' agent for the Damianos. The Trial Court properly granted summary judgment to Sea Pines Real Estate and Robert Reichel on the unjust enrichment claim as well.

IV. The Trial Court's grant of summary judgment on the purchasers' breach of fiduciary duty claims against the real estate agency and the real estate agent should be affirmed because as the seller's agent, the agency and the agent owned no fiduciary duty to the purchasers.

The Trial Court also correctly granted summary judgment to Sea Pines Real Estate and Robert Reichel on the Bernardons' breach of fiduciary duty cause of action because Sea Pines Real Estate and Robert Reichel did not owe any fiduciary duty to the Bernardons.

To establish a claim for breach of fiduciary duty, the plaintiff must prove "(1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from the wrongful conduct of the

defendant." RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 399 S.C. 322, 335-36, 732 S.E.2d 166, 173 (2012).

To succeed on its cause of action for breach of fiduciary duty, the Bernardons must therefore establish, as a matter of law, the existence of a fiduciary relationship giving rise to such a duty. "[W]hether [a fiduciary relationship] should be imposed between two classes of people is a question for the court." Hendricks v. Clemson Univ., 353 S.C. 449, 459, 578 S.E.2d 711, 715 (2003); see also Spence v. Wingate, 395 S.C. 148, 160, 716 S.E.2d 920, 926 (2011) (observing that whether the law recognizes a particular duty is an issue of law to be decided by the court).

A fiduciary relationship is "founded on trust and confidence reposed by one person in the integrity and fidelity of another." Steele v. Victory Sav. Bank, 295 S.C. 290, 293, 368 S.E.2d 91, 93 (Ct. App. 1988). Under South Carolina law, "[a] confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one imposing the confidence." Brown v. Pearson, 326 S.C. 409, 422, 483 S.E.2d 477, 484 (Ct. App. 1997). "A fiduciary relationship cannot be established by the unilateral action of one party. The other party must have actually accepted or induced the confidence placed in him." Steele, 295 S.C. at 295, 368 S.E.2d at 94.

The law does recognize that "[r]eal estate agents occupy a fiduciary relationship with their clients and are under a legal obligation as well as a high moral duty to give loyal service to the principal." Darby v. Furman Co., 334 S.C. 343, 346-47, 513 S.E.2d 848, 849 (1999). However, in this case, it is an undisputed fact that Sea Pines Real Estate and Robert

Reichel were not the Bernardons' agents. [See R.p. ___; Contract of Sale, p. 7 (acknowledgement that listing agent only acting on behalf of sellers).]

The Bernardons admit that they did not meet, correspond, or speak with Robert Reichel or anyone at Sea Pines Real Estate at any time relevant to this matter. [R.pp. ___; ___; ___; ___; L. Bernardon Dep., pp. 18, l. 24 -19, l. 4; 27, l. 17 – 28, l. 1; R. Bernardon Dep., pp. 17, l. 15 – 18, l. 1; 25, ll. 3-11.]. Accordingly, there is no evidence that the Bernardons entrusted Sea Pines Real Estate or Robert Reichel with any special confidences and as such, Sea Pines Real Estate and Robert Reichel owed no fiduciary duty to the Bernardons as a matter of law. See Harrington v. Mikell, 321 S.C. 518, 522, 469 S.E.2d 627, 629 (Ct. App. 1996) (holding that agent of seller owed no fiduciary duty to buyer).

The Bernardons argue that S.C. CODE ANN. § 40-57-350 imposes a per se fiduciary duty between a licensed agent and all parties to the transaction. The language of this statute does not create a fiduciary duty between a seller's agent and a buyer. Instead, the statute imposes duties a seller's agent owes to its client and duties a buyer's agent owes to its own client. § 40-57-350(C) and (E).

While § 40-57-350(G) provides that "[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," this provision in and of itself does not create a fiduciary relationship whereby one imposes a special confidence in another.

Additionally, there is no evidence in this case that Sea Pines Real Estate or Robert Reichel did not treat all parties honestly or knowingly gave false or misleading information about the condition of the property. As previously stated herein, the Bernardons had no communications with or questions of Sea Pines Real Estate or Robert Reichel. The square

footage representation in the MLS listing was limited by disclaimers: INFORMATION IS BELIEVED ACCURATE BUT IS NOT WARRANTEED," and "Information Deemed Reliable But Not Guaranteed." [R.p. ___; January 19, 2022 MLS Listing.] These disclaimers warned the Bernardons to verify information contained in the listing.

The statute from which the Bernardons seek to impose a fiduciary duty upon Sea Pines Real Estate and Robert Reichel also provides, consistent with the disclaimers, that "[n]othing in this chapter limits the obligation of the buyer to inspect the physical condition of the property." § 40-57-350(H). The Legislature "places the duty of performing such an inspection or investigation squarely on the shoulders of the buyer." Isaac v. Onions, 445 S.C. 525, 535, 915 S.E.2d 492, 497 (2025) (internal citation omitted).

Under the facts of this case and the relevant law, there is no evidence Sea Pines Real Estate or Robert Reichel were the Bernardons' fiduciaries or that they held themselves out in that fashion. It follows then that they could not have breached a fiduciary duty owed to the Bernardons. As a result, the Trial Court properly granted summary judgment on the Bernardons' breach of fiduciary duty claim as a matter of law.

CONCLUSION

For the reasons set forth herein, the Respondents Mark Damiano, Ellery K. Damiano, Sea Pines Real Estate at the Beach Club, and Robert Reichel request this Court to affirm the Trial Court's grant of summary judgment on all causes of action asserted by the Bernardons.

Respectfully submitted,

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