

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

On Certiorari to the Court of Appeals of South Carolina
Opinion No. 4761 (S.C. Ct. App. filed December 1, 2010)

Robert Coake and Susan Coake Respondents

VS

Kathleen Butt, N/K/A Kathleen Thomason Petitioner

BRIEF OF RESPONDENTS

Kirsten E. Small
James A. Blair, III
NEXSEN PRUTTE, LLC
55 East Camperdown Way (29601)
Post Office Drawer 10648
Greenville, South Carolina 29603-0648
864-370-2211

*Attorneys for Respondents
Robert and Susan Coake*

RECEIVED
AUG 19 2012
S.C. SUPREME COURT

INDEX

	Page
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE	1
FACTS AND PROCEDURAL HISTORY	3
SUMMARY OF ARGUMENT	10
ARGUMENT.....	12
I. THE COURT OF APPEALS CORRECTLY RULED THAT THE REASONABLENESS OF THE COAKES’S INSPECTION IS A QUESTION OF FACT FOR THE JURY	13
II. MS. THOMASON’S “WAIVER” ARGUMENT IS NOT PROPERLY BEFORE THIS COURT; IN ANY EVENT, IT IS WITHOUT MERIT.....	16
III. THE COURT OF APPEALS CORRECTLY HELD THAT THE COAKES’S DAMAGES MAY BE MEASURED BY THE AMOUNT THEY SPENT TO REPAIR UNDISCLOSED DEFECTS.....	17
IV. THE DISCLOSURE ACT APPLIES TO ALL RESIDENTIAL PROPERTY “FOR WHICH THE OWNER HAS DIRECT AND PRIMARY RESPONSIBILITY,” INCLUDING DETACHED STRUCTURES	19
V. MS. THOMASON IS NOT ENTITLED TO ATTORNEY’S FEES.	20
CONCLUSION	23

TABLE OF AUTHORITIES

Page

CASES

<i>Florentine Corp. v. PEDAI, Inc.</i> , 287 S.C. 382, 339 S.E.2d 112 (1985).....	13
<i>Gadson v. Eco Servs. of SC, Inc.</i> , 374 S.C. 171, 648 S.E.2d 585 (2007).....	12
<i>Kiawah Prop. Owners Grp. v. Pub. Serv. Comm’n</i> , 359 S.C. 105, 597 S.E.2d 145 (2004)	16
<i>Layman v. State</i> , 376 S.C. 434, 444, 658 S.E.2d 320, 325 (S.C. 2008).....	21
<i>May v. Hopkinson</i> , 289 S.C. 549, 347 S.E.2d 508 (Ct. App. 1986).....	17
<i>McLaughlin v. Williams</i> , 379 S.C. 451, 665 S.E.2d 667 (Ct. App. 2008)	13
<i>Moseley v. All Things Possible, Inc.</i> , 395 S.C. 492, 719 S.E.2d 656 (2011)	13
<i>New York Times Co. v. Spartanburg County School Dist. No. 7</i> , 374 S.C. 307, 312, 649 S.E.2d 28, 30-31 (2007).....	21
<i>Peake v. South Carolina Dep’t of Motor Vehicles</i> , 375 S.C. 589, 654 S.E.2d 284 (Ct. App. 2007)	20
<i>Pope v. Heritage Communities, Inc.</i> , 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011)	18
<i>Pye v. Estate of Fox</i> , 369 S.C. 555, 633 S.E.2d 505 (2006)	16
<i>Sabb v. S.C. State Univ.</i> , 350 S.C. 416, 567 S.E.2d 231 (2002).....	12
<i>Unlimited Servs., Inc. v. Macklen Enters., Inc.</i> , 303 S.C. 384, 401 S.E.2d 153 (S.C. 1991)	13
<i>Winters v. Fiddie</i> , 394 S.C. 629, 716 S.E.2d 316 (Ct. App. 2011).....	10, 12

STATUTES

Residential Property Condition Disclosure Act, S.C. Code Ann. §§ 27-50-10 to -110 (2007 & Supp. 2011).....	passim
---	--------

OTHER AUTHORITIES

George Lefcoe, <i>Property Condition Disclosure Forms: How the Real Estate Industry Eased the Transition from Caveat Emptor to "Seller Tell All"</i> , 39 Real Prop. J. 193 (Summer 2004).....	10
--	----

STATEMENT OF THE CASE

Plaintiffs/Respondents Robert and Susan Coake filed this civil action on May 26, 2005, in the Court of Common Pleas in Anderson, in the Tenth Judicial Circuit. The Coakes alleged causes of action against Defendant/Petitioner Kathleen Thomason for fraud and for violating the Residential Property Condition Disclosure Act, S.C. Code Ann. §§ 27-50-10 to -110 (2007 & Supp. 2011) (“the Disclosure Act”). Ms. Thomason answered the Complaint on or about June 7, 2005.

The case was tried to a jury on July 30, 2007. After the Coakes presented their case-in-chief, the circuit court granted Ms. Thomason’s motion for a directed verdict on the fraud claim but denied her motion as to the claim under the Disclosure Act.¹ At the close of the evidence, the circuit court granted Ms. Thomason’s renewed motion for a directed verdict on the Disclosure Act claim. The court memorialized its ruling regarding the Disclosure Act claim in a written order dated April 28, 2008.

The Coakes moved to alter or amend the April 28 order, and Ms. Thomason moved for an award of attorneys’ fees as the prevailing party on the Disclosure Act claim. The circuit court denied both motions. The Coakes timely appealed the directed verdict on the Disclosure Act claim, and Ms. Thomason timely cross-appealed the denial of her motion for attorney’s fees.

The Court of Appeals heard argument on June 22, 2010, and on December 1, 2010 it issued a decision reversing the directed verdict on the Disclosure Act claim. In light of this ruling, the Court of Appeals did not consider Ms. Thomason’s cross-appeal regarding attorney’s fees. The court thereafter denied Ms.

¹ The fraud claim is no longer at issue in this litigation.

Thomason's motion for rehearing.

On May 24, 2012, this Court granted Ms. Thomason's petition for a writ of certiorari.

FACTS AND PROCEDURAL HISTORY

In early 2004, Robert Coake received an offer of employment with BMW at its facility in Upstate South Carolina. (App. pp. 121-23.)² At that time, Mr. Coake, his wife Susan, and their three children were living in Orlando, Florida. (App. p. 122-23.) Mr. Coake began working in Greenville and for the next six months made the 1100-mile roundtrip between Greenville and Orlando every weekend so that he could be with his family. (App. p. 170.) In June 2004, in anticipation of Mrs. Coake and the children moving to the Upstate, the Coakes entered into a purchase contract for a home located at 2208 East North Street in Anderson, South Carolina (“the Property”). (App. pp. 123-24.) The Property consisted of a 100-year-old home, a detached garage and apartment, and a pool and pool house, all situated on approximately two acres.

Ms. Thomason, the owner of the home, had completed a seller’s disclosure statement on May 18, 2004 (“Disclosure Statement”). (App. pp. 245-48.) The Disclosure Statement form enumerates 24 items concerning various aspects of the structure and property that might have problems. For each, the homeowner can answer “Yes,” “No,” or “No Representation.” With respect to these three options, the form provides the following instructions:

- (a) If you check “Yes” for any question, you must explain the problem or attach a descriptive report from an engineer, contractor, pest control operator or other expert or public agency....
- (b) If you check “No” for any question, you are stating that you have no actual knowledge of any problem. *If you check “No” and you know there is a problem, you may be liable for making an intentional misrepresentation.*

² “App.” refers to the Appendix filed by Petitioner. The page numbers for the appendix appear in the lower right corner of each page.

- (c) If you check “No Representation” for any question, you are stating that you are making no representation regarding the conditions or characteristics of the property, but you may have a duty to disclose even if you know or should have known of them.

(App. p. 245.) Ms. Thomason admitted at trial, however, that she did not read these instructions before completing the Disclosure Statement. (App. p. 231.)

A. Misrepresentations on the Disclosure Statement

The Disclosure Statement contained a number of false statements and omissions regarding the condition of the Property.

I. Underground Fuel Tank

Item number 14 required the seller to identify any

Environmental hazards (substances, materials or products) including asbestos, formaldehyde, radon gas, methane gas, lead-based paint, underground storage tank, toxic mold or other hazardous or toxic material (whether buried or covered), contaminated soil or water, or other environmental contamination[.]

(App. p. 247.) Ms. Thomason underlined the word “asbestos” and, in the space at the bottom of the Disclosure Statement provided for explanations, wrote “#14 Asbestos is present in basement.” (*Id.*) Although the form specifically inquired about underground storage tanks, Ms. Thomason failed to disclose that an old propane tank was buried near the front of the house. (App. p. 222.) The Coakes were unable to see the pipes for the fuel tank when they looked at the house and grounds because they were concealed by overgrown vegetation. (App. p. 154 (“Q. ... What prevented you from seeing the underground oil tanks? A. About two days’ worth of cleaning out the flower beds.”).)³ Robert Coake found the pipes, and

³ “The property had not been maintained, from what we understand from neighbors, for about ten years and really more or less unmanned for two.... [T]here was so much vegetation growing up around the property ... we had estimates like

thus discovered the existence of the tank, when he cleaned out the flower beds after purchase. (App. p. 140.) The Coakes were required to spend \$2,040 to have the tank filled and capped before they could re-sell the Property. (App. pp. 146, 249.)

Ms. Thomason testified that she believed that simply checking “Yes” on Item 14 was sufficient to alert potential buyers to the existence of the underground storage tank. (App. pp. 221-22.) But she evidently did not feel this way in 2003, when she completed a disclosure statement for the realtor who first listed the house for sale. (App. p. 227.) On that disclosure statement, Ms. Thomason specifically noted the presence of the propane tank in two ways: by underlining the phrase “underground storage tank” on the form and by adding the notation “tank underground” in the space provided for additional explanations. (App. p. 253.)

2. Termite Bond

Ms. Thomason stated in the Disclosure Statement that there was a transferable termite bond on the home. (App. p. 246.) In fact, the termite bond had expired approximately two years before Ms. Thomason completed the Disclosure Statement. (App. p. 168.) Shortly after moving into the home, the Coakes discovered extensive termite damage in the garage apartment and the pool house. (App. p. 137; *see* App. pp. 187-88.) Because there was no transferable termite bond, the Coakes had to pay for the repairs themselves, at a cost of \$3,800. (App. p. 137 (“So if the bond was good, we could have gone after the bond company for the

\$2,000 just to clean the property, to find property lines and sidewalks and fences.” (App. p. 140.)

termite infestation.”); App. p. 249.)⁴

Ms. Thomason testified that she checked “Yes” as to the transferable termite bond because she “assumed that it was transferable.” (App. p. 233.) She did not testify regarding any efforts she might have made to determine whether the bond was transferable before certifying that it was so.

3. Wood Rot

Ms. Thomason represented on the Disclosure Statement that she had no knowledge of any problem with any of the structural components of the Property. (App. p. 246.) However, the Coakes discovered almost immediately after moving into the home that the bottoms of the wooden garage doors were rotten. (App. pp. 143-44.) The Coakes could not discover this fact prior to purchasing the home because the electric garage door opener was broken, making it impossible to open the doors unless the mechanism was dismantled. (*Id.*)

4. Security System

Ms. Thomason disclosed the existence of a security system on the Disclosure Statement and asserted that there were no problems with the system. (App. p. 246.) As it turned out, however, the security system was both non-functional and wholly inadequate. As Mr. Coake explained at trial, “The security system itself, at one point there was probably one there. But at the point of closing, there was no security working at the time. We had to have a new company come in, put a whole new system. It was [a] very old, inadequate system that was there.” (App. p. 138.) Ms. Thomason testified at trial that she simply

⁴ The Coakes do not contend that Ms. Thomason is liable for failing to disclose the termite damage.

stopped paying the security company when she moved out of the house two years prior to the sale. (App. p. 234.) The Coakes spent \$2,500 to solve the problem of the non-functioning security system. (App. p. 147; App. p. 249.)

5. Pool House Plumbing

Ms. Thomason asserted on the Disclosure Statement that there were no known problems with the plumbing at the pool house. (App. p. 246.) The Coakes later discovered that the pool house had no hot water because the supply line had become encased in concrete at some point in the past when a fence was built on the Property. (App. p. 136.) The Coakes spent \$500 to repair this problem. (App. p. 249.)

6. Water Leakage in Basement

Ms. Thomason also failed to disclose the fact that the basement flooded when it rained. (App. pp. 126-30.) Although the Coakes obtained estimates for repairs to the basement, BMW transferred Mr. Coake to California before they could begin the project. (App. p. 163.) Accordingly, the Coakes's damages did not include any amount for water leakage in the basement.

B. The Coakes's Inspection of the Property

Mr. Coake testified that when he examined the Property prior to making an offer, he spent about two hours walking around and examining the house and outbuildings. (App. p. 174.) During this initial inspection of the Property, Mr. Coake found several problems, such as a broken attic fan and an inoperable air conditioning unit. (App. p. 170.) Ms. Thomason agreed to pay for the repair of these items as part of the parties' negotiation of the sale of the Property. (App. pp. 169-70.)

Mr. Coake's inspection of the Property, and specifically of the undisclosed defects, was hindered in a number of ways. For example, the wood rot in various outbuildings was concealed by a fresh coat of paint (App. p. 163); the only way to discover the rot was to poke at the wood with one's finger. (App. pp. 154-55, 179.) Mr. Coake could not inspect the garage apartment because it was locked and the key had been lost. (App. p. 137.) The choking overgrowth of the garden hid the spout for the underground oil tank. (App. p. 154.)

The Coakes also had the Property professionally inspected. (App. p. 166; see App. pp. 258-84 (inspection report).) Although the inspection report mentioned the buried propane tank, the inspector did not discover the expired termite bond (or the termite damage), the wood rot, the inoperable and deficient security system, or the problems with the plumbing in the pool house.

Moreover, the Coakes did not have access to the inspection report before they closed the sale of the house. The report was not faxed until during, or possibly after, the closing. (App. p. 170.) The Coakes were under pressure to complete the sale of the house because the closing date specified in the sale contract had already passed. (App. p. 181.) Another factor was the family's living circumstances: Mr. Coake was working full-time and driving to Orlando and back every weekend, and Mrs. Coake was raising their three children. (App. p. 170.)

C. Rulings of the Circuit Court.

After all the evidence had been presented, the Circuit Court granted a directed verdict to Ms. Thomason on the Disclosure Act claim. The court determined there was a genuine issue of fact as to whether Ms. Thomason had made material misstatements on the Disclosure Statement. The court nevertheless

granted a directed verdict on the grounds that (1) the Coakes's inspection of the Property unreasonable as a matter of law, and (2) the Coakes had failed to prove damages because (a) they realized a profit on the sale of the home; (b) they did not repair all of the items that were not disclosed; and (c) they failed to relate any expenditure directly to a failure to disclose. (App. pp. 65-66.)

The Coakes moved for reconsideration of the directed verdict (App. p. 81-82), and Ms. Thomason moved for an award of attorney's fees. (App. pp. 83-86.) The circuit court denied both motions in an order dated August 18, 2008. (App. pp. 67-68.)

D. Ruling of the Court of Appeals

The Court of Appeals reversed. (App. pp. 10-17.) First, the court concluded that while the Coakes had a duty to conduct a reasonable inspection of the Property, "the reasonableness of the Coakes' actions is a question of fact for the jury." (App. p. 15.) Second, the court held that the issue of damages was a jury question because the Coakes presented evidence that they "spent \$10,900 on repairs for items not disclosed by [Ms. Thomason] in the Disclosure Statement." (App. p. 16.) The court did not address Ms. Thomason's argument that the Disclosure Act applies to detached structures on a property, nor did it consider whether Ms. Thomason was entitled to attorney's fees. (App. pp. 16-17.)

SUMMARY OF ARGUMENT

Since the 2002 enactment of the Residential Property Condition Disclosure Act, S.C. Code Ann. §§ 27-50-10 to -110 (2007 & Supp. 2011) (“the Disclosure Act”), the doctrine of *caveat emptor* (let the buyer beware) no longer applies to purchases of residential real estate. *Cf. Winters v. Fiddie*, 394 S.C. 629, 651-51, 716 S.E.2d 316, 328 (Ct. App. 2011) (Few, C.J., concurring in part and dissenting in part) (observing that South Carolina courts have gradually moved away from the doctrine of *caveat emptor* in real estate transactions). The Disclosure Act places a duty on homeowners—who are in the best position to know of the conditions of their home—to disclose certain information to potential buyers. The Act enforces that requirement by providing a civil cause of action to purchasers who have been harmed by material nondisclosures.

The purpose of property disclosure laws like the Disclosure Act is to ensure that potential buyers are made aware of latent defects—items a seller is likely to know about by virtue of living in the house but which the buyer can only discover with the assistance of a professional. *See* George Lefcoe, *Property Condition Disclosure Forms: How the Real Estate Industry Eased the Transition from Caveat Emptor to “Seller Tell All”*, 39 *Real Prop. J.* 193, 203 (Summer 2004). Disclosure of property conditions enables buyers to make informed decisions. When a home seller complies with the statutory duty of disclosure, a potential buyer can walk away or negotiate with the seller over necessary repairs.

Robert and Susan Coake brought this action because the disclosure statement written by Ms. Thomason was materially false in several ways. The evidence presented at trial, viewed in the light most favorable to the Coakes, establishes that Ms. Thomason’s false statements and nondisclosures deprived the Coakes of

information necessary to an informed home-buying decision. The Coakes knew that the Property would need extensive repair—as Mr. Coake put it, “[I’m] going to spend the rest of my life working on the property; but it’s well worth it because it’s a beautiful house.” (App. p. 172.) Before agreeing to buy the Property, the Coakes negotiated with Ms. Thomason over patent defects, such as the broken attic fan. The false statements on the Disclosure Statement deprived the Coakes of the ability to negotiate over latent defects and resulted in more than \$10,000 in unanticipated repairs.

ARGUMENT

The Disclosure Act requires an owner of residential real property to provide a written statement disclosing certain conditions of the property. See S.C. Code Ann. § 27-50-40; *Winters*, 394 S.C. at 642, 716 S.E.2d at 323. The Act establishes a cause of action against “[a]n owner ... who discloses any material information on the disclosure statement that he knows to be false, incomplete, or misleading.” S.C. Code Ann. § 27-50-65. A claim under the Disclosure Act requires proof of three elements by a preponderance of the evidence: (1) a materially false or misleading statement on the disclosure form; (2) reasonable reliance by the buyer; and (3) damages.

The circuit court held that a genuine issue of fact existed as to whether Ms. Thomason made a materially false or misleading statement on the Disclosure Statement. Ms. Thomason did not appeal this ruling, and it is therefore the law of the case. Accordingly, the question for this Court is whether the circuit court erred in ruling that there was *no evidence* that supported the Coakes on the questions of the reasonableness of their inspection of the Property and their damages.

In reviewing the grant of the motion for directed verdict, this Court must employ the same standard as that applied by the circuit court. See *Gadson v. Eco Servs. of SC, Inc.*, 374 S.C. 171, 175, 648 S.E.2d 585, 588 (2007). The Court must view the evidence in the light most favorable to the non-movant and draw all reasonable inferences in favor of the non-movant. See *Sabb v. S.C. State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). “A motion for directed verdict ... may be granted only when the evidence raises no issue for the jury as to liability.” *Winters*, 394 S.C. at 644, 716 S.E.2d at 324. The court’s only concern is the existence of evidence, not

its weight; “neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence.” *Id.*

I. THE COURT OF APPEALS CORRECTLY RULED THAT THE REASONABLENESS OF THE COAKES’S INSPECTION IS A QUESTION OF FACT FOR THE JURY

The Disclosure Act “does not limit the obligation of the purchaser to inspect the physical condition of the property and improvements.” S.C. Code Ann. § 27-50-80. As at common law, a buyer asserting a claim under the Disclosure Act must demonstrate that he exercised “reasonable diligence to protect [his] interests.” *Moseley v. All Things Possible, Inc.*, 395 S.C. 492, 497, 719 S.E.2d 656, 659 (2011) (quoting *Slack v. James*, 364 S.C. 609, 612-13, 614 S.E.2d 636 638 (2005)).

The reasonableness of a party’s actions is a question for the jury to decide. See *McLaughlin v. Williams*, 379 S.C. 451, 457, 665 S.E.2d 667, 670-71 (Ct. App. 2008).

As this Court has explained,

issues of reliance and reasonableness going as they do to subjective states of mind and applications of objective standards of reasonableness, are *preeminently factual issues for the trier of facts.*

Unlimited Servs., Inc. v. Macklen Enters., Inc., 303 S.C. 384, 387, 401 S.E.2d 153, 155 (1991) (emphasis added). Most critically, “[t]he determination of what constitutes reasonable diligence and prudence must be made on a case by case basis.” *Florentine Corp. v. PEDAI, Inc.*, 287 S.C. 382, 386, 339 S.E.2d 112, 114 (1985); *cf. Moseley*, 395 S.C. at 498, 719 S.E.2d at 659 (“Our jurisprudence reflects a preference for a case by case approach to the question of whether a hearer’s reliance on misrepresentations as to matters in the public record is reasonable.”).

A. A jury could find that the Coakes’s inspection of the property was reasonable.

Robert Coake testified that when he examined the property before making

an offer, he spent about two hours walking around and examining the house and outbuildings. (App. p. 174.) His inspection of the property, and specifically of the undisclosed defects, was hindered in a number of ways. For example, the Coakes could not inspect the wood rot in the garage and pool house because the wood had been freshly painted; the only way to discover the rot was to poke at the wood with one's finger. (App. pp. 154-55.) The choking overgrowth of the garden hid the spout for the underground oil tank. (App. p. 154.)

In deciding whether the Coakes's inspection was reasonable, the jury also would have been entitled to consider their circumstances: Robert Coake was working in Greenville, living in a corporate apartment, and driving 1,100 miles to and from Orlando every weekend to be with his family, while Susan Coake was living in Florida and raising the Coakes's three children. (App. pp. 122-23, 170.) The time the Coakes had to look over the house was extremely limited, a fact the jury would have been entitled to consider in deciding whether the Coakes acted reasonably.

B. The record contradicts Ms. Thomason's factual claims.

Ms. Thomason claims that the Coakes had "unlimited and unrestricted access to inspect the Property" and "access to the findings of the home inspector" prior to closing on the Property. Br. of Pet'r at 8. These assertions are contradicted by the record.

First, no testimony or documentary evidence would allow a jury to conclude that the Coakes had free access to the Property. Ms. Thomason's assertion is based only upon a hypothetical question by her counsel. (App. p. 156 ("Let's suppose that you spent the 35 days [before the closing] ... look[ing] over the house

....”).) Neither that question, nor any other evidence in the record, indicates that the Coakes had free access to the Property. And, even if the Coakes had such access, it would not be reasonable to expect them to spend days inspecting the house during a time when Mr. Coake was working full time and traveling to Florida during the weekends to be with his family, and Mrs. Coake was in Florida raising their three young children. (App. pp. 152-53, 170.)

Second, the uncontradicted evidence shows that the Coakes did not have access to the home inspection report before closing. Mr. Coake testified consistently that the inspection report was sent by fax during or after the closing. (App. pp. 156-57, 108.) And even if the Coakes had obtained the inspection report before closing, the home inspector did not find the expired termite bond, the wood rot, the inoperable security system, or the damaged pool house plumbing.

Moreover, as noted previously, the Coakes were under pressure to close due to their family circumstances and because the closing date specified on the purchase contract had already passed. (App. p. 181.) It was for the jury to consider whether the fact that the home inspection report arrived during the closing should excuse the Coakes from calling the closing off so that they could review the report, when the circumstances virtually forced them to proceed with the closing.

C. Conclusion

Because the evidence presented at trial permits more than one inference as to whether the Coakes acted with reasonable diligence, the Court of Appeals properly reversed the circuit court’s grant of a directed verdict.

II. MS. THOMASON’S “WAIVER” ARGUMENT IS NOT PROPERLY BEFORE THIS COURT; IN ANY EVENT, IT IS WITHOUT MERIT

Ms. Thomason contends that the Coakes “waived” their claim under the Disclosure Act because (1) Ms. Thomason repaired “conditions identified in the home inspection report,” and (2) all of the problems with the Property were observable or were identified on the home inspection report. Br. of Pet’r at 12. This argument was raised for the first time in the Petition for Rehearing, and therefore is not properly before this Court. See *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) (“It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved.”); *Kiawah Prop. Owners Grp. v. Pub. Serv. Comm’n*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (finding an issue raised for the first time in a petition for rehearing was not preserved).

Further, Ms. Thomason’s factual allegations are not accurate. Ms. Thomason asserts that she “spent \$2,500.00 to repair conditions identified in the home inspection report.” Br. of Pet’r at 12 (citing App. p. 169). This is an inaccurate statement of the evidence presented at trial. In the portion of the trial transcript cited by Ms. Thomason, Mr. Coake actually testified that the items repaired prior to closing were those that *the Coakes and their realtor* noticed as they walked the Property before making an offer:

All the items we found through the inspections and *the realtors* [sic] inspections were taken care of, yes.... When we did the inspection on the property, we noted ... the attic fan did not work. We wanted that fixed. *The realtor and ourselves* noticed that the air conditioning upstairs didn’t work. That’s why the condenser outside, the air conditioning had to be replaced. *Those are the items we found as we walked through the property the first time we inspected it back in June.* That wasn’t found by an inspector, no.

(App. pp. 169-70 (emphasis added).)

Second, the Coakes did not have access to the home inspection report prior to the closing. Certainly, a buyer who obtains a home inspection within a reasonable period prior to closing, and who then proceeds to closing with no further comment, should be assumed to have reviewed the report and to be satisfied with its contents. Such an assumption is not warranted here, however, given that the report arrived during or after closing, and the Coakes's circumstances placed them under substantial pressure to proceed with the transaction without reviewing the home inspection report.

III. THE COURT OF APPEALS CORRECTLY HELD THAT THE COAKES'S DAMAGES MAY BE MEASURED BY THE AMOUNT THEY SPENT TO REPAIR UNDISCLOSED DEFECTS.

The Court of Appeals correctly held that a jury could award damages based upon the amount the Coakes spent repairing the undisclosed defects to the Property.

The Disclosure Act does not set forth a mechanism for determining damages due to a seller's failure to disclose. Relevant case law, however, indicates that damages may be established by evidence of the amount spent repairing undisclosed defects. *See May v. Hopkinson*, 289 S.C. 549, 559-60, 347 S.E.2d 508, 514 (Ct. App. 1986). In *May*, the Court of Appeals held that one who claims a violation of a duty to disclose may present evidence of damages in either of two ways: (1) by comparing the value of the property as it was represented to be with the value as it actually was; or (2) by offering evidence of the costs of repairs. *See id.* What the plaintiff may not do is recover both the diminution in the value of the property and the cost of repairs. *See id.*

Here, the Coakes did not seek damages premised on the value of the Property. Rather, they introduced specific evidence concerning the amount spent on repairs for items not reported by Ms. Thomason on the Disclosure Statement:

\$800.00	Materials for repairing garage door (does not include 16-20 hours of Mr. Coake's labor)
\$500.00	Pool house plumbing repairs
\$450.00	Other repairs
\$3,800.00	Repair wood rot/termite damage
\$2,040.00	Fill and cap underground fuel tank
\$2,500.00	Alarm system
<hr/>	
\$10,090.00	Total

(App. pp. 142-49, 249.) This evidence enabled the jury “to determine the amount of damages with reasonable certainty or accuracy.” *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 434, 717 S.E.2d 765, 781 (Ct. App. 2011).

Ms. Thomason argues that because the Coakes realized a profit on the sale of the Property some 18 months after they purchased it, they cannot pursue a claim for violation of the Disclosure Act. This cannot be the standard; if it were, many (if not most) claims for violation of the Disclosure Act could be defeated by a simple showing that the property had appreciated in value between the time of the violation and the time of trial.⁵

⁵ This truth is easily illustrated. Suppose Buyer purchases a property that is represented (due to failure to disclose material defects) to be worth \$100,000; in fact, the property is only worth \$80,000. Buyer sells the property a few months later for \$125,000. It is true that Buyer has profited from the sale of the property. However, had Buyer been aware of the defects and paid the actual value of the property (\$80,000), his profit would have been \$20,000 greater. It defies logic to suggest that Buyer could not recover under these circumstances, yet that is precisely what Ms. Thomason argues.

IV. THE DISCLOSURE ACT APPLIES TO ALL RESIDENTIAL PROPERTY “FOR WHICH THE OWNER HAS DIRECT AND PRIMARY RESPONSIBILITY,” INCLUDING DETACHED STRUCTURES

The Coakes’s damages included \$5,550.00 spent repairing the garage, apartment, and pool house. Ms. Thomason argues that she should not be liable for these damages because the Disclosure Act applies only to the main dwelling, not to any detached structures that may be on the property. The Court of Appeals found it unnecessary to address this argument. (App. p. 16.) If this Court elects to address the issue, the correct interpretation of the statutory language is that the Disclosure Act encompasses all structures on a property for which the owner has direct and primary responsibility.

The Disclosure Act requires homeowners to disclose certain information regarding “real property” being sold. S.C. Code Ann. § 27-50-40. The Act defines “real property” as “the lot or parcel *and* the dwelling unit described in the real estate contract.” S.C. Code Ann. § 27-50-10(8) (emphasis added). The contract of sale describes the Property as “*all* that lot or parcel of land, with the buildings and improvements thereon” located at 2208 E. North Avenue in Anderson. (App. p. 255 (emphasis added).) The property description in the sales contract thus clearly includes not only the dwelling house, but also the other improvements on the Property—including the garage and pool house.

In arguing that the disclosure obligation does not apply to detached structures, Ms. Thomason points to the Act’s definition of “owner,” which includes the qualification, “This disclosure is limited to the actual residential dwelling and does not address common elements or areas *for which the owner has no direct and primary responsibility.*” S.C. Code Ann. § 27-50-10(4) (emphasis added). If the statutory text did not include the italicized language, Ms. Thomason’s argument

might have some force. However, statutory interpretation requires that all of the text be considered and read as a whole in order to discern the intent of the legislature. See *Peake v. South Carolina Dep't of Motor Vehicles*, 375 S.C. 589, 597, 654 S.E.2d 284, 289 (Ct. App. 2007). When the phrase “actual residential dwelling” is read in context, it is clear that the legislative intent was relieve home sellers of a duty to disclose defects in areas for which they have no “direct responsibility,” such as the common areas of a condominium development. The distinction is not between “attached” and “detached” structures, but rather between areas controlled by the seller and areas not so controlled. The definition of “owner” thus dovetails with the disclosure obligation itself, which does not reach “conditions of the property of which the owner has no actual or constructive knowledge.” S.C. Code Ann. § 27-50-40(C).

The Act’s disclosure obligation reaches all portions of a property for which the owner bears daily responsibility, because the owner can be expected to know the condition of such areas. An owner cannot necessarily be expected to know the conditions of areas owned in common, and thus Act’s disclosure obligation does not reach those areas. This reading of the plain statutory language comports with the legislature’s manifest purpose in enacting the Disclosure Act, namely, to protect unwitting home purchasers from latent defects known to the seller.

V. MS. THOMASON IS NOT ENTITLED TO ATTORNEY’S FEES.

The Disclosure Act provides that the circuit court “*may* award reasonable attorney fees incurred by the prevailing party.” S.C. Code Ann. § 27-50-65 (emphasis added). According to the plain language of the statute, an award of attorney’s fees is discretionary with the court. *Accord Layman v. State*, 376 S.C. 434, 444,

658 S.E.2d 320, 325 (2008) (holding that circuit court has discretion to award attorney's fees under state action statute, S.C. Code Ann. § 15-77-300, which provides that the court "may" award fees to the prevailing party if certain factors are present); *New York Times Co. v. Spartanburg County School Dist. No. 7*, 374 S.C. 307, 312, 649 S.E.2d 28, 30-31 (2007) (holding that circuit court has discretion to award attorney's fees under South Carolina Freedom of Information Act, S.C. Code Ann. § 30-40-100(b), which provides that the court "may" award fees to a prevailing plaintiff). "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." *Layman*, 376 S.C. at 444, 658 S.E.2d at 325.

First, if this Court affirms the Court of Appeals and remands this case for retrial, Ms. Thomason will not be a prevailing party under the Disclosure Act and will have no claim for attorney's fees. Regardless of the outcome of the Coakes's appeal, however, the circuit court did not abuse its discretion in denying attorney's fees.

The circuit court clearly and correctly recognized that the Disclosure Act granted it the discretion to make an award of attorney's fees. (App. p. 67.) Therefore, there is no error of law that would mandate reversal of the denial of attorney's fees. With the appropriate standard in mind, the circuit court concluded that "due to the posture of the case being dismissed at the end of trial ... it would be fair and equitable to allow each party to pay their respective attorneys." (App. p. 67.) This ruling was not an abuse of discretion. The circuit court had previously found that a genuine issue of material fact existed as to whether Ms. Thomason fulfilled her duty to disclose under the Act. The court ultimately concluded, how-

ever, that Ms. Thomason was entitled to a directed verdict. In essence, then, the court ruled in favor of the Coakes on one issue, and in favor of Ms. Thomason on another. In light of these mixed rulings on the merits, it was certainly not an abuse of discretion for the circuit court to conclude that the “fair and equitable” solution would be to allow each party to bear its own attorney’s fees.

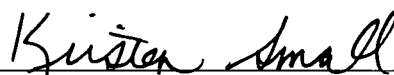
This conclusion is supported by the uncontroverted testimony at trial that the Coakes spent substantial sums to rectify defects in the home which Ms. Thomason failed to disclose. Notably, the circuit court did not find that the Coakes had not incurred these expenditures; it merely ruled that they could not recover them from Ms. Thomason.

Ms. Thomason maintains that she is entitled to an award of attorney’s fees because she prevailed against the Coakes’s “spurious,” “unreasonable,” and “unjustifiable” claims. Br. of Pet’r at 14-15. With respect, the Coakes’s claims are none of those things. Even if this Court rules against the Coakes on the merits of their appeal, the fact remains that the Coakes presented (1) sufficient evidence to reach the jury on the question of whether Ms. Thomason violated the Disclosure Act, (2) a substantial question as to whether the inspection they conducted was objectively reasonable, and (3) uncontroverted evidence of their expenses to repair the undisclosed items.

CONCLUSION

The Coakes respectfully submit that this case was correctly decided by the Court of Appeals and that there is no basis for granting Ms. Thomason's Petition.

Respectfully submitted,



Kirsten E. Small
James A. Blair, III
NEXSEN PRUET, LLC
55 East Camperdown Way (29601)
Post Office Drawer 10648
Greenville, SC 29603-0648
864.370.2211

*Attorneys for Respondents
Robert and Susan Coake*

August 8, 2012
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

On certiorari to the Court of Appeals of South Carolina
Opinion No. 4761 (S.C. Ct. App. filed December 1, 2010)

Robert Coake and Susan Coake, Respondents,

v.

Kathleen Burt, n/k/a Kathleen Thomason, Petitioner.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of Respondents complies with Rule
211(b), SCACR.


Kirsten E. Small, Esq.
James A. Blair, III, Esq.
NEXSEN PRUET, LLC
55 E. Camperdown Way, 4th Floor (29601)
Post Office Drawer 10648
Greenville, South Carolina 29603
PHONE: 864.370.2211

Attorneys for Respondents

August 8, 2012
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

AUG - 9 2012

J. Cordell Maddox, Jr., Circuit Court Judge **S.C. Supreme Court**

On certiorari to the Court of Appeals of South Carolina
Opinion No. 4761 (S.C. Ct. App. filed December 1, 2010)

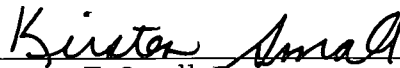
Robert Coake and Susan Coake, Respondents,

v.

Kathleen Burt, n/k/a Kathleen Thomason, Petitioner.

PROOF OF SERVICE

I certify that on this day I have served the Brief of Respondents on Kathleen Thomason by depositing a copy of it in the United States mail, postage prepaid, addressed to her attorney of record, Harold P. Threlkeld, P.O. Box 1385, Anderson, South Carolina 29622-1385.



Kirsten E. Small, Esq.
NEXSEN PRUET, LLC
55 E. Camperdown Way, 4th Floor (29601)
Post Office Drawer 10648
Greenville, South Carolina 29603
PHONE: 864.370.2211

August 8, 2012
Greenville, South Carolina

Attorney for Respondents

NEXSEN | PRUET **RECEIVED**

AUG 09 2012

S.C. SUPREME COURT

August 8, 2012

pm 8-8-12

Kirsten E. Small
Special Counsel
Admitted in SC, NC, MD

The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

Re: *Robert Coake and Susan Coake v. Kathleen Burt,*
n/k/a Kathleen Thomason
Opinion No. 4761

Dear Mr. Shearouse:

Enclosed for filing please find the original and 17 copies of Brief of Respondents in the above-referenced matter. Please file the original and return two filed, stamped copies in the enclosed, self-addressed, stamped envelope.

As noted on this letter and as further evidenced by the Proof of Service, opposing counsel is being served.

Thank you for your assistance in this matter.

Very truly yours,

Kirsten Small

Kirsten E. Small

KES/bc
Enclosures

cc: Harold B. Threlkeld, Esquire w/encl.

Charleston
Charlotte
Columbia
Greensboro
Greenville
Hilton Head
Myrtle Beach
Raleigh

55 East Camperdown Way
Suite 400 (29601)
PO Drawer 10648
Greenville, SC 29603-0648
www.nexsenpruet.com

T 864.282.1112
F 864.477.2619
E KSmall@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law