THE STATE OF SOUTH CAROLINA
In the Court of Appeals

---

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

---

Case No. 2008-CP-10-0069

---

Dudley N. Carpenter and
Jane G. Carpenter
.....Respondents/Appellants,

v.

Charles L. Measter and
Barbara P.
Measter.....Appellants/Respondents.

---

# FINAL RESPONDENTS' BRIEF OF RESPONDENTS/APPELLANTS

---

Thomas C. Hildebrand, Jr.
Haynsworth Sinkler Boyd, P.A.
P.O. Box 340
Charleston, SC 29402
(843) 720-4437
(843) 722-2266 (facsimile)

Attorneys for Respondents/Appellants
Dudley N . Carpenter and Jane G. Carpenter

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES



STATUTES



OTHER AUTHORITIES



RULES

## STATEMENT OF ISSUES ON APPEAL

1. WAS THE MEASTERS' MOTION FOR JNOV BARRED BECAUSE THEY WAITED MORE THAN TEN DAYS TO FILE THEIR MOTION?

2. DID THE MEASTERS FAIL TO PRESERVE THEIR ARGUMENTS ON APPEAL BY FAILING TO MAKE PROPER MOTIONS FOR JNOV OR FOR NEW TRIAL BEFORE THE TRIAL COURT?

3. DID THE TRIAL COURT PROPERLY PROCEED WITH TRIAL ON CARPENTERS' CAUSES OF ACTION?

4. WAS THERE EVIDENCE TO SUPPORT THE JURY VERDICT FOR BREACH OF CONTRACT AND BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING IN A CONTRACT?

5. WAS THERE EVIDENCE TO SUPPORT THE TRIAL COURT'S AND JURY'S DETERMINATION THAT THE CARPENTERS' CLAIMS WERE NOT BARRED BY WAIVER, DISCLAIMER OR FORFEITURE/MERGER?

6. WAS THERE EVIDENCE TO SUPPORT THE JURY'S AWARD OF DAMAGES?

7. WAS THE TRIAL COURT CORRECT IN FINDING NO BASIS FOR A NEW TRIAL BASED ON THE MEASTERS' ASSERTION THEY SHOULD HAVE BEEN GIVEN ACCESS TO THE CARPENTERS' TRIAL BRIEF?

## STATEMENT OF THE CASE

Dudley "Chip" and Jane Carpenter (the "Carpenters" or "Respondents") filed this action against Appellants (the "Measters") on January 7, 2008 related to damages the Carpenters incurred with the purchase of a condominium on Seabrook Island, South Carolina. (R. pp. 22-30). The Complaint alleges six causes of action: breach of contract, breach of the South Carolina Residential Disclosure Act S.C. Code Ann. §27-50-10 ("Disclosure Act"), fraud, breach of contract accompanied by a fraudulent act, negligent misrepresentation, and breach of South Carolina's Unfair Trade Practices Act. (R. pp. 22-30).

Prior to trial, Appellants moved for summary judgment asserting various arguments against Respondents' six causes of action. The Hon. Markley Dennis subsequently issued an order granting Appellants motion to dismiss two of Respondents' claims (for fraud and negligent misrepresentation) but denying their motion as to unfair trade practices. (R. p. 3). The order did not dismiss, or even address, Respondents' three other causes of action.

When this case was called for trial before a different judge, the Hon. Deadra Jefferson, the Measters filed a motion requesting that Judge Jefferson interpret Judge Dennis's order as dismissing all of the Carpenters' causes of action, including the causes of action that were not mentioned in the prior order. (R. pp. 32-33). Judge Jefferson acknowledged that the Carpenters' UTPA claim was clearly still in the case, but she directed the parties to obtain clarification from Judge Dennis as to the intent of his prior order regarding the three causes of action that were not addressed in that prior order. (R. p. 173, lines 12-14). It was confirmed that counsel for Respondents would voluntarily

dismiss the UTPA claim and seek clarification from Judge Dennis (as directed by Judge Jefferson) on the remaining causes of action. (R. p. 174, lines 16-19).

Judge Jefferson then issued a form order which requested clarification from Judge Dennis as to the intent of his order, and stated that after Judge Dennis' reconsideration, the matter would be restored to the trial roster (if there were any causes of action remaining), or the case would be dismissed with prejudice. (R. p. 4).

The Carpenters, as directed by Judge Jefferson, then moved for Judge Dennis to clarify his order under Rule 54(b), SCRCP. (R. pp. 89-145). Judge Dennis then issued an order dated February 23, 2010 which ruled nunc pro tunc to clarify his prior order and which stated that that prior order denied the Measters' motion for summary judgment as to breach of contract, breach of contract accompanied by fraudulent act, and breach of S.C. Code Ann. §27-50-10, *et. seq.* (R. pp. 5-6). Stated otherwise, Judge Dennis clarified that the Carpenters' claims for breach of contract, breach of contract accompanied by fraudulent act, and breach of S.C. Code Ann. §27-50-10 were not and never had been dismissed and were still active. Judge Dennis then tried the case.

At the end of their case and at the end of trial, the Carpenters moved for directed verdict on all causes of action (R. p. 317, R. pp. 375-376) and the Measters similarly moved for directed verdict dismissing the Carpenters' causes of action. (R. p. 376). At the end of the Measters' case, the trial judge partially granted the Measters' motion for directed verdict and dismissed the Carpenters' claims for breach of the Disclosure Act and breach of contract accompanied by fraudulent act. (R. pp. 377-389). The case proceeded to the jury on the Carpenters' breach of contract action and the jury returned a verdict in favor of the Carpenters in the amount of $65,000. (R. p. 414, lines 9-12). The

Measters then moved for JNOV (R. pp. 146-162) and filed this notice of appeal on May 9, 2011. No motions for new trial were filed by the Measters.

## STATEMENT OF THE FACTS

This matter arises out of the purchase of a condominium by the Carpenters from the Measters. The contract to purchase the residence (the "Agreement") is dated March 17, 2007, and the closing took place on July 17, 2007. (R. pp. 416-421) The Carpenters paid $675,000 for the residence. (R. p. 416). The sellers are both attorneys (R. pp. 274-275, R. pp. 281-282) and, in fact, Mr. Measter is a highly-credentialed international maritime arbitrator. (R. pp. 282-283). The Measters were required, and did, execute a Residential Property Disclosure Statement ("Disclosure Statement") related to the sale of the property as mandated by South Carolina law and the Agreement. (R. p. 418). Although the Measters could have declined to provide a Disclosure Statement, or could have made "No Representation" as to any specific aspect of the residence, they chose to make a disclosure and explicitly stated that there were no problems related to the:

> Foundation, floors or structural components.
>
> Water seepage or leakage.
>
> Heating or air conditioning (the Measters represented the age of the heating unit as being one half year old and the cooling unit one year old).
>
> Violations of building codes.
>
> Lawsuits or proposed assessments that could affect title to the property. (R. pp. 422-425).

Contrary to their express representations in the Disclosure Statement that there were no problems with the residence, the undisputed evidence at trial established that the Measters were members of an active class action lawsuit (R. p. 333, R. pp. 335-336)

which alleged defects to both common and private elements related to the foundations, floors and water intrusion, and which sought damages, including loss-of-use damages, on behalf of the Measters as individual class members. (R. pp. 349-356 and R. pp. 436-484). That class action lawsuit alleged that there were damages in excess of $15 million suffered by the class members (R. p. 354) and, in fact, the Measters received compensation of approximately $16,000 because of their status as plaintiffs in that suit. (R. p. 257, 279).

In addition, prior to the closing, the Annual Meeting of the regime was held and the minutes were mailed to the Measters which stated that structural repairs were just about to commence to their particular building. (R. pp. 267-269). Moreover, the repair contractor who was about to commence repairs to the Measters' building met with Mr. Measter before the closing and advised him that the major structural repairs were about to commence to the building. (R. pp. 238-240). The repairs that were actually performed to the Carpenter unit were extensive and included four-by-four holes that were cut through the floors of each room in the residence (R. p. 234); the floor finishes were ruined and had to be replaced (R. pp. 205-206) and the Carpenters were dispossessed from their unit from four months while those repairs were performed. (R. pp. 294-295).

In fact, the day that the Carpenters were scheduled to move into their unit, they were approached by that same repair contractor who told them that the repairs were about to start and that they would not be able to move in for an extended period of time. (R. pp. 197-199). Moreover, there was testimony that the Measters had made prior repairs to their particular unit to correct sagging floors. (R. pp. 244-245, R. pp. 271-272).

## ARGUMENT IN REPLY

This case stems from a jury verdict finding the Measters breached their contract with the Carpenters. An action for breach of contract is an action at law. Roberts v. Gaskins, 327 S.C. 478, 486 S.E.2d 771 (Ct. App. 1997). As such, the jury's findings of fact must be affirmed on appeal unless there is no evidence to support them. Creighton v. Coligny Plaza P'ship, 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1999).

### 1. THE MEASTERS' MOTION FOR JNOV WAS BARRED BECAUSE THEY WAITED MORE THAN TEN DAYS TO FILE THEIR MOTION.

As an initial matter, this appeal should be dismissed as untimely because the Measters failed to timely file their post trial motions. On June 3, 2010, the Carpenters were awarded a $65,000 jury verdict. (R. p. 414). The Measters requested and were given ten additional days to file post-trial motions. (R. p. 415, lines 19-23). The only post-trial motion which the Measters submitted was a Motion for Judgment NOV (R. pp. 146-162). Rule 50, SCRCP, which governs motions for judgment NOV, states that the motion shall be "made" promptly after the jury is discharged or within ten days in the discretion of the court. The language in Rule 50 differs from that found in Rule 59, SCRCP, which governs motions for a new trial. The Reporter's Notes following the Rule 50 state that "[t]he parties may be allowed up to ten (10) days to file the motions." Rule 50, SCRCP, Reporter's Notes. The ten day filing period for the Measters to file their Motion for Judgment NOV began to run on Thursday, June 3, 2010. Because the tenth day, June 13, 2010, was a Sunday, the period expired on Monday, June 14, 2010. Although Appellants served Respondents with their motion NOV on Monday, June 14 (by hand delivery) they inexplicably waited until the following day to file and serve (again, by hand delivery) their motion with the court. (R. pp. 146-162).

Respondents anticipate that Appellants will argue that service on Respondents on June 14, 2010 was effective to ensure their Motion was timely. However, any such argument would fail for two reasons. First, the Reporter's Notes to Rule 50, SCRCP plainly provide for parties to file their motions within ten days. Second, nothing in Rule 50, SCRCP suggests that service is effective to prolong the trial court's jurisdiction.

Where there is any ambiguity in a post-trial rule concerning timeliness that can be answered in the Reporter's Notes to that rule, the prescriptions in the Reporter's Notes should be followed. Boone v. Goodwin, 314 S.C. 374, 444 S.E.2d 524 (1994).

The recent case of Curtis v. Blake, 381 S.C. 189, 672 S.E.2d 576 (2009) features procedural facts that are almost identical to the ones here, except that under consideration was the timeliness of a motion for a new trial under Rule 59(b), SCRCP as opposed to a written motion JNOV under Rule 50(b), SCRCP Id. In Curtis, the petitioner served but did not file a Rule 59(b), SCRCP motion within ten days. Id. at 191. After acknowledging that the term "made" is not defined in Rule 59(b), SCRCP the South Carolina Supreme Court noted that "other portions of Rule 59, SCRCP utilize service as the effective date for making a motion." Id. Thus, it observed that "service" is clearly enunciated for compliance with Rule 59(c), SCRCP, Rule 59(d), SCRCP and Rule 59(e), SCRCP. Id. Reasoning that these three instances found elsewhere in Rule 59, SCRCP informed how motions are "made" in Rule 59(b), the Court concluded that written Rule 59(b), motions are timely when served within the allotted time period. Id.

Unlike Rule 59, SCRCP which contains numerous references to "service" as the effective means for moving under that rule, no portion of Rule 50, SCRCP provides, or suggests that written JNOV motions are effectively made when they are served. Rather,

the only place in Rule 50, SCRCP that provides guidance on how to effect a written motion JNOV occurs in the Reporter's Notes, which as already discussed herein, state that "parties may be allowed up to ten days to file their motions." (emphasis added).

Because Appellants' Motion JNOV was not filed within ten days, it was barred and the Appellants' Appeal should be dismissed.

2. THE MEASTERS FAILED TO PRESERVE THEIR ARGUMENTS ON APPEAL BECAUSE THEY FAILED TO MAKE PROPER MOTIONS FOR JNOV OR FOR NEW TRIAL BEFORE THE TRIAL COUNRT.

Appellants moved for JNOV only on the grounds that Respondents (1) waived, (2) disclaimed and (3) forfeited any rights that Respondents may have had under the contract. (R. pp. 147-152)

Appellants did not move for directed verdict and JNOV on the grounds that the cause of action for breach of contract was not properly in the case because of an earlier summary judgment order (Issue 1 on appeal), that there was no breach of contract (Issue 2 on appeal), that Respondents claims are barred by estoppel (Issue 3 on appeal), that there was an improper jury charge and that the jury could not find breach of implied good faith in a contract (Issue 4 on appeal), that there was an improper award of damages (Issue 5 on appeal), that Respondents claims are barred by merger (Issue 6 on appeal) or that the trial judge erred in failing to provide Appellants with Respondent's pre-trial brief (Issue 6 in Appellants Argument). As a result, all of those grounds for appeal should be dismissed.

Appellants did not file any motions for new trial. Therefore, Appellants have no basis for appeal regarding a jury charge (Issue 4 on appeal), that there was in improper award of damages (Issue 5 on appeal), or that the trial court committed error in failing to

require Respondents to provide Appellants with Respondents Pre-trial Brief (Argument 6).

3. THE TRIAL COURT PROPERLY TRIED ALL OF THE ACTIVE CAUSES OF ACTION IN THIS CASE.

Prior to trial, Appellants moved for summary judgment asserting various arguments against Respondents' six causes of action. Judge Dennis subsequently issued an order granting Appellants' motion to dismiss two of Respondents' claims (for fraud and negligent misrepresentation) but denying their motion as to unfair trade practices. (R. p. 3). The order did not address, much less dismiss, Respondents' three other causes of action, namely; breach of contract, breach of contract accompanied by fraudulent act or breach of S.C. Code Ann. §27-50-10, *et. seq.*

When this case was called for trial before Judge Jefferson, the Measters filed a motion requesting that Judge Jefferson interpret Judge Dennis' order as dismissing all of the Carpenters' causes of action, including the causes of action that were not mentioned in the prior order. (R. pp. 32-33). Judge Jefferson acknowledged that the Carpenters' UTPA claim was clearly still in the case, but she directed the parties to obtain clarification from Judge Dennis as to the intent of his prior order regarding the three causes of action that were not addressed in that prior order. As Judge Jefferson stated: "And so it seems to me it's in everyone's best interest that you all get clarity on Judge Dennis's ruling and that would be the court's position on it." R. p. 173, lines 12-14). It was confirmed that counsel for Respondents would voluntarily dismiss the UTPA claim and seek clarification from Judge Dennis (as directed by Judge Jefferson) on the remaining causes of action.

Judge Jefferson then issued a form order which stated, in pertinent part:

> The parties are unclear as to the interpretation of Judge Dennis's Order....
>
> [I]n the interests of justice and for clarity of the record for appellate purposes Mr. Hildebrand will file a Motion to Clarify Judge Dennis' order. After Judge Dennis's consideration of the motion if there is remaining any cause of action the matter will be restored to the jury trial roster for trial and if none remains the matter will be ended with prejudice so that the parties may avail themselves of the appellate process.

(R. p. 4).

In short, Judge Jefferson's order requested clarification from Judge Dennis as to the intention of his order, and stated that after Judge Dennis' ruled, the matter would be restored to the trial roster (if there were any causes of action remaining), or the case would be dismissed with prejudice. In effect, Judge Jefferson's order requesting clarification simply removed the case from the active roster and held that further handling would be contingent on Judge Dennis' subsequent ruling.

The Carpenters, as directed by Judge Jefferson, then moved for Judge Dennis under Rule 54(b), SCRCP to clarify his order. (R. pp. 89-145). In the meanwhile, both Appellants and Respondents moved pursuant to Rule 59(e), SCRCP for Judge Jefferson to amend her order of November 9, 2009 that sought clarification from Judge Dennis. (R. p. 7).

Before Judge Jefferson ruled on the Rule 59(e), SCRCP motions of both the Appellants and Respondents, Judge Dennis issued an order dated February 23, 2010 which ruled nunc pro tunc to clarify his prior order and found that that prior order denied the Measters' motion for summary judgment as to breach of contract, breach of contract accompanied by fraudulent act, and breach of S.C. Code Ann. §27-50-10, et. seq. (R. pp. 5-6). Stated otherwise, Judge Dennis clarified that the Carpenters' claims for breach of contract, breach of contract accompanied by fraudulent act, and breach of S.C. Code Ann.

§27-50-10 were not and never had been dismissed and were still active. Judge Dennis then tried the case on the remaining causes of action.

Rule 54(b), SCRCP specifically allows a Judge to revise an order that adjudicates fewer than all the issues in a case "at any time before the entry of judgment adjudicating all the claims and rights and liabilities of all the parties." In this case, there was no order dismissing the Carpenters' causes of action for breach of contract, breach of contract accompanied by fraudulent act, and breach of S.C. Code Ann. §27-50-10, *et. seq.*, and Judge Dennis specifically ruled nunc pro tunc that that was never his intention. Judge Jefferson's order requesting clarification of Judge Dennis's prior order was simply that; a request for clarification that noted how the action would proceed depending on Judge Dennis' ruling. There was never an order dismissing all of the Carpenters' causes of action (as seen by Judge Dennis' two orders) and in any event Judge Jefferson's order seeking clarification was not a final order because her ruling on the Rule 59(e), SCRCP motions by both Appellants and Respondents came after Judge Dennis' order clarifying that three of Respondents claims were viable for trial.

Even if Judge Dennis had not issued his subsequent order nunc pro tunc clarifying his first order, it would have been improper to rule that the first order dismissed all of the Carpenters' causes of action.

"As a general rule, judgments are to be construed like other written instruments. The determinative factor is the intent of the court, as gathered, not from an isolated part thereof, but from all the parts of the judgment itself. Hence, in construing a judgment, it should be examined and considered in its entirety." 46 Am. Jur. 2d Judgments § 73 (1969). "If the language employed is plain and unambiguous, there is no room for

construction or interpretation, and the effect thereof must be declared in the light of the literal meaning of the language used." 49 C.J.S. Judgments § 436 (1947). [1] However, if an order is ambiguous and uncertain, a reviewing court "must look to all parts of the order and to the record to ascertain the trial court's intent in issuing the order" and moreover "must construe the order in the light of what was before the court and the accompanying circumstances." Sunamerica Financial Corp. v. Equi-Data, Inc., 299 S.C. 175, 178, 383 S.E.2d 8, 10 (Ct. App. 1989), citing Drawdy v. Drawdy, 285 S.C. 159, 328 S.E.2d 133 (Ct. App. 1985); 46 Am. Jur. 2d Judgments § 73 at 363 (1969); 49 C.J.S. Judgments § 436 at 867 (1947) (emphasis added). Further, "'the interpretation or construction of a judgment must be characterized by justice and fairness.'" Widewater Square Assocs. v. Opening Break of Am., 314 S.C. 149, 151, 442 S.E.2d 185,186 (Ct. App. 1994), quoting Eddins v. Eddins, 304 S.C. 133, 136, 403 S.E.2d 164, 166 (Ct. App. 1991) (quoting 46 Am. Jur. 2d Judgments § 73 (1969)). [2]

A hearing on the Measters' Motion for summary judgment was held before Judge Dennis on July 6, 2009. At the hearing, Judge Dennis indicated that he felt that the tort claims might be barred by the economic loss doctrine, but he stated there was sufficient evidence to proceed with the contract claims. (R. pp. 168-169).

At the hearing on the motion, the Measters' attorney argued primarily that the Carpenters' claims were barred by the economic loss rule and should proceed under the breach of contract claims unless the court found that the contract claims had been waived. (R. pp. 163-166). As stated by Mr. Stuckey, "The exclusive remedy of Plaintiffs in this

---

[2] "In construing an ambiguous order . . ., the determinative factor is to ascertain the intent of the judge who wrote the order." Eddins v. Eddins, 304 S.C. 133, 135, 403 S.E.2d 164, 166 (Ct. App. 1991) (citing Weil v. Weil, 299 S.C. 84, 382 S.E.2d 471 (1989)).

case is to proceed under the contract.... So we think those three tort causes of action should be dismissed and the Plaintiffs can then allegedly go forward on his remaining three causes of action." "So we think by those provisions, your Honor, that the Plaintiffs are limited to the provisions of the contract, the claim under the contract, and that the contract clearly provides that they have waived, that they have disclaimed and, accordingly do not have any remedy under the contract." (R. p. 163, line 22-p. 164, line 10).

Where a judgment is silent with regard to the disposition of a matter, it is presumed that the claim is denied. Sun Finance Co. v. Jackson, 525 So. 2d 532, 533 (La. 1988). [3] ; 46 Am. Jur. 2d. Judgments § 94.

The record, including the transcript of the hearing on Summary Judgment, makes it patently clear that Judge Dennis's order only dismissed two of Respondents' six causes of action. As a result, this matter appropriately proceeded to trial.

4. THE RECORD CONTAINS EVIDENCE TO SUPPORT THE JURY VERDICT FOR BREACH OF CONTRACT AND BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING IN A CONTRACT.

There was a host of evidence introduced at trial from which the jury rightfully found that the Measters breached their contract with the Carpenters. Paragraph 19 of the Agreement To Buy and Sell Real Estate Condominiums (the "Agreement") provided that the Measters would execute a Seller's Property Condition Disclosure Statement. (R. pp. 416-421). The Measters had the option of providing a Disclosure Statement or not

[3] Moreover, other courts have noted "a judgment which grants part of the relief but omits reference to other relief put in issue by the pleadings will ordinarily be construed to settle all issues by implication." Wilson v. Wilson, 532 F.Supp. 152 (D. La. 1980). (emphasis added); 46 Am. Jur.2d. Judgments 94. Judge Jefferson construed the Order as disposing the other causes of action by implication.

providing a Disclosure Statement, and they elected to provide one. (R. p. 418). Paragraph 19 of the contract provides in pertinent part:

> Buyer and Seller agree that a Seller's Property Condition Disclosure statement, as required by South Carolina Code of Laws, as amended, Section 27-50-10, et. seq. has been provided to Buyer by Seller prior to the ratification of this agreement. If the Seller discovers, after his delivery of a disclosure statement to a Buyer, a material inaccuracy in the disclosure statement or the disclosure is rendered inaccurate in a material way by the occurrence of some event or circumstance, the Seller shall correct promptly the inaccuracy by delivering a corrected disclosure statement to the Buyer or make reasonable repairs necessitated by the occurrence before closing.

The Disclosure Statement (R. pp. 422-425) defines what a "No" representation by the Measters on the form would mean. The Disclosure Statement reads:

> 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.

The Disclosure Statement then goes on to state, in all capital letters and in bold print "DO YOU HAVE KNOWLEDGE OF ANY PROBLEM (MALFUNCTION OR DEFECT) WITH ANY OF THE FOLLOWING"

The Measters checked "No" on several pertinent items, indicating they had no knowledge of any deficiencies with the following:

1. Foundation, floors or structural components.
2. Water seepage or leakage.
3. Heating or air conditioning (the Measters represented the age of the heating unit as being one half year old and the cooling unit one year old).
4. Violations of building codes.
5. Lawsuits or proposed assessments that could affect title to the property.

At trial, the evidence established the following facts which support the jury's finding that the Measters made misrepresentations in the Disclosure Statement:

1. The Measters were members of a class action lawsuit that was still active and which alleged claims for defects to all the buildings, and the Carpenters' building, for both the common elements and the private elements.

- The Measters bought their unit in 1998. (R. p. 323, lines 19-22).
- There had been general structural problems and water intrusion problems with all of the buildings as far back as 1990 that were generally known to the regime members. (R. p. 254, lines 6-20) (R. pp. 436-484).
- A class action was filed on August 18, 2000 (R. pp. 436-484) against the regime officers alleging that there were structural deficiencies and water intrusion in the buildings that had not been corrected. (R. pp. 257-258) (R. pp. 436-484).
- The Measters were members of that class action. (R. p. 333, lines 1-13).
- The class action lawsuit was still active at the time of the sale to the Carpenters, and there were motions regarding attorneys' fees and other issues. (R. pp. 335-336).
- There were known structural problems with all of the buildings, including building 8 (where the Measter/Carpenter unit was located), where all of the buildings had to be jacked up and repaired. (R. p. 258, line 22-p. 260, line 20).
- Interior problems because of the sagging buildings included cracked sheetrock on the inside and sagging floors. (R. p. 261, line 16-p. 262).
- The class action pleadings state that deficiencies exist in all the buildings that will cause deteriorating and sagging floors and walls, carpentry and doors out of trim and out of line, and with all conditions continuing to worsen. (R. pp. 351, lines 6-13). (R. pp. 448-450 and R. pp. 474-475);
- and that the damages would damage not only the regime but "the individual property of the plaintiffs' in the class." (which included the Measters) (R. p. 351, lines 21-24);
- and that it would cost in excess of $15 million to fix all of the problems "and to compensate the class for the resulting loss of use for the apartments during said repairs." (R. p. 354, lines 4-15).

- One purpose of the class action was to compensate each of the individual owners for the amounts that they would be assessed to fund the repairs to the common elements. (R. p. 357, line 8-p. 358, line 17);

- and it was specifically known that repairs and funds and assessments would be needed for the repair of building 8. (R. p. 359).

- The Measters were active members of the community and with the HOA board, "they attended meetings and voiced their opinions on certain items". They also attended the hearing where the funds for the class action settlement were disbursed. (R. p. 361, line 21-p. 362, line 12).

2. The Measters were specifically aware, prior to the sale to the Carpenters, that major repairs were about to begin on their particular building.

- The annual meeting of the HOA regime is a big deal. (R. p. 267) and Notice is given to all of the owners. (R. p. 267) and agendas are provided and meeting minutes are provided. (R. p. 267).

- The report for the Annual Meeting (R. pp. 428-431) held on June 2, 2007, was provided to each of the unit owners. (R. p. 267).

- At the time of that report, repairs to building 8 were to begin "immediately" (R. p. 270, lines 4-9) which included the "repair of the sagging, sinking three-bedroom stacked buildings" which contained the Carpenters' unit. (R. pp. 268-269).

- The settlement proceeds from the class action (approximately sixteen thousand dollars) were supposed to be used to fund the repairs to the buildings. (R. p. 270, line 10-p. 271, line 1).

- Herman Hatfield, the contractor who did the repairs, talked with Mr. Measter in June, 2007, when Mr. Measter walked out of his unit. (R. pp. 238-240).

- Hatfield told Mr. Measter that he was going to do the repairs including jacking up of the entire building. (R. p. 240).

- Measter responded that "it wasn't no worry of his, he'd sold his unit." (R. p. 240, lines 16-17).

- Hatfield saw Mr. Measter at the building a couple of weeks later and Mr. Measter asked when the repairs were going to start and Mr. Hatfield said he did not know when. (R. p. 241, lines 19-24).

- The Hatfield testimony is effectively undisputed by Mr. Measter. When repeatedly asked about the conversation, did not deny that it took place, he simply replied that he did not recall it. (R. pp. 284-286, line 6).

3. The repairs to the Measters' unit were extensive and included both the common elements and the interior private elements.

- The floors in building 8 were noticeably sagging. (R. p. 232).
- The floors had to be jacked up to make them level. (R. p. 232).
- The jacking moved up the entire building and impacted the flooring. (R. pp. 231-232).
- In order to fix the Carpenters' unit, Hatfield had to cut four-foot by four-foot holes in every floor. (R. p. 234).
- Hatfield had to jack up unit 1964 (the Carpenters' unit) and had to cut holes in the interior walls to check the framing. (R. pp. 236-237).
- Large holes were cut in every single room. (R. p. 200, line 18-p. 201, line 5) and ruined all of the tile floors and floor coverings. (R. p. 203, lines 9-25) which the Carpenters had to replace. (R. p. 205, line 20-p. 206, line 17).

4. There was testimony that prior repairs had been made to the Measters' unit to try to level the sagging floors in the unit.

- When Hatfield started work on the Measter unit, he saw evidence that there had been prior repairs made to fix sagging floors. (R. p. 244, line 11-p. 245).
- Another witness, Ken Schneider, also saw evidence in the Measter unit that there has been prior repairs to fix sagging floors. (R. pp. 271-272, line 7).
- The Measters admitted that they had done renovations which included replacing all the floors in their unit. (R. p. 338, lines 10-15).

5. The Measters understood the significance of the disclosure statement and understood that they had to fill it out completely and list deficiencies whether or not they related to common elements or private elements.

- When Mrs. Measter filled out the disclosure statement she understood that it was her obligation to complete it as to the entire unit, regardless of whether the deficiencies related to common elements or private elements. (R. p. 276, line 9-p. 277, line 19).

- Mrs. Measter sent an email after the closing stating that the Carpenters were terribly upset and were consulting a lawyer about suing them about misrepresentations. "Not only do I not blame them, Charlie and I are very embarrassed that we knew nothing about this." (R. pp. 329-331).

- The Measters' real estate agent, Janice Franklin, understood the importance of the disclosure statement and sat down with the Measters and reviewed each of the disclosures before they were filled out. (R. pp. 341-343).

- If Ms. Franklin had known of any of the Measters' misrepresentations, she would have told the Measters to complete the form differently. (R. pp. 341-344).

The Measters had a contractual obligation to truthfully complete a Disclosure Statement and to correct any material disclosures that were inaccurate. They breached this obligation by failing to disclose any of the deficiencies discussed above. Although the Measters argue that they had no obligation to disclose any of the above-referenced evidence because it affected only the "common elements" of the buildings, the facts established that the deficiencies impacted both the common elements and private elements, and individual claims for damages were being made on behalf of the Measters as members of the class. Moreover, a critical fact remains that the Measters could have made no representation as to the deficiencies that existed; however, they explicitly and affirmatively misrepresented that the deficiencies did not exist when they in fact did. The fact that the Measters could have legally chosen not to have made representations did not release them under the contract or the Disclosure Form from making false statements. As such, there was ample evidence to support the jury's verdict that the Measters breached their contract with the Carpenters.

5. THE EVIDENCE SHOWS THAT THE CARPENTERS' CLAIMS WERE NOT BARRED BY WAIVER, DISCLAIMER OR FORFEITURE/MERGER?

The Measters argue that the Carpenters' claims are barred by the doctrine of waiver (Appellants Argument II.E.1.), disclaimer (Appellants Argument II.E.2.), forfeiture/termination (Appellants Argument II.E.3.) and merger (Appellants Argument V.). The Carpenters respond to these arguments in turn.

1. Waiver

The Measters argue that the Agreement contained a provision referencing waiver from which the jury could only conclude that the Carpenters waived their right to sue for breach of contract. Paragraph 19B, "Inspection," which mentions waiver, merely provides that the Carpenters will obtain an inspection and notify the Measters of any issues warranting repair that the inspection revealed by a certain date. The testimony conclusively established that the Carpenters both obtained an inspection and requested that repairs be made by the Measters within the time period specified under Paragraph 19B. However and in any case, their failure to have done either or both these things would only have resulted in a waiver of "rights under the terms of this Paragraph." Paragraph 19B, aptly entitled "Inspection," in no way limits the Carpenters' rights to sue under the contract for misrepresentations.

2. Disclaimer

The Measters argue that a provision in the Agreement entitled 19H, "Disclaimer," under which the Measters disclaimed certain warranties, precludes the Carpenters' ability to sue for breach of contract. This too is an incorrect reading of the cited provision. First, the Carpenters never filed or alleged a warranty claim. Moreover, a disclaimer of future warranties about property conditions would not foreclose a suit for breach of

contract for known misrepresentations made by the disclaimer during the course of the agreement.

3. Forfeiture/Merger

The Measters' argument on forfeiture/merger echoes testimony given by the Measters at trial, which was that, even if the Measters did make misrepresentations, they could not be liable. (R. p. 337, line 4-p. 338, line 9). The Measters cite Paragraph 19E, "Repairs," in support of their position that the Carpenters forfeited all rights to sue the Measters because the Measters' obligations under that paragraph terminated on the date of closing. The Measters seem to assert that, because the closing occurred without their misrepresentations having been discovered, they outmaneuvered the Carpenters and successfully navigated around any legal accountability. However, the Carpenters have not sued the Measters for wrongfully refusing to pay for repairs, but for unjustified and known misrepresentations which the Measters made and continued to make through the date of closing.

The Measters' argument regarding merger is misplaced. The Measters argue that when the closing took place, any past representations of the Measters were annulled. This argument ignores the fact that the Carpenters did not have standing and were not damaged by the misrepresentations until they took title to the property. Moreover, the contract required the Measters to correct any disclosure inaccuracies "before closing." (R. p. 418). This provision was therefore not breached until the property was closed without the Disclosure Statement corrections being made.

6. THE EVIDENCE SUPPORTS THE JURY'S AWARD OF DAMAGES.

There was ample evidence to support the jury's award of damages. The jury awarded $65,000.00 in actual damages. Mr. Carpenter testified about damages well in excess of that amount consisting of the following:

Mr. Carpenter testified that they had significant out-of-pocket expenses related to the misrepresentations. (R. p. 292, lines 12-23). These included the costs to repack and reload their belongings when they could not move into the unit when they expected to, $1,492.75, (R. p. 432); the cost to store their belongings while the unit was being fixed, $263.00 for four months, for a total of $1,053.16 (R. pp. 294-295, R. p. 433); the cost to replace the air handler and condenser unit because of the repairs, $5,655.00, (R. p. 434); the cost to replace the subfloor, $2,961.00, (R. p. 297, R. p. 434); the cost to replace carpets, $5,755.00, (R. pp. 297-298, R. p. 434); the cost to replace ceramic tile, $5,401.00 (R. p. 298, R. p. 434); an assessment that the Carpenters had to pay to fund the repairs for their building, $7,515.00 (R. p. 298, R. p. 435).

Mr. Carpenter also testified that there was diminution in value of the structure because of the deficiencies of at least $50,000. (R. p. 301, line 25-p. 301, line 13). Mr. Carpenter is a graduate of the University of Pennsylvania. (R. p. 287, lines 19-25). The testimony of Mr. Carpenter as to his estimation of the property value came after he had heard the testimony of five prior witnesses regarding the property and the damages, and after he had heard extensive testimony regarding the property. The diminution was testified to and was computed based on Mr. Carpenter's assessment of the market value and cost of other units in the building. (R. pp. 300-301). Mr. Carpenter was cross-examined about appraised values and tax values in relation to his assessment of the property value (R. pp. 301-303) and it was established that Mr. Carpenter was

experienced with buying and selling real estate. (R. pp. 305-307). It is clear that Mr. Carpenter knew of his property well and offered an appropriate opinion. In short, Mr. Carpenter had sufficient basis to offer an opinion and the trial judge appropriately let him testify and allowed the jury to afford it the weight they deemed appropriate. See Gould v. O'Shaunnessy Realty Company 380 S.C. 548, 671 S.E.2d 79 (Ct. App. 2008) "Unless the landowner's want of qualification is so complete that his testimony is entirely worthless, it is for the jury to assess the value of his opinion." Id. at Headnote 8, p. 560. The air handler was twenty years old, not one year old as represented by the Measters. (R. p. 309, lines 9-25). Mr. Carpenter testified regarding fair rental value/loss of use of the unit for four months at $2,400.00 per month totaling $9,600.00. (R. p. 315, line 8-p. 316, line 8).

The out-of-pocket and loss of use damages totaled $39,483.35. The diminution in value of the building, as testified by Mr. Carpenter, was $50,000.00. These figures total $89,483.35. There was also testimony that additional repairs would need to be made to the buildings in the future, and the jury could have awarded damages for what it anticipated those future costs would be. (R. pp. 358-361). Moreover, as discussed above, evidence was introduced that the total damages sustained to the buildings was approximately $15 million (R. p. 354), so the jury may well have awarded damages for future repairs.

It was up to the jury's discretion as to the amount of damages to be awarded and there was ample evidence to support that award. Moreover, as noted above, the Measters filed no motion for a new trial regarding damages.

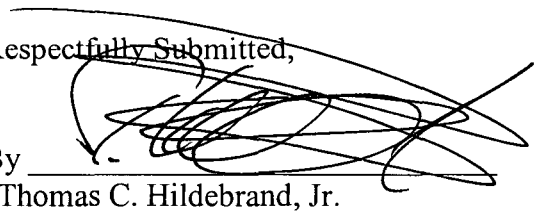
7. THE TRIAL COURT CORRECTLY FOUND NO BASIS FOR A NEW TRIAL BASED ON THE MEASTERS' ASSERTION THEY SHOULD HAVE BEEN GIVEN ACCESS TO THE CARPENTERS' TRIAL BRIEF.

The Measters claim that they should have been provided with a copy of the Carpenters' pretrial brief. However, they have shown no prejudice if they in fact did not get the brief, the pretrial brief was not introduced into evidence and there is no evidence that the Judge was impacted by it, there is no record of what the brief contained, and the Measters filed no motion for new trial based on this issue. The Carpenters submit that the Pretrial Brief issue was at worst harmless error.

## CONCLUSION

Because the Measters did not timely file their Motion for Judgment NOV, this Court lacks jurisdiction to hear this appeal. Alternatively, because the record contains evidence providing a sufficient evidentiary basis for the jury's verdict that the Measters breached their contract with the Carpenters, the verdict should be upheld and the judgment of the lower court should be affirmed.

Respectfully Submitted,



By _____
Thomas C. Hildebrand, Jr.

April 24, 2012

Haynsworth Sinkler Boyd, P.A.
P.O. Box 340
Charleston, SC 29402
(843) 720-4437

Attorneys for Respondents/Appellants
Dudley N. Carpenter and Jane G. Carpenter