THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Case No. 2016-CP-40-1536

Raymond J. Malejko and Cristine Malejko, individually and in the interests of a minor child, Appellants,

v.

Todd Corley, Janet Loper, NextGen Real Estate, LLC, Thomas Humphries, Dr. Roofs, Inc., Ray Mooneyham, Mooneyham Solar & Electric, Professional Home Inspections, Inc., Corley Enterprises, Inc. of South Carolina, and DBR Franchising, LLC, Defendants,

Of whom Janet Loper and NextGen Real Estate, LLC are Respondents.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. Did the lower court err in granting summary judgment in favor of Respondents?

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STATEMENT OF THE CASE

This matter came before the Richland County Court of Common Pleas by way of a complaint filed by Appellants on January 23, 2015. The matter was dismissed without prejudice pursuant to Rule 40(j), SCRCP, on November 23, 2015, and later restored to the active docket by order of the Honorable Alison R. Lee dated March 8, 2016.

In their complaint Appellants brought causes of action against Respondents Janet Loper and NextGen Real Estate, LLC ("Respondents") for actual and constructive fraud, negligent misrepresentation, breach of contract, breach of contract accompanied by a fraudulent act, negligence and breach of fiduciary duty. Respondents filed a motion for summary judgment as to all Appellants' causes of actions on April 10, 2017. A hearing on the motion was convened on July 26, 2017 at the Richland County Courthouse before the Honorable Robert E. Hood. Appellants were represented by Allen Bullard, Esquire. Respondents were represented by David Anderson, Esquire. The Court granted Respondents' motion by order dated July 31, 2017. The order was filed on August 3, 2017. Appellants received written notice of the order on August 10, 2017. Thereafter, on August 18, 2017, Appellants filed a motion requesting the lower court reconsider its order granting Respondents summary judgement. Appellants' motion was denied by the lower court by order dated September 8, 2017. Appellants received notice of the lower court's order on September 12, 2017. Appellants filed a timely notice of intent to appeal on September 20, 2017. Appellants' initial brief follows.

FACTS

Appellants purchased the residence located at 141 Fox Crossing Road, West Columbia, South Carolina from Todd Corley on March 31, 2014. (Appellants' Motion for Reconsideration, pp. 89-97). This purchase was a result of a contract the parties entered into on or about March 8, 2014. (Respondents' Memorandum in Support of Summary Judgment, Exhibit H). Prior to the March 2014 contract the parties had previously entered into a contract for the sale of the same property "as-is" sometime in January 2014. In contemplation of fulfilling the January 2014 contract, Appellants had the home inspected on or about January 16, 2014 by Professional Home Inspections. (Respondents' Memorandum in Support of Summary Judgment, Exhibit K). Because of the numerous items identified in the home inspection report as being in need of repair and their associated costs, Appellants decided not to purchase the property. (Respondents' Memorandum in Support of Summary Judgment, pp. 4-5 and Exhibit B). Appellants and Mr. Corley mutually agreed to terminate the January 2014 contract on January 29, 2014. After several weeks of looking for other potential homes, Appellants again approached Mr. Corley regarding purchasing Fox Crossing, because they observed repairs to the house being undertaken by Mr. Corley. (Respondents' Memorandum in Support of Summary Judgment, pp. 4-5, Exhibit B, Exhibit C; Deposition of Ray Malejko, p. 336, l. 13 - p. 337, l. 13). Unlike the January 2014 contract between the parties, the March 2014 was not an "as-is" contract. The March 2014 contract contained an addendum titled "Repair Request Proposal" obligating Mr. Corley to repair all the items identified in the January 16, 2014 home inspection, save one. (Respondents' Memorandum in Support of Summary Judgment, Exhibit H). Corley Enterprises was hired for that purpose. Mr. Corley also hired Dr. Roofs to repair roof leaks identified in the inspection report. (Respondents' Memorandum in Support of Summary Judgment, Exhibit I). Although

not initially hired by Mr. Corley for that purpose, Dr. Roofs agreed to conduct a roof inspection at the request of Respondents while on site for the repairs. (Affidavit of Raymond Malejko, ¶ 17(d)). Respondents called in Ray Mooneyham to perform an inspection of the HVAC system. (Affidavit of Raymond Malejko, ¶ 6). The parties closed on the purchase on March 31, 2014, and Appellants took possession of the property. (Appellants' Response to Motion for Summary Judgment, pp. 89-97).

Shortly after moving into the property Appellants began experiencing respiratory problems, headaches, bouts of sneezing and coughing, runny noses, and other health problems. (Complaint, ¶ 28; Deposition of Ray Malejko, p. 140, ll. 5-8). They also began having difficulty with roof leaks and noticed strange, foreign materials being blown into the home through the HVAC registers. (Complaint, ¶ 33; Appellants' Response to Respondents' Motion for Summary Judgment, pp. 66-67; Affidavit of Raymond Malejko, ¶ 4). Although they attempted to have Dr. Roofs remedy the roof leaks, their efforts were unsuccessful. (Deposition of Cristine Malejko, p. 143, l. 5 - p. 144, l. 14). Upon calling HVAC vendors to the house to diagnose their HVAC problems, they learned that the HVAC system contained animal feces and mold. (Respondents Memorandum in Support of Summary Judgment, Exhibit B; Deposition of Cristine Malejko, p. 154, ll. 22-24, p. 156, ll. 2-8). Both the roof and HVAC system were then inspected by qualified experts and found to be in defective condition. Replacement of both was recommended and eventually accomplished. (Complaint, ¶ 38; Appellants' Response to Respondents' Motion for Summary Judgment, p. 72; Affidavit of Raymond Malejko, ¶¶ 11, 13).

Unfortunately, in the intervening months between their purchase of the property and the discovery of the defective conditions of the roof and HVAC systems, Appellants were exposed to elevated levels of mold and particulates from animal feces in the indoor air. (Appellants'

Response to Respondents' Motion for Summary Judgment, pp. 68-70; Respondents Memorandum in Support of Summary Judgment, Exhibit B; Deposition of Cristine Malejko, p. 154, ll. 22-24). These toxins exacerbated Mr. Malejko's existing breathing problems and caused other deleterious health effects for both him and his wife, some of which persist today due to the length and degree of exposure. (Appellants' Response to Respondents' Motion for Summary Judgment, pp. 74-77; Affidavit of Ray Malejko, ¶¶ 11, 12). In conjunction with the elevated mold and harmful particulate levels discovered in the home, Appellants were also required to replace contaminated household items and furnishings and live elsewhere while the home was remediated. (Deposition of Cristine Malejko, p. 307, lines 21-25). These alternative living arrangements included living in an RV in the driveway at Fox Crossing for approximately five months. The illnesses and displacement experienced by the family naturally led to elevated stress levels which, in turn, caused mental health conditions for which Appellants required counseling, psychiatric treatment and medication.

Respondent Janet Loper ("Loper"), who is the owner, broker-in-charge and agent of Respondent NextGen Real Estate, LLC ("NextGen"), acted as a dual agent in the transaction, representing both Appellants (buyers) and Todd Corley (seller). (Respondents' Memorandum in Support of Summary Judgment, Exhibit G; Exhibit H). Appellants claim that Respondents breached various contractual, common law and fiduciary duties owed to Appellants and, thereby, proximately caused the injuries and damages they have suffered.

ARGUMENT I

I. The lower court erred in granting summary judgment to respondents.

In its order the Court provided four grounds for granting summary judgment. They were: (1) [Appellants'] claims against [Respondents] fail to state a cause of action as a matter of law; (2) [Appellants] have failed to make a showing sufficient to establish the requisite elements needed to prevail on any of the causes of action levied against [Respondents]; (3) [Appellant] Cristine Malejko does not have privity of contract needed to demonstrate breach of contract or breach of contract accompanied by a fraudulent act; and, (4) [Appellant] Raymond Malejko waived all claims versus [Respondents] with the Buyer Agency Contract, Designated Agency Contract, Dual Agency Contract and the Contract for Sale that he signed. (Order Granting Summary Judgment, pp. 1-2). Since the lower court order's does not provide any further analysis indicting the factual or legal foundation for its ruling beyond the above quoted language, and lower court did not make any definite on the record findings during the motion hearing, Appellants assume the lower court based its ruling on the arguments presented by Respondents at the hearing and in their memorandum in support of their motion. Accordingly, Appellants have addressed the issues raised by Respondents' therein.

Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002); Rule 56(c), SCRCP. "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Fleming, 350 S.C. at 493-94, 567 S.E.2d at 860 (citation omitted). Because summary judgment is a drastic remedy, it should be cautiously invoked to ensure that a litigant is not improperly

deprived of a trial. Spence v. Wingate, 395 S.C. 148, 716 S.E.2d 920 (2011). Consequently, summary judgment is proper when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004), but not when further fact inquiry is desirable to clarify the law's application. Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). "Summary judgment should not be granted even when there is no dispute as to the evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." Baugus v. Wessinger, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991).

A. Respondents' Duties

The lower court's first stated reason for granting Respondents' motion for summary judgment was Appellants' failure to state a cause of action as a matter of law. Since Respondents did not make a motion to dismiss for failure to state a cause of action, and the lower court considered matters outside the pleadings, the proper standard of review is the summary judgment standard enunciated above, rather than that applied to appellate review of the granting of a Rule 12(b)(6) motion. Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry, 403 S.C. 623, 743 S.E.2d 808 (2013) (Rule 12(b)(6) motion treated as motion for summary judgment if matters outside pleadings are presented to and not excluded by the Court).

Based on the lower court's comments during the motion hearing and the arguments advanced by Respondents, it appears the lower court's first ground for granting summary judgment is more accurately described as a finding that Appellants failed to present sufficient evidence of any duties owed to them by Respondents to sustain their various causes of actions. (Motion Hearing Transcript, p. 35, line 20 - p. 36, l. 6).

However, Respondents owed Appellants statutory, contractual and common laws duties of care requiring, among other things, the exercise of reasonable skill in discharging their duties and the exercise of care not to pass along misleading information. Further, as fiduciaries, Respondents were bound to refrain from acting adversely to Appellants' interests.

There are three statutory provision which speak to the duties owed by Respondents to Appellants that are relevant to this matter. Pursuant to S.C. Code Ann. § 40-57-137(A) a real estate brokerage company, such as NextGen, that provides services through an agency agreement for a client is bound by the duties of loyalty, obedience, disclosure, confidentiality, reasonable care, diligence, and accounting. Likewise, a licensee, such as Loper, who represents a seller shall treat all prospective buyers honestly and may not knowingly give them false or misleading information about the condition of the property which is known to the licensee or, when acting in a reasonable manner, should have been known to the licensee. S.C. Code Ann. § 40-57-137(F). Further, on reaching a written agreement to provide brokerage services to a potential buyer of real estate, a buyer's agent shall disclose to the buyer all relevant facts concerning the transaction which are actually known to the licensee or, if acting in a reasonable manner, should have been known to the licensee. S.C. Code Ann. § 40-57-137(H)(c).

Under the common law real 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, 513 S.E.2d 848 (1999); Hamby v. St. Paul Mercury Indemnity Co., 217 F.2d 78, 80 (4th Cir. 1954). The duty of an agent to make full disclosure to his principal of all material facts relevant to the agency is fundamental to the fiduciary relationship of principal and agent. Darby v. Furman Co., 334 S.C. 343, 513 S.E.2d 848 (1999); Bost v. Bankers Fire & Marine Ins. Co., 242 S.C. 274, 283, 130 S.E.2d 907, 911-12

(1963); Designer Showrooms, Inc. v. Kelley, 304 S.C. 478, 405 S.E.2d 417 (Ct. App. 1991). Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud. Ellie, Inc. v. Miccichi, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004); Anthony v. Padmar, Inc., 320 S.C. 436, 449, 465 S.E.2d 745, 752 (Ct. App. 1995). Nondisclosure is fraudulent when there is a duty to speak. Ardis v. Cox, 314 S.C. 512, 517, 431 S.E.2d 267, 270 (Ct. App. 1993).

Contractually, Respondents agreed to use their professional real estate knowledge and skills to represent Appellants in a diligent and effective manner. (Exclusive Right to Buy Buyer Agency Contract, ¶3). Respondents also undertook to disclose to Appellants any known material facts concerning the property or the transaction. (Dual Agency Agreement, ¶2(c)). In addition, Respondents agreed to take no action adverse or detrimental to Appellants' interest in the transaction. (Designated Agency Agreement). Finally, there exists in every contract an implied covenant of good faith and fair dealing. Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC, 414 S.C. 635, 780 S.E.2d 263 (Ct. App. 2015); Commercial Credit Corp. v. Nelson Motors, Inc., 247 S.C. 360, 367, 147 S.E.2d 481, 484 (1966).

Appellants submit that the foregoing statutory authority, South Carolina common law, and contractual provisions, all of which was before the lower court, present sufficient evidence that Respondents owed Appellants the following duties: (1) loyalty; (2) obedience; (3) disclosure; (4) confidentiality; (5) to exercise reasonable care; (6) to exercise diligence in the performance of their duties; (7) to treat Appellants honestly; (8) to refrain from giving Appellants false or misleading information; (9) to disclose to Appellants all relevant facts concerning the transaction which were known or reasonably should have been known by them; (10) a fiduciary duty to make full disclosure to Appellants of all material facts relevant to the

agency; (11) a fiduciary duty to fully disclose all known information that is significant and material; (12) a fiduciary duty to act in good faith and with due regard to the interests of Appellants; (13) to use their professional real estate knowledge and skills to represent Appellants in a diligent and effective manner; (14) to disclose to Appellants any known material facts concerning the property or the transaction; (15) to take no action adverse or detrimental to Appellants' interest in the transaction; and, (16) to act in good faith and to deal fairly with Appellants.

B. Evidence Supporting Respondents' Breach of Their Duties

Appellants presented more than a scintilla of evidence to support their claims that Respondents' actions and inactions breached their statutory, common law and contractual duties. Appellants presented testimony from an expert in real estate, Carlton Segars, who testified concerning a realtor's duty of care. Mr. Segars testified that Loper violated the duty of care she owed to Appellants by recommending Ray Mooneyham as an HVAC inspector without ensuring that he was licensed and qualified to perform such inspections.

> Q: Mr. Segars, I'm Allen Bullard. I represent the Malejkos. I have some questions for you. In the course of a real estate transaction, is it customary for a realtor to recommend inspectors to their client?
>
> A: Typically we tell the agents when we're going through the classes not to recommend one specific person, but to provide them with a list of people that they can choose from.
>
> **Q: In that list of people that you suggest that they choose from, should those individuals be licensed to do the work that they are being recommended for?**
>
> **A: Yes, sir.**
>
> Q: If Ms. Loper recommended an expert to perform an HVAC inspection on the house, would that have violated her duty of care if he was not licensed?
>
> A: If she recommended one individual, ideally she should have presented them with a choice, a list, as I mentioned, not just one specific person.

Q: If she recommended someone who did not hold a license to perform an HVAC inspection, would that have violated her duty of care?

A: If she knew that that person was not licensed.

Q: Did she have a duty to determine whether or not someone she's recommending is licensed or not?

A: That's what we tell the agents in training, to be sure they check their licenses and make sure they are qualified.

Q: So if, in fact, an HVAC inspector was recommended by Ms. Loper and it turns out he was not licensed, would that have violated her duty of care?

A: It could have.

(Deposition of Carlton Segars, p. 71, line 13 - p. 72, line 22). Mr. Segars also testified that Loper violated her duty of care by requesting that Thomas Humphries perform a roof inspection without first determining whether he was licensed and qualified to perform such an inspection.

Q: By the same token, if a fellow came, in this particular case let's say Mr. Humphries, came to do a roof repair, just to repair a roof, and while he's on the roof if Ms. Loper asked him would he mind doing an inspection while you're here, **is it proper for her to be asking somebody to do an inspection who she has just met for the first time standing on the roof?**

...

A: You could ask, but there's also -- the agent needs to check and make sure that the person that is doing that inspection is qualified to do that -- to do the inspection.

Q: And you would agree with me if you just met somebody for the first time, you wouldn't have any idea what their qualifications were, would you?

A: I wouldn't have any idea as to what their qualifications were.

Q: So you think its okay for Ms. Loper to go ahead and recommend this guy to do an inspection that she just met for the first time?

...

A: Personally, I wouldn't do that.

Q: Do you think it's a violation of her duty of care to do so?

...

A: Personally, I do.

(Deposition of Carlton Segars, p. 72, line 23 - p. 74, line 3). Furthermore, Mr. Segars testified that Loper violated her duty of care when she presented Appellants with a document which purported to be a letter from the roof inspector on the roofer's letterhead, which was not, in fact, from the roof inspector, but was, in reality, a document which she had created herself.

> Q: If the roofer who did the inspection sent Ms. Loper an e-mail that contained a written explanation of the work he had performed, **would it be proper for Ms. Loper to copy that e-mail into a document and put her own letterhead on it purporting to be from the roofer, basically creating a document that didn't exist and then handing it to her clients?**
>
> ...
>
> **A: I think that would be improper if she created a document.**
>
> **Q: Would it be a violation of her duty of care?**
>
> ...
>
> **A: I would consider it as a violation of that.**

(Deposition of Carlton Segars, p. 74, lines 5 - 23). In addition, Mr. Segars testified that Loper violated her duty of care when she erroneously informed Appellants that they were not entitled to a Property Condition Disclosure Statement from the seller.

> Q: If Ms. Loper informed both the buyer and the seller that the seller was exempt from filling out a property disclosure form prior to them contracting, would that be a proper statement for a realtor to make? I mean, this seller was not exempted in any way unless the parties agreed to it in the contract, right?
>
> A: Right.
>
> Q: So if she told them before the contract, "Y'all don't have to enter into a property disclosure because you're exempt," that's not proper, is it?

A: Would she have known that they would not -- that the seller was exempt? What would she be basing that on?

Q: Let me show you this. This is Exhibit No. 37. It says, "Residential Input Sheet." It's dated 11/30/13, isn't it?

A: Yes, sir.

Q: And it says, "Exempt from property disclosure, X," doesn't it?

A: Yes, sir.

Q: So Ms. Loper had decided in November of '13 that Mr. Corley was exempt from filing a property disclosure, hadn't she?

A: That's what it appears.

Q: And that's not proper, is it?

A: No, sir.

Q: It's not correct, is it?

A: No, sir.

Q: And it's a violation of her duty of care to tell the seller and the buyer that he's exempt, isn't it?

A: She's to inform them of what that property disclosure is and tell them what the exemptions are and if they meet them, then mark this accordingly.

(Deposition of Carlton Segars, p. 74, line 25 - p. 76, line 11). Moreover, Mr. Segars testified that it was a violation of her duty of care for Loper to withhold the fact she knew that the person who lived in the property from 1989 to 2010, Clementina Garvin, was the mother of a friend and former business associate of hers and that she knew how to contact both Mrs. Garvin and her daughter.

Q: Now, if Ms. Loper was aware that the person who lived in the property from 1989 to 2010 was a mother of one of her friends, should she have disclosed that to the buyers?

A: If she was aware of the person that lived there?

Q: If she was aware that -- if there was information available from the prior property owner, because we know that Mr. Corley didn't live there, but the person who did for the past 20 years was the mother of a friend, shouldn't she tell the buyers, "Hey, I know who used to live here? We might be able to ask her some questions"?

A: That might be some useful information to pass on, that you know more about the property.

Q: Would it be proper to withhold that information from the buyers?

A: If there were -- if there was information in that knowledge that she had of anything wrong with the property, material defects or anything like that, then she would have had prior knowledge of it and she would need to disclose that.

Q: But her knowledge of the fact that the prior owners was living with their daughter and that she knew the daughter, she should have brought that to the attention of the buyers or at least mentioned it to them?

...

A: Yeah, it's -- if she -- that would indicate that she knew about the property and was familiar with it.

Q: Knew something about the history of the property, right?

A: Yes, sir.

Q: That would have been a violation of her duty of care?

A: Yes, sir. If she knew of any issues with the property and she would have had the prior knowledge of, as you said, the history of the property.

(Deposition of Carlton Segars, p. 76, line 14 - p. 78, line 7).

In addition to Mr. Segars' deposition testimony, an affidavit from Mr. Segars summarizing and clarifying his deposition testimony was also before the lower court. In that affidavit Mr. Segars again confirmed that Loper breached her duty to Appellants by (1) failing to ensure Ray Mooneyham was licensed to perform HVAC inspections prior to recommending him; (2) erroneously informing Appellants the seller, Todd Corley, was not required to complete a

Residential Property Condition Disclosure Statement; (3) creating a false and misleading document designed to entice Appellants to proceed with the purchase; (4) asking a roofer with whom she was unfamiliar to perform a roof inspection without verifying he was qualified to perform such a task; (5) representing to Appellants that the roof was in good condition; and, (6) failing to inform Appellants that a personal friend and business associate had knowledge of the home's condition. (Affidavit of Carlton Segars, ¶ 23).

In addition to Mr. Segars' deposition testimony and affidavit, both Loper and Thomas Humphries confirmed in their depositions that Loper fabricated the letter from Commercial Services. (Deposition of Janet Loper, p. 188, line 10 - p. 189, line 12; p. 189, line 22 - p. 189, line 5; Deposition of Thomas Humphries, p. 52, line 13 - p. 53, line 5). Loper also confirmed that she was aware that the property had recently been owned for twenty years by the mother of her friend and former business associate, Lori Corley. (Deposition of Janet Loper, p. 103, line 24 - p. 104, line 9; p. 104, line 23 - p. 205, line 5). Loper further acknowledged that she informed Appellants that the seller, Todd Corley, did not have to complete a property disclosure statement. (Deposition of Janet Loper, p. 76, lines 9-22).

Appellants also testified during their depositions that Loper did not offer them a list of names of inspectors to perform the various inspections necessary to determine the condition of the property whom they could choose or reject, but, instead, pushed for and arranged for inspectors of her choosing whose competency for which she vouched. For example:

> Q: Okay. You and your husband made—did Ms. Loper tell you to have the home inspected?
>
> A: Ms. Loper was – **she was the one that gave us the name of the inspectors. We didn't ask, she voluntarily gave us the names and there wasn't a list**, here you go, here's the names of a great inspector. She gave us the number on the list. She gave us who he was and that he was the best.

Q: But she gave you a list and she suggested somebody off of the list?

A: No, she didn't give us the list. She gave us a name, she contacted him and made the appointment for the inspection.

Q: Okay. Did you ask her to do that?

A: Voluntarily did it. And the exact words that I can give it to you today is: I have a guy.

Q: All right. She knows of a home inspector?

A: I have a guy, was her answer.

Q: Okay.

A: I have a good guy and the number on the South Carolina list.[1]

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Q: Why is it that you sued NextGen Realty and Ms. Loper in this matter? I want to know what your beef is. What are you going to tell a Richland County jury that NextGen Realty or Ms. Loper did against the Malejkos?

A: Well, she had the guys, she had the inspectors. We didn't need to contact anybody because she had the best. She made it very clear to my husband and I, she was the one that had the guy. She's got the best HVAC inspector. She had the guy, I didn't need to call anybody else because she had the best. If you had the best, why would you dispute it with the realtor that has integrity? That's what she said, I have integrity, I have the best, so....[2]

****

Q: Did she make any actual representations to you about the HVAC unit?

A: She told me that she had a great guy to inspect the home, and she called out Mr. Mooneyham, an unlicensed and uninsured HVAC gentleman.[3]

(Additional testimonial examples: p. 288, line 20 - p. 289, line 2; p. 420, lines 8-25; Deposition of Raymond Malejko, p. 121, lines 18-21; p. 124, lines 3-17; p. 143, line 17 - p. 144, line 13; p. 144, line 22 - p. 145, line 11; p. 150, lines 13-20; p. 236, lines 1-5). Loper affirmed that she did

[1] Deposition of Cristine Malejko, p. 60, line 12 - p. 61, line 9.
[2] Deposition of Cristine Malejko, p. 158, line 20 - p. 159, line 9.

not and never does check to ensure that inspectors she recommends are licensed. (Deposition of Janet Loper, p. 203, lines 12-20; p. 255, lines 6-9).

Appellants also repeatedly testified that Loper misled them into thinking that the roof was newer than it actually was and assured them that it was in good condition. Examples of such testimony are as follows:

> A: What I'm telling you is that when I pulled up and Mr. Humphries was on the roof repairing the roof and I said, well, did he do the inspection already? **She said, oh, that was all done, everything is fine with the roof, you got a great roof. Everything is fine with the roof.**[4]
>
> ********
>
> A: And Mrs. Loper answered and said, that was already done already. **You've got a great roof here. You have nothing to worry about. Everything is fine.**[5]
>
> ********
>
> A: No. As I said before, I didn't feel they needed to. **The realtor said there was nothing wrong with the roof.**[6]
>
> ********
>
> Q: So did she ever tell you that it was a three-year-old roof?
>
> A: **Absolutely she told us it was a three-year-old roof.**[7]

(Addition testimonial examples: Deposition of Cristine Malejko, p. 115, lines 7-10; p. 116, line 23 - p. 117, line 5; p. 124, lines 15-20; Deposition of Raymond Malejko, p. 130, line 25 - p. 131, line 4; p. 141, lines 2-12; p. 246, lines 4-16).

In addition to his deposition testimony, Appellant Ray Malejko also submitted an affidavit in which he reiterated his testimony regarding the claims of impropriety he makes

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[3] Deposition of Cristine Malejko, pg. 307, lines 2-6.
[4] Deposition of Cristine Malejko, pg. 183, lines 3-8.
[5] Deposition of Cristine Malejko, p. 278, lines 13-16.
[6] Deposition of Raymond Malejko, p. 239, lines 1-4.
[7] Deposition of Cristine Malejko, p. 58, lines 12-15.

against Respondents. In that affidavit Mr. Malejko identified the following conduct of Loper to which he objected:

> **[Loper] erroneously advised us that the seller, Defendant Todd Corley, was not required to provide us with a property disclosure statement.** We agreed in the purchase and sale contract not to require him to fill one out based upon her erroneous advice that he was not required to do so. Had we known he was required to fill one out, we would not have agreed to that term in the purchase and sale contract.
>
> **[Loper] arranged for the home inspector, air conditioning/heating system inspector, and termite inspector to perform the inspections at the property. She did not provide us choices of people to perform each inspection.** She called in who she wanted, and they all performed substandard work.
>
> **[Loper] did not inform us that she did not check to make sure the inspectors she called in were licensed.** Had she told us that, we would have made certain all inspections were performed by licensed individuals. Instead, Mrs. Loper made comments making it appear that Mr. Mooneyham was highly rated on some sort of list of inspectors. I have since learned that he was not licensed to perform air conditioning/heating work of any kind. Had we known that we would not have relied on his inspection, and would, instead, have employed a licensed air conditioning/heating inspector. At the time we had no reason to think an additional inspection was needed.
>
> **[Loper] asked Defendant Dr. Roofs/Thomas Humphries to perform a roof inspection without checking his licensure status or his experience as a roof inspector.** She did not inform us she lacked this knowledge of him, but instead praised his efforts and made comments regarding his inspection and the condition of the roof that persuaded us there was no need to seek any further examination of the roof's condition. **I have since learned that Mr. Humphries is not personally licensed and neither he nor his company had ever performed a roof inspection at the time.**
>
> Mrs. Loper knew that Lori Corley's mother was the person from whom Defendant Todd Corley had purchased the property, and that she had owned the property for approximately 20 years. She also knew that Lori Corley had been taking care of the property for her mother for several years prior to Todd Corley purchasing it, and had arranged the sale of the property to Todd Corley to secure a personal loan to herself, not her mother. **Mrs. Loper knew how to contact Lori Corley and, in fact, contacted her at times during this process. She did not share this information with my wife and I, thereby depriving us of the ability to contact Lori Corley to ask her questions about the condition of the house.**

> **[Loper] copied portions of an email from Thomas Humphries and pasted its contents into a document which she created and presented to my wife and I as a roof inspection letter on the letterhead of Mr. Humphries' company.** She did not disclose this information to us. I did not learn about this until her deposition and Mr. Humphries' deposition in this case.
>
> [Loper] and I reviewed the home inspection report together. Many times when I had a question about repairs to items identified by the home inspector, **she would make comments to me indicating that the home inspector had been overly thorough, and that I did not need to worry about them.**
>
> **When the home inspector came to the house to determine whether all the items the seller had agreed to repair had been repaired, Mrs. Loper directed him to the items for him to review.** After the re-inspection and shortly prior to closing we were told that the seller had repaired all items he was supposed to repair. After moving in we discovered that not all of the items had been repaired.

(Affidavit of Raymond Malejko, ¶ 17).

Again, Appellants submit that the foregoing statutory authority, South Carolina common law, and contractual provisions, coupled with the deposition testimony, affidavits and other documentation, all of which was before the lower court, taken in the light most favorable to the Appellants present a genuine issue of material fact regarding whether the following actions and inactions constituted breaches of Respondents' duties to Appellants: (1) recommending Ray Mooneyham as an HVAC inspector without ensuring that he was licensed and qualified to perform such inspections; (2) requesting that Thomas Humphries perform a roof inspection without first determining whether he was licensed and qualified to perform such an inspection; (3) creating a fraudulent and misleading document designed to entice Appellants to proceed with the purchase; (4) erroneously informing Appellants that they were not entitled to a Property Condition Disclosure Statement from the seller[8]; (5) withholding the fact that they knew that the

[8] S.C. Code § 27-50-30 lists the types of real estate transactions excluded from the property disclosure requirement. Respondents claim no property disclosure was required in the instant transaction because the seller owned the home as an investment and never lived in it. They cite to § 27-5-30(10) as the relevant exception. However, that section applies to the "first sale of a home never lived in" (i.e., a newly constructed home). This transaction was at least the third sale of this home, which had previously been lived in for at least 20 years, not the first sale of a home which

person who lived in the property from 1989 to 2010, Clementina Garvin, was the mother of a friend and former business associate and that they knew how to contact both Mrs. Garvin and her daughter; (6) representing to Appellants that the roof was only three years old and in good condition; (7) pushing for and arranging for inspectors of their choosing whose competency for which she vouched; (8) withholding from Appellants the fact that they had not and never check to make sure the inspectors they called in were licensed; (9) suggesting to Appellants that they should not be concerned about items noted in the home inspection because the home inspector had been overly thorough; and, (10) withholding the fact that the home inspector had come to the re-inspection without his report and that Respondents, not the home inspector, determined what would be reviewed upon re-inspection.

C. Appellants' Causes of Action

In order to prove [actual] fraud, the following elements must be shown: (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. Pitts v. Jackson National Life Insurance Company, 352 S.C. 319, 574 S.E.2d 502 (Ct. App. 2002). To establish constructive fraud, all elements of actual fraud except the element of intent must be established. Ardis v. Cox, 314 S.C. 512, 431 S.E.2d 267 (Ct. App. 1993). Respondents argued that Appellants failed to present evidence as to elements (1), (5), (6) and (8). However, Appellants presented evidence that Respondents misrepresented the age of the roof, misrepresented the condition of the roof,

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had never been lived in. (Appellants' Response to Motion for Summary Judgment, pp. 14-16, 65; Affidavit of Ray Malejko, ¶ 17(e); Affidavit of Carton Segars, ¶ 23(f)). Statutory property disclosure schemes in other jurisdiction contain a similar exemption applicable only to new construction. See, N.C. Gen. Stat. § 47E-2; Md. REAL

fraudulently created and presented them with a document purporting to be a roofing letter from the roof inspector, withheld the existence and identity of a known, readily available source of information regarding the condition of the property, and led Appellants to believe that Respondents had vetted the inspectors they brought to the transaction.

The condition of the property was of paramount importance to Appellants in this transaction[9], especially given Respondents had informed them the seller was not required to provide them with a property disclosure statement.[10] So much so that they had walked away from the property on one occasion due to concerns over the amount of repairs needs, and, then, only agreed to purchase the property when a repair addendum was included in the contract. (Respondents' Memorandum in Support of Summary Judgment, pp. 4-5, Exhibit B, Exhibit C; Deposition of Cristine Malejko, p. 349, ll. 4-8; Deposition of Ray Malejko, p. 77, ll. 6-14). Respondents' actions were taken in an effort to dispel any concerns Appellants had regarding the condition of the property. The two areas of the home that the home inspector recommended Appellants have inspected further, the roof and the HVAC, were negligently inspected by individuals of questionable competence. Respondents praised the quality of the HVAC inspector and assured Appellants that the roof was relatively new (three years old) and in good condition, rather than take the minimal step to ensure the inspectors were licensed to perform the important tasks with which they were charged, which, it turns out, they were not. These statements compounded the poorly performed inspections, because they left Appellants with the impression that there was no need to question the inspection results or to seek further inspections. Each

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PROPERTY Code Ann. § 10-702; Tenn. Code Ann. § 66-5-209; R.R.S. Neb. § 76-2,120; La. R.S. § 9:3197; 765 ILCS 77/15; Idaho Code § 55-2505; Conn. Gen. Stat. § 20-327b.

[9] Affidavit of Raymond Malejko, ¶ 16; Respondents' Memorandum in Support of Summary Judgment, Exhibit C; Deposition of Ray Malejko, p. 339, ll. 6-13.

[10] What constitutes a material term to an agreement depends on what the parties deem material and, thus, is largely a question of fact. Georgetown Entertainment Corp. v. District of Columbia, 496 A.2d 587, 590 (D.C. 1985).

action was taken with the intent to discourage Appellants from further inquiry and encourage Appellants to proceed with the purchase the property, thereby securing a sales commission for Respondents upon closing. (Respondents' Memorandum in Support of Summary Judgment, Exhibit B, Deposition of Cristine Malejko, p. 166, ll. 14-23). Appellants did rely on and had a right to rely on Respondents' misrepresentations given that Respondents owed them statutory duties of loyalty, obedience, disclosure, reasonable care, diligence, and honesty; contractual duties of diligence, effectiveness, disclosure, good faith and fair dealing; and, fiduciary common law duties. Furthermore, the general rule is that questions concerning reliance and its reasonableness are factual questions for the jury. Frewil, LLC v. Price, 411 S.C. 525, 769 S.E.2d 250 (Ct. App. 2015). Issues of reliance and its reasonableness, going as they do to subjective states of mind and applications of objective standards of reasonableness, are preeminently factual issues for the triers of the facts. Id. Thus, summary judgment on the issue of reliance would be inappropriate.

Appellants must allege and prove the following elements to establish liability for negligent misrepresentation: (1) Respondents made a false representation to them; (2) Respondents had a pecuniary interest in making the statement; (3) Respondents owed a duty of care to see that they communicated truthful information to Appellants; (4) Respondents breached that duty by failing to exercise due care; (5) Appellants justifiably relied on the representation; and (6) Appellants suffered a pecuniary loss as the proximate result of their reliance upon the representation. AMA Management Corp. v. Strasburger, 309 S.C. 213, 420 S.E.2d 868 (Ct. App. 1992); Winburn v. Insurance Co. of North America, 287 S.C. 435, 339 S.E.2d 142 (Ct. App. 1985). Respondents claimed they were entitled to summary judgment because Appellants failed to present evidence of any affirmative statement made by them. However, as discussed above,

there is ample evidence in the record of misrepresentations made by Respondents. Appellants adduced evidence that Respondents misrepresented the age of the roof, misrepresented the condition of the roof, incorrectly informed Appellants that they were not entitled to a property disclosure statement from the seller, misrepresented the authorship of the letter Loper created and presented to Appellants which purported to be a roofing letter from the roof inspector, and misrepresented the qualifications of the inspectors they brought to the transaction. Again, each of these actions was taken with the intent to encourage Appellants to proceed with the purchase the property, a transaction in which Respondents had a pecuniary interest.

The elements for a breach of contract are the existence of a contract, its breach, and damages caused by such breach. Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC, 414 S.C. 635, 780 S.E.2d 263 (Ct. App. 2015); South Glass & Plastics Co. v. Kemper, 399 S.C. 483, 491-92, 732 S.E.2d 205, 209 (Ct. App. 2012). The general rule is that for a breach of contract the [breaching party] is liable for whatever damages follow as a natural consequence and a proximate result of such breach. Id. at 492, 732 S.E.2d at 209 (quoting Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)). Respondents do not deny the existence of a contract between the parties or that Appellants have sustained damages. Rather, they claim Appellants failed to present evidence of a breach. However, there is evidence in the record that Respondents erroneously advised Appellants that the seller did not have to provide a property disclosure statement, failed to ensure that the HVAC and roof inspectors, which they unilaterally brought into the transaction, were properly licensed and qualified, misrepresented the age of the roof, misrepresented the condition of the roof, fraudulently created and presented them with document purporting to be a roofing letter from the roof inspector, and withheld the existence and identity of a known, readily available source of information regarding the condition of the

property. These acts and omissions breached Respondents' contractual duty to represent Appellants in a diligent and effective manner (Exclusive Right to Buy Buyer Agency Contract, ¶3), their contractual duty to disclose any known material facts concerning the property or the transaction (Dual Agency Agreement, ¶2(c)), their duty to take no action adverse or detrimental to Appellants' interest in the transaction (Designated Agency Agreement, section (b) of first paragraph), and breached their warranty of good faith and fair dealing.

In order to maintain a claim for breach of contract accompanied by fraudulent act, a plaintiff must prove three elements: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract, not merely to its making; and (3) a fraudulent act accompanying the breach. Floyd v. Country Squire Mobile Homes, Inc., 287 S.C. 51, 53-54, 336 S.E.2d 502, 503-04 (Ct. App. 1985) (citations omitted); Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC, 414 S.C. 635, 780 S.E.2d 263 (Ct. App. 2015). Respondents claimed Appellants did not present evidence of an independent fraudulent act. Appellants, however, have presented ample evidence of incidents of fraudulent conduct by Respondents, each of which would serve as independent fraudulent acts to support a breach of contract accompanied by fraudulent act cause of action. Rather than restate them again here, Appellants would incorporate herein by reference their discussion of those acts contained above.

To establish a cause of action in negligence, three essential elements must be proven: (1) duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty. Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 468 S.E.2d 292 (1996); Bishop v. S.C. Department of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998). Respondents argued Appellants failed to identify any standards of care that were breached or any action, conduct or omission by Respondents that

constitute a breach. In doing so, Respondents cherry pick deposition questions in which Appellants provided answers to support such a theory. However, the lower court ignored the deposition testimony of Carton Segars and the contents of his affidavit, recounted above, which provide evidence of both.

In addition, although there were many times that Appellant Ray Malejko could not remember or provide answers to certain questions, there were other times throughout the course of his four day deposition in which he could and did. While his unenlightening answers may provide Respondents with fodder for cross-examination at trial, at the summary judgment stage of the proceedings, in the face of evidence to the contrary, the lower court should have cast them aside, and viewed the evidence in the light most favorable to Appellants.

Again, since the testimony of Mr. Segars, Mr. Malejko and Mrs. Malejko regarding the duties owed by Respondents and the breaches thereof is exhaustively presented above, Appellants incorporate it here by reference, rather than restate it again, in support of their contention that the evidence presented to the lower court, when viewed in the light most favorable to Appellants, presents a genuine issue of material fact regarding their claims of negligence against Respondents.

To establish a claim for breach of fiduciary duty, a 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. It is well settled that real 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, 513 S.E.2d 848 (1999); Hamby v. St. Paul Mercury Indemnity Co., 217 F.2d 78, 80 (4th Cir. 1954). Respondents do not deny they owe Appellants a fiduciary duty, but rather

claim that Appellants failed to identify any material facts withheld by them. However, Respondents duty to make full disclosure of material facts was only one aspect of their fiduciary duty to Appellants, for Respondents were also bound to act in good faith and with due regard to the interests of Appellants. Spence v. Wingate, 395 S.C. 148, 716 S.E.2d 920 (2011); O'Shea v. Lesser, 308 S.C. 10, 416 S.E.2d 629 (1992). Appellants have presented ample evidence of both Respondents' nondisclosure of material facts and their failure to act in good faith and with due regard to their interests. Respondents failed to pass along personally known information regarding the former owner of the house, who could have provided valuable information regarding the condition of the house, which was otherwise lacking. Respondents' failure to ensure the inspectors they brought to the transaction were qualified and competent, failure to inform Appellants the inspectors had not been vetted, fabrication of a roofing letter, and misrepresentation regarding their entitlement to a property disclosure statement were not made with due regard to Appellants interests.

In granting summary judgment the lower court essentially turned the summary judgment standard on its head and viewed the conflicting evidence in the light most favorable to Respondents. For example, the lower court appeared to accept Respondents' position that Appellant Raymond Malejko was unable to articulate any basis for bringing an action against Respondents based upon certain equivocal responses he gave defense counsel during his deposition, when the court was otherwise provided with ample instances where both Appellants did provide specific, factual responses supporting each of the causes of action they brought against Respondents, all of which have been discussed and cited above. (Motion Hearing Transcript, p. 48, l. 22 - p. 51, l. 13).

D. Appellant Cristine Malejko and Privity of Contract

The lower court also found that Appellant Cristine Malejko cannot maintain an action for breach of contract against Respondents because she lacks privity of contract. While Mrs. Malejko is not a signatory of the Exclusive Right to Buy Buyer Agency Contract, the Dual Agency Agreement, the Contract for Sale nor the Designated Agency Agreement, she is, nevertheless, a third-party beneficiary of those contracts, and can, therefore, maintain an action against Respondents for their breach on that basis. "Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third-party is not, as such, recoverable by the plaintiff." Windsor Green Owners Association v. Allied Signal, Inc., 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004) (citation omitted). "However, if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." Id. (citation omitted); Fabian v. Lindsay, 410 S.C. 475, 765 S.E.2d 132 (2014). Here, it is undisputed that Ray and Cristine Malejko were contemplating the purchase of a home which they would both live in, along with their daughter. There is no question that Respondents were aware that Appellant Cristine Malejko would be directly benefitted by their services in assisting Appellant Ray Malejko in procuring a home. (Appellants' Response to Respondents' Motion for Summary Judgment, p. 82). It would strain credulity to argue otherwise. Since Appellant Cristine Malejko is a direct beneficiary of Respondents' services and the contracts upon which

they were based, she has third-party beneficiary status to maintain a breach of contract action against Respondents.[11]

E. Contractual Waiver Issues

Respondents point to language in the Exclusive Right to Buy Buyer Agency Contract, the Designated Agency Agreement and the Dual Agency Agreement for the proposition that Appellant Ray Malejko waived his claims against them. The lower court agreed. The lower court is incorrect as a matter of law. Contracts that seek to exculpate a party from liability for the party's own negligence are not favored by the law. Pride v. Southern Bell Tel. & Tel. Co., 244 S.C. 615, 619, 138 S.E.2d 155, 157 (1964). An exculpatory clause is to be strictly construed against the party relying thereon. Id. An exculpatory clause will never be construed to exempt a party from liability for his own negligence in the absence of explicit language clearly indicating that such was the intent of the parties. McCune v. Myrtle Beach Indoor Shooting Range, Inc., 364 S.C. 242, 612 S.E.2d 462 (Ct. App. 2005); South Carolina Elec. & Gas Co. v. Combustion Engineering, Inc., 283 S.C. 182, 191, 322 S.E.2d 453, 458 (Ct. App. 1984) (quoting Hill v. Carolina Freight Carriers Corp., 235 N.C. 705, 71 S.E.2d 133, 137 (N.C. 1952)). None of the language cited by Respondents attempts to exempt Respondents from their own negligence. Thus, their claim of waiver as to Appellants' negligence cause of action fails as a matter of law.

Furthermore, the exculpatory language referenced by Respondents does not pertain to the claims made by Appellants in this action. Respondents point to the following language in the parties' Exclusive Right to Buy Buyer Agency Contract in support of their argument:

> Buyer agrees to work exclusively with Broker and its affiliated licensees during the term of this agreement by: ... (4) holding Broker harmless from liability ***as a result of incomplete/inaccurate information provided to Broker by Buyer or***

[11] Cristine Malejko is listed on the deed to 141 Fox Crossing. In addition, she is listed as a purchaser on the Settlement Statement (HUD-1) and other associated closing documents. (Appellants' Response to Motion for Summary Judgment, pp. 89-97).

> ***Seller***; (5) holding Broker harmless from liability ***as a result of Seller's failure to provide a complete Seller's Property Condition Disclosure*** statement....

(Exclusive Right to Buy Buyer Agency Contract, ¶ 4(A)). Appellants' claims are not based on Respondents not being provided with complete information from the seller or for the seller's failure to provide a property disclosure statement. Rather, they are based upon Respondents' fraudulent, negligent and intentionally misleading conduct and non-disclosure of material facts. Appellants' claim against Respondents relating to the lack of a property disclosure statement is not a claim that seller willingly failed to provide the disclosure, but that Respondents' erroneously advised both the seller and them that the seller was not required to provide one. The cited exculpatory language is simply not applicable to the claims in this matter.

Respondents also point to the following language in the Designated Agency Agreement:

> Seller and Buyer agree to indemnify and hold Broker harmless against all claims, damages, losses, expenses, or liabilities, ***other than violations of the South Carolina Real Estate License law and intentional wrongful acts***, arising from Broker's role under the terms of this Designated Agency Agreement.

(Designated Agency Agreement, ¶ 1(j)). As discussed above, pursuant to the South Carolina Real Estate License Law found in S.C. Code Ann. § 40-57-137(A), (F) and (H)(c), Respondents owed Appellants duties of loyalty, obedience, disclosure, confidentiality, reasonable care, diligence, honesty and accounting. It is the violation of these very duties, and, thus, violation of South Carolina Real Estate License Law, through Respondents' intentional acts upon which Appellants base their claims. Thus, this provision provides Respondents no protection.

Respondents cite to similar exculpatory language contained in the parties' Dual Agency Agreement:

> Seller and Buyer agree to indemnify and hold Broker harmless against all claims, damages, losses, expenses, or liabilities, ***other than violations of the South Carolina Real Estate License Law and intentional wrongful acts***, arising from Broker's role as a Dual Agent.

(Dual Agency Agreement, ¶ 3(d)). This provision is unavailing for the same reasons its counterpart in the Designated Agency Agreement is unavailing.

Respondents also claim the following language in the Dual Agency Agreement acts as a waiver to the claims brought by Appellant Ray Malejko:

> Broker is required by law to disclose to Seller and Buyer any known material facts concerning the property or the transaction. Seller and Buyer agree that Broker shall not be liable to either party for (1) disclosing known material facts concerning the property required by law to be disclosed and (2) refusing or falling to disclose other information the law does not require to be disclosed which could harm or compromise one party's bargaining position but could benefit the other party.

(Dual Agency Agreement, ¶ 2(c)). Appellants' claims against Respondents are not based on Respondents' disclosure of material facts to the seller which they were required by law to disclose, so reliance on section (1) is misplaced. Appellants' claims are, in part, based upon Respondents' failure to disclose material facts which they had statutory, contractual and common law duties to disclose. However, since the law does require them to be disclosed, Respondents' reliance on section (2) is also misplaced, since it is only applicable to information for which the law does not require disclosure. Furthermore, Appellants have other claims against Respondents that do not involve non-disclosure, and, therefore, are not impacted by this provision.

Finally, Respondents claim that Appellants waived the claims they brought in this litigation by entering into the Contract for Sale. Specifically, they reference the following provision:

> Buyer and Seller acknowledge that Buyer's and Seller's Brokers give no warranty of any kind, expressed or implied, as to: (1) physical condition of the Property or as to condition of or existence of improvements, services or systems including but not limited to termite damage, roof, basement, appliances, heating and air conditioning systems, plumbing, sewage/septic, electrical systems or to structure; (2) condition of the Property, any matters which would be reflected by a current survey of the Property or the accuracy of the square footage heated or unheated....

(Contract of Sale, ¶ 33). One of Appellants' claims against Respondents does involve a representation by Respondents concerning the condition of the roof. However, this provision only protects Respondents in situations where Respondents remain silent. Here Respondents affirmatively represented to Appellants that the roof was three years old and made affirmative statements regarding the condition of the roof. Where, as here, Respondents voluntarily undertook to advise Appellants on the condition of the roof, they had a duty to exercise due care in doing so. Byerly v. Connor, 307 S.C. 441, 415 S.E.2d 796 (1992) (At common law, where there is no duty to act, but an act is voluntarily undertaken, the actor assumes a duty to use due care); Sherer v. James, 290 S.C. 404, 351 S.E.2d 148 (1986). Respondents did not do so, for the roof was not three years old and was not, as represented, in good condition. Moreover, where there are factual issues regarding whether a defendant was, in fact, a volunteer, summary judgment is not appropriate, as the existence of a duty becomes a mixed question of law and fact to be resolved by the fact finder. Vaughan v. Town of Lyman, 370 S.C. 436, 635 S.E.2d 631 (2006), quoting Miller v. City of Camden, 329 S.C. 310, 494 S.E.2d 813 (1997). Even were this not the case, those of Appellants' claims which do not allege Respondents made representations regarding the condition of the property would remain unaffected by this provision.

ARGUMENT II

II. The lower court erred in failing to apply the proper standard of review in analyzing Appellants' motion for reconsideration.

The lower court's order denying Appellants' motion for reconsideration pursuant to Rule 59(e), SCRCP, indicates that the court applied the federal standard of review for motions to reconsider, rather than the standard of review followed by the State of South Carolina.

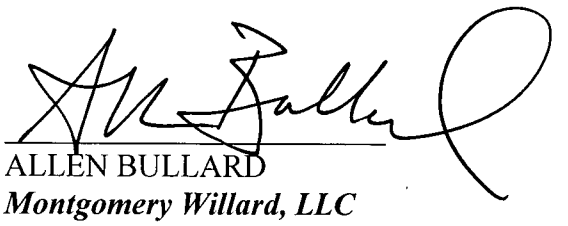
"The purpose of Rule 59(e), SCRCP, to alter or amend the judgment[,] is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (quoting Budinich v. Becton Dickinson and Co., 486 U.S. 196, 200, 108 S. Ct. 1717, 100 L. Ed. 2d 178 (1988)). Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006). It is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court "alter or amend the judgment," but also as a vehicle to seek "reconsideration" of issues and arguments. A motion under Rule 59(e) long has been viewed as "motion for reconsideration" despite the absence of those words from the rule. Consequently, as interpreted by the appellate courts of this state, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented. See, e.g., Curcio v. Caterpillar, Inc., 355 S.C. 316, 585 S.E.2d 272 (2003) (an example of the many cases in which trial and appellate courts describe a Rule 59(e) motion as a "motion to reconsider" or "motion for reconsideration"); James Flanagan, *South Carolina Civil Procedure* 474-475 (2d ed. 1996). There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity. Elam v. S.C. DOT, 361 S.C. 9, 602 S.E.2d 772 (2004).

The lower court, relying on a federal district court opinion, Dockins v. Benchmark Communications, 180 F.R.D. 294 (D.S.C. 1998), declined to consider any "arguments previously presented" or arguments which requested it to "rethink its decision." Since Appellants' motion to reconsider requested the lower court to reexamine, or rethink, the arguments they had previously presented to it through oral argument and written submissions, taking the lower court at its word, it refused to consider the arguments presented in Appellants' motion to reconsider, based upon a misapprehension of the applicable standard of review. Therefore, if this Court is not inclined to reverse the lower court's decision on Respondents motion for summary judgment, in the alternative, it should remand this matter to the lower court for consideration of Appellants' motion under the proper standard of review.

CONCLUSION

For the foregoing reasons, this Court should reverse the lower court's grant of summary judgment in favor of Respondents, or, in the alternative, remand this matter to the lower court for consideration of Appellants' motion under the proper standard of review.

Respectfully submitted,



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Attorneys for Appellant

January 5, 2018.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Case No. 2016-CP-40-1536

Raymond J. Malejko and Cristine Malejko, individually and in the interests of a minor child, Appellants,

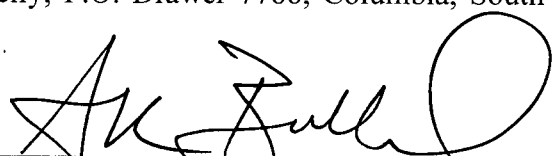
v.

Todd Corley, Janet Loper, NextGen Real Estate, LLC, Thomas Humphries, Dr. Roofs, Inc., Ray Mooneyham, Mooneyham Solar & Electric, Professional Home Inspections, Inc., Corley Enterprises, Inc. of South Carolina, and DBR Franchising, LLC, Defendants,

Of whom Janet Loper and NextGen Real Estate, LLC are Respondents.

PROOF OF SERVICE

I certify that I have served Appellants' Initial Brief on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on January 5, 2018, addressed to their attorneys of record, David Anderson and Michelle P. Kelly, P.O. Drawer 7788, Columbia, South Carolina 29202.



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January 5, 2018.

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January 5, 2018

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Raymond J. Malejko v. Todd Corley
Appellate Case No.: 2017-001939
Our File No.: 2145732

Dear Ms. Kitchings:

Enclosed please find Appellants Initial Brief and Designation of Matter to be Included in the Record on Appeal in the aforementioned matter. I am, by copy of this letter, serving a copy on Respondents.

Please feel free to contact me if you have any questions or concerns.

Sincerely,

MONTGOMERY WILLARD, LLC

Allen Bullard

cc: David Anderson, Esquire
Michelle P. Kelly, Esquire
Raymond and Cristine Malejko