THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS
THE HONORABLE ROBERT E. HOOD
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2017-001939
CIVIL ACTION NO. 2016-CP-40-1536

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

APPELLANTS,

versus

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,

DEFENDANTS,

Of whom Janet Loper and NextGen Real Estate, LLC are the

RESPONDENTS.

FINAL BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF THE CASE

The Appellants filed the underlying lawsuit with the following causes of action against Respondents: (1) Actual or Constructive Fraud; (2) Negligent Misrepresentation; (3) Breach of Contract; (4) Breach of Contract Accompanied by a Fraudulent Act; (5) Negligence; and (6) Breach of Fiduciary Duty. (R. pp. 12- 41)

On June 7, 2017, Respondents filed a Motion for Summary Judgment asserting there was no genuine issue of material fact and the Appellants failed to state a viable cause of action where the Appellants could not demonstrate, as a matter of law, their allegations of Actual or Constructive Fraud, Negligent Misrepresentation, Breach of Contract, Breach of Contract Accompanied by a Fraudulent Act, Negligence, or Breach of Fiduciary Duty. The Motion additionally stated that Appellant Cristine lacked the privity required to maintain her contractual claims and Appellant Raymond contractually waived all of his claims against Respondents.

On July 26, 2017, the Honorable Robert E. Hood heard Respondents' Motion for Summary Judgment. On August 3, 2017, Judge Hood filed an order granting Respondents' Motion for Summary Judgment. The Appellants filed a Rule 59(e) Motion for Reconsideration, which was denied via written order on September 8, 2017. The Appellants subsequently filed an appeal. This Final Brief of Respondent follows.

COUNTERSTATEMENT OF FACTS

As stated in the lower court, the Appellants were experienced home buyers. They had recently bought and "returned" a home and Appellant Raymond Malejko was a licensed real estate agent. In December 2013, the Appellants purchased a new construction home. After one year, the builder bought the home back from them due to the Appellants' continued complaints that the new construction home was making Appellant Cristine Malejko ill. During this time, the Appellants also filed a complaint against the builder with the Department of Labor, Licensing, and Regulation. (R. pp. 189-193).

Subsequently, the Appellants found the 141 Fox Crossing Road home, the home at issue, and hired Respondent Loper, the listing agent, to serve as a dual agent when they made an offer on the house. (R. pp. 194-197) Raymond was a licensed real estate agent in New Jersey and he negotiated with Respondent Loper to receive a percentage of her commission as a referral fee. (R. p. 271, lines 6-18; p. 274)

After entering a contract, they underwent the inspection process for the property. The seller, Defendant Corley, testified he purchased the property only for investment. The seller testified he never lived there and never had the property inspected. He testified that he did not complete a property disclosure for the property because he had no knowledge of the property condition. Appellant Raymond agreed via the Contract of Sale that the seller would not provide a

property condition disclosure statement. (R. p. 287, para 12(b); R. p. 299, lines 3-24; p. 301, line 12- p. 302, line 19)

Testimony indicated that Respondent Loper presented the Appellants with a list of numerous recommendations of third parties to hire during the inspections process. Respondent Loper advised the Appellants that they could use one of the recommended companies or someone else that they were comfortable with. (R. p. 303, line 20- p. 304, line 7; p. 305, line 22- p. 306, line 4)

Inspector Joe Boyle completed an inspection report dated January 16, 2014 which outlined many property defects. The report noted that the roof was actively leaking and also had prior roof repairs that "could fail with time." The report stated, "Recommend having the roofing checked by a licensed roofing contractor." The inspection report also noted termite damage and recommended a termite inspection. (R. p. 311) Appellants declined to hire anyone to inspect the roof. Likewise, they did not get a termite inspection.

The inspection report further noted holes in the HVAC lines and HVAC lines that were lying on the ground. Boyle recommended having the HVAC lines checked and repaired by an HVAC company. The inspection report additionally advised of problems with the "framed floors" and suggesting that a licensed contractor inspect the floors. Appellants did have someone inspect the HVAC system, but did not hire a licensed contractor to inspect the floors. (R. p. 324; p. 332)

The inspection report cautioned that "[a]ll repairs needs or recommendations for further evaluation should be addressed prior to closing. It is the client's responsibility to perform a final inspection to determine the conditions of the dwelling and property at the time of closing." (R. p. 308)

After reviewing the inspection report, the Appellants initially decided not to go forward with the purchase of 141 Fox Crossing Road. (R. p. 201, lines 18-23; p. 241, lines 4-7) Cristine testified that after receiving the inspection report, Appellants Loper went through the inspection report with them "page-for-page." (R. pp. 201-202) When Cristine was asked which inspection report issues caused them to back out of the contract. She stated that "all of them" did. "The home inspection report talks about many issues that were wrong with this home and we didn't feel comfortable." (R. p. 203, lines 8-21)

Due to the home inspection report and "consultation" with a contractor they selected privately to review the items on the inspection report, the Appellants backed out of the original contract for 141 Fox Crossing Road and resumed their house search. In March of 2014, the Appellants decided to revisit the home at 141 Fox Crossing Road because "[i]t was a beautiful home, we liked the house." (R. p. 209, lines 9-10) At some point, the Appellants found tax records revealing that the home had been purchased for substantially less than the sale price, so they contacted the seller and offered a low verbal offer. This offer was not accepted. (R. p. 210, lines 14- p. 212, lines 22) The Appellants then contacted Respondent Loper and went back for another showing. Cristine claimed that Respondent Loper said changes and repairs had been made to the property and the Appellants observed some of these changes during this follow-up showing. The Appellants decided to proceed with another offer. (R. pp. 213-214)

On March 8, 2014, Appellant Raymond entered into a second contract with Todd Corley for 141 Fox Crossing Road. The contract allowed for the buyer to inspect the property during the due diligence period and also allowed for possible extensions of the due diligence period to allow for additional inspections. The contract also gave the buyer the right to reinspect the property following repairs. Raymond also initialed next to the Property Condition Disclosure

Statement paragraph stating that "Buyer understands and agrees that Seller's Property Condition Disclosure Statement is not intended to replace inspections of the Property." (R. p. 285-287)

Additionally, the Contract for Sale contained paragraph 33 entitled "Disclaimer," which stated:

> 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....

(R. p. 292)

They subsequently had Joe Boyle, the original inspector, return for a reinspection of the property. The Appellants claim they cannot recall the results of the reinspection, but Appellant Cristine admitted that following the reinspection, they were advised that there was "still work that needed to be done to the home." (R. p. 215, lines 2-20) Cristine also admitted her husband said that the only item from the inspection report he felt needed to be addressed prior to closing was the animal feces under the house. (R. p. 216, lines 6-10)

They closed on March 31, 2014. (R. p. 216, line 2) After they moved into the home, the Appellants testified they began to discover numerous defects with the home. A close review of these alleged defects specified in the Complaint reveals, however, that these defects were noted in the original inspection report and/or were discovered prior to closing.

The Appellants claim "the condition of the property was of paramount importance to Appellants in this transaction." (IBOA, p. 21) However, Raymond testified that although Respondent Loper reviewed the inspection report with them, he did not read the inspection report prior to his purchase of the property. Raymond admitted he had the inspection report for six

weeks in between the first and second contracts on the property, but he did not read the report because he went over it with the realtor and relied on her impressions of the report. (R. p. 245, line 21- p. 246, line 22; p. 260, line 20- p. 268, line 12)

The Appellants make several allegations regarding the condition of the roof and comments related to the same. Cristine claimed that Respondent Loper told her "[I]t was a great looking roof." (R. p. 220, lines 9-17) Cristine also testified that Respondent Loper knew she had been told the roof was three years old. (R. p. 237, lines 17-23) However, Raymond testified they did not get a roof inspection despite being told to do so and being advised of defects. (R. p. 245, lines 2-7) Cristine acknowledged that the inspection reported noted roof issues. (R. p. 240, lines 3-25) When the seller hired a roofer to make some repairs, the Appellants did not hire a roofer to inspect the roof or check the repairs made. (Second Supp. R. p. 3, line 22- p. 5, line 13) The seller testified he hired the roofing contractor to make repairs and that he contacted the roofer directly without recommendation from Respondents. (R. p. 298, lines 3-12)

Prior to closing, Defendant Mooneyham, the HVAC inspector, advised the Appellants that there were problems with the HVAC ducts, but Appellants declined to hire him, or anyone, to fix them. (Second Supp. R. p. 7, line 3-12) Raymond acknowledged the inspection report stated it did not evaluate mold and another inspector would be required for a mold evaluation. Raymond admitted that he did not hire anyone to inspect for mold, despite having just returned a house because of an alleged toxic condition within the home. (R. p. 273, lines 3-11) So though at least five additional inspections were recommended, namely roof, termite, general contractor, mold and HVAC, only the HVAC inspection was obtained. Also, Appellants declined to follow the HVAC inspector's recommendation for additional evaluation and repair regarding identified damage.

ARGUMENT

In a case involving claims by a home buyer against the realtor, the South Carolina Court of Appeals affirmed the lower court's granting of the realtor's Motion for Summary Judgment and set forth the following standard of review:

> An appellate court reviews the grant of summary judgment under the same standard applied by the trial court. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). The trial court should grant summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 217, 578 S.E.2d 329, 334 (2003). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). A court considering summary judgment makes neither factual determinations nor considers the merits of competing testimony. *David,* 367 S.C. at 250, 626 S.E.2d at 5. However, summary judgment is appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. *Id.* To survive a motion for summary judgment, the non-moving party must offer some evidence that a genuine issue of material fact exists as to each element of the claim. *Steele v. Rogers,* 306 S.C. 546, 552, 413 S.E.2d 329, 333 (Ct.App.1992).

Chastain v. Hiltabidle, 381 S.C. 508, 514, 673 S.E.2d 826, 829 (Ct. App. 2009). As will be discussed, the Appellants failed to offer evidence that a genuine issue of material fact existed as to any elements of the claims. As a result, the trial court did not err in granting the motion.

I. THE APPELLANTS FAILED TO PRESERVE THEIR ARGUMENTS FOR APPEAL

Appellants did not preserve any arguments opposing the trial court's findings on privity and waiver. The Appellants neglected to file a detailed written response to Respondents' Motion for Summary Judgment and supporting Memorandum. Instead, they made an oral argument and submitted affidavits prepared by Appellants and their real estate expert, Carlton Segars. The

hearing transcript and Segars' affidavit, therefore, serve as the record for Appellants' argument before the lower court in opposition to the Motion for Summary Judgment.

The Motion for Summary Judgment argued the Appellants failed to offer evidence of a genuine issue of material fact, failed to state a viable cause of action, the Appellants failed to demonstrate the allegations pled in the Complaint, Appellant Cristine did not have privity of contract to sustain her claims against Respondents and Appellant Raymond contractually waived his claims versus Respondents. The trial court granted the Motion for Summary Judgment on all of these grounds holding, "there are no genuine issues of any material fact as to Plaintiffs' allegations." (R. p. 6) The trial court stated the alternative grounds for granting the Motion were that the Appellants' claims failed to state a cause of action as a matter of law, Appellants failed to establish requisite elements needed to prevail on any of the causes of action; Appellant Cristine does not have privity of contract needed to demonstrate the contractual claims; and Appellant Raymond waived all claims versus Respondents through the contracts he signed. (R. p. 7) At the hearing, the Appellants failed to oppose Respondents' arguments regarding Cristine's lack of privity and Raymond's release of claims. As a result, Respondents' arguments went unchallenged, the trial court granted the Motion for Summary Judgment on their basis, and subsequent challenges to these grounds are not preserved. Lester v. Sanchez, No. 2015-000027, 2017 WL 4817527, at *2 (S.C. Ct. App. Aug. 30, 2017) (Court found an argument was not preserved "because the argument raised in the motion to reconsider was not sufficient to put the argument before the court")

The Appellants did not raise a counter argument on these issues until their 59(e) motion. All arguments raised for the first time in the 59(e) argument lack proper preservation for consideration. A party cannot for the first time raise an issue by way of a Rule 59(e) motion

which could have been raised at trial." Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) Hickman establishes that 59(e) motions are not the appropriate venue for introducing arguments that could have been advanced earlier. In the case at hand, the Appellants had advanced written notice of the grounds for Summary Judgment and neglected to raise arguments related to contract privity and contractual releases until after the ruling against them.

> A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not. *See Natural Resources Defense Council v. U.S. E.P.A.*, 705 F.Supp. 698, 701 (D.D.C.1989), *vacated on other grounds*, 707 F.Supp. 3 (D.D.C.1989) ("Rule 59(e) motions are not vehicles for bringing before the court theories or arguments that were not advanced earlier."); *Smith v. Stoner*, 594 F.Supp. 1091, 1118 (N.D.Ind.1984) ("Issues which could have been presented to the court for consideration previously, but which were not, are not the proper subject of Rule 59(e) relief; the issues are waived."); *Johnson v. City of Richmond*, 102 F.R.D. 623, 623 (E.D.Va.1984) ("I do not conceive of Fed.R.Civ.P. 59(e) as serving the office of providing a disappointed suitor with a post-judgment opportunity to argue that which could have been argued pre-judgment.").
>
> We do not address Mrs. Hickman's contention regarding Rule 60(b). The motion to alter or amend the judgment, to which Mrs. Hickman's supplemental motion referred, was grounded on Rule 59(e) and not on Rule 60(b). Also, the family court never passed upon the contention. *See Stanley v. Reserve Insurance Co.*, 238 S.C. 533, 121 S.E.2d 10 (1961) (a contention not presented to and passed upon by the trial court cannot be considered on appeal); *cf. Talley v. S.C. Higher Education Tuition Grants Committee*, 289 S.C. 483, 347 S.E.2d 99 (1986) (an issue raised in but not ruled upon by the trial court and not presented to the trial court in a motion to amend the judgment is not preserved for appellate review).

Hickman v. Hickman, 301 S.C. 455, 456–57, 392 S.E.2d 481, 482 (Ct. App. 1990)

> The South Carolina Supreme Court recently reaffirmed this principle, stating:
>
> Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the Court with a platform for meaningful appellate review. *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2012). "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

> Furthermore, a party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not. *Hickman v. Hickman,* 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct.App.1990).

Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014).

Even if the Appellants had opposed these grounds for the Motion prior to the trial court's ruling, which they did not, the trial court properly found Appellant Cristine lacked privity to maintain the causes of action against the Respondents. As Cristine did not enter into a contractual relationship with Respondents, she lacked the contractual privity by which a contractual claim could be sustained.

> "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." *Bob Hammond Constr. Co. v. Banks Constr. Co.,* 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct.App.1994).

Windsor Green Owners Ass'n, Inc. v. Allied Signal, Inc., 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004).

The Appellants counter the contractual privity holding with an unpreserved argument that Appellant Cristine was a third-party beneficiary to the contract. In Windsor Green, the Court of Appeals rejected that a home owners association was a third-party beneficiary to a property owner's rental contract and stated that third-party beneficiaries must be explicitly identified in the contract.

> No third-party beneficiary status is created absent an intent by the parties to confer a substantial benefit on Windsor Green. Since we find no evidence of an intent to benefit Windsor Green, we hold the circuit court erred in granting summary judgment to Windsor Green on its claim for breach of contract.

Id., 362 S.C. 12, 19, 605 S.E.2d 750, 753 (Ct. App. 2004) Where the Appellants do not identify contractual language expressing an intent to confer a benefit on Appellant Cristine, even if it had been preserved, this argument should be dismissed.

Appellants also neglected to respond to the motion's argument that Appellant Raymond waived all of the Complaint allegations through the releases contained in his contracts with the Respondents. (Supp. R. p. 64, line 24- p. 66, line 22) The Appellants did not dispute this allegation until after the trial court ruled in the Respondents' favor. As a result, this argument is also not preserved and the trial court's finding that Appellant Raymond waived all of the claims contained within the Complaint should stand. Even if they had responded, however, the trial court did not err in finding the releases valid.

South Carolina has found that contracts are primarily governed by the language contained therein.

> "The main guide in contract interpretation is to ascertain and give legal effect to the intentions of the parties as expressed in the language of the lease." *Gilbert v. Miller,* 356 S.C. 25, 30, 586 S.E.2d 861, 864 (Ct.App.2003) (holding it was clear the lease language evidenced no intent to make the plaintiff, either as a guest or a tenant, a third-party beneficiary by imposing a duty in tort on the landlord to prevent a tenant's dog from injuring another). "If a contract's language is clear and capable of legal construction, this Court's function is to interpret its lawful meaning and the intent of the parties as found in the agreement." *Id.* at 30–31, 586 S.E.2d at 864. "A clear and explicit contract must be construed according to the terms the parties have used, with the terms to be taken and understood in their plain, ordinary, and popular sense." *Id.* at 31, 586 S.E.2d at 864.

Id. at 17, 752.

Appellant Raymond signed three different contracts in which he pledged to indemnify and hold harmless Respondents from all claims such as the ones at issue in this suit. These contracts are binding and amount to a release of the claims brought herein.

South Carolina has held that releases are contracts and are governed by contract principles. Bowers v. Dep't of Transp., 360 S.C. 149, 153–54, 600 S.E.2d 543, 545 (Ct. App. 2004) As such, "[i]n construing terms in contracts, this Court must first look at the language of the contract to determine the intentions of the parties." Id. at 153 (quoting C.A.N. Enterprises, Inc. v. South Carolina Health & Human Services Fin. Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988)).

In Bowers, the Plaintiffs settled a car accident and signed a general release that released ALL other persons or entities that may be liable. Following the settlement, the Plaintiffs attempted to sue the South Carolina Department of Transportation. The South Carolina Court of Appeals held that SCDOT was covered in the prior general release. The Court found release language was unambiguous and precluded the examination of additional extrinsic evidence. In analyzing this, the Court stated the following:

> Since the Release unambiguously sets forth the contracting parties' intent, we are bound by that clearly expressed intent without resort to extrinsic evidence. "Extrinsic evidence giving the contract a different meaning from that indicated by its plain terms is inadmissible." Accordingly, the circuit court applied the proper summary judgment standard and correctly determined Appellants' unmistakable intent from the terms of the Release without resort to affidavits and deposition excerpts....
>
> The terms of the Release here are clear and unambiguous: Appellants released "all other persons, firms or corporations liable or, who might be claimed to be liable" and the settlement was accepted as a "full and final compromise ... precluding forever any further or additional claims arising out of the aforesaid accident." The Release, by its unmistakable terms, establishes Appellants' intent as a matter of law, and forecloses the need for any further inquiry regarding both its scope and the presence of "full compensation amounting to a satisfaction." The explicit, plain language of the Release permits no other finding. We therefore find the Release bars Appellants' actions against SCDOT.

Id. at 153-154, 156.

In McCune, the South Carolina Court of Appeals examined a liability release where a customer of a recreational paintball playground released the facility from liability stemming from injuries sustained while paintballing. The Court examined the contract and found, "The release in the instant case explicitly and unambiguously limited the Range's liability." McCune v. Myrtle Beach Indoor Shooting Range, Inc., 364 S.C. 242, 248, 612 S.E.2d 462, 465 (Ct. App. 2005). The Court additionally stated:

> Exculpatory contracts, such as the one in this case, have previously been upheld by the courts of this state. *See Huckaby v. Confederate Motor Speedway, Inc.*, 276 S.C. 629, 630, 281 S.E.2d 223, 224 (1981) (finding plaintiff's action against speedway for injuries sustained during a race was barred by "waiver and release" voluntarily signed by plaintiff prior to entering the race track); *Pride v. Southern Bell Tel. & Tel. Co.*, 244 S.C. 615, 619–22, 138 S.E.2d 155, 157–58 (1964) (holding it was not violative of public policy for telephone company to legally limit its liability by contract for negligence in the publication of a paid advertisement in the yellow pages of its telephone directory). "However, notwithstanding the general acceptance of exculpatory contracts, '[s]ince such provisions tend to induce a want of care, they are not favored by the law and will be strictly construed against the party relying thereon.' " *Fisher v. Stevens,* 355 S.C. 290, 295, 584 S.E.2d 149, 152 (Ct.App.2003) (quoting *Pride,* 244 S.C. at 619, 138 S.E.2d at 157).

Id. at 247–48.

The Court concluded:

> The agreement was voluntarily signed and specifically stated: (1) she assumed the risks, whether known or unknown; and (2) she released the Range from liability, even from injuries sustained because of the Range's own negligence. It is clear McCune voluntarily entered into the release in exchange for being allowed to participate in the paintball match.

Id. at 249.

As stated, under South Carolina law, this Agreement is governed by contract law. "To determine the intention of the parties, the court 'must first look at the language of the contract. The construction of a clear and unambiguous contract presents a question of law for the court."

S. Carolina Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC, 379 S.C. 645, 655, 667 S.E.2d 7, 12–13 (Ct. App. 2008)(internal citations omitted).

As part of the Exclusive Right to Buy Buyer Agency Contract ("Buyer Agency Contract"), Appellant Raymond agreed to hold the Broker "harmless from liability as a result of incomplete/inaccurate information provided to Broker by Buyer or Seller" and "harmless from liability as a result of Seller's failure to provide a complete Seller's Property Condition Disclosure statement." (R. p. 275, para. 4(A)(4)-(5))

The Designated Agency Agreement stated that the "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." (R. p. 280, para. (1)(j)) Likewise, the Dual Agency Agreement stated "Seller and Buyer agree to indemnify and hold Broker harmless against all claims, damages, losses, expenses, or labilities, other than violations of the South Carolina Real Estate License Law and intentional wrongful acts, arising from Broker's role as a Dual Agent." (R. p. 281, para. (3)(d))

The Dual Agent contract also stated the following: "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 failing 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." (R. p. 281, para. (2)(c))

Additionally, the Contract for Sale contained paragraph 33 entitled "Disclaimer," which stated:

> 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....

(R. p. 292, page 10)

Appellants attempt to raise an unpreserved argument that the contract language cited above would not stand where the language would not exempt a party from liability for their own negligence. This argument fails, however, where the Appellants' have failed to demonstrate any negligence by the Respondents that correlates with the Appellants' alleged damages. The Appellants have failed to demonstrate that the Respondents are a negligent party seeking a release from claims stemming from their negligence. The contracts highlight the many areas the Respondents are not responsible for and the contract releases the Respondents from all claims stemming from these identified items, such as inspections.

Appellant Raymond knowingly released Respondents from all claims herein when he signed the above contracts. The Appellants did not raise an argument in opposition prior to or at the hearing on the Motion for Summary Judgment. Their first opposition to this argument appears in the Motion for Reconsideration and has not been preserved for appeal. The trial court held Appellant Cristine lacked privity to sustain her contractual claims and Appellant Raymond waived his claims against Respondents. Appellants' arguments alleging error are both unpreserved and without merit. Respondents respectfully request this Court affirm the lower court's ruling on this basis.

II. THE TRIAL COURT PROPERLY HELD THE APPELLANTS FAILED TO ESTABLISH THE REQUISITE ELEMENTS NEEDED TO SUPPORT THEIR CAUSES OF ACTION

Because the response in opposition to the Motion for Summary Judgment document Appellants' filed did not contain legal analysis, the only instance in which the Appellants responded to the Motion for Summary Judgment was the Appellants' oral argument before Judge Hood at the hearing with their accompanying submission of affidavits. Any new arguments made after Judge Hood's ruling, via the Motion for Reconsideration and/or the Initial Brief of Appellant, were not raised in a timely manner and are not preserved for appeal.

As a result, this brief examines the arguments articulated by Appellants at the Motion for Summary Judgment hearing and raised again on appeal. Judge Hood said, "This is a very simple case. This is not complicated. I'm not making it complicated." (Supp. R. p. 58, lines 2-7) At the hearing, the Appellants put forth very few arguments. Appellants' central argument was that the Respondents failed to "vet" the HVAC inspector. (Supp. R. p. 35, lines 12-13; p. 36, lines 15-18; p. 52, line 13; p. 57, lines 14-16) Appellants admitted there was "no evidence that she knew anything negative about that roofer or the heating and air guy," but claim Respondents had an affirmative duty to proactively "vet" the inspectors. (Supp. R. p. 35, lines 12-17; p. 36, lines 15-18; p. 52, line 13; p. 57, lines 14-16)

On Appeal, Appellants' brief claims Respondents had the duty to exercise "reasonable skill in discharging their duties and the exercise of care not to pass along misleading information," or act "acting adversely to Appellants' interests." (IBOA, p. 8) These alleged duties are the crux of Appellants' position at the trial court level and on appeal. Appellants wish to expand the Respondents' responsibilities from a duty to not "knowingly" providing false or misleading information to a duty to verify that information is not false or misleading before

relaying any third party information to a buyer. Appellants attempt to use their real estate expert's affidavit as an authority for creating these duties, but where these alleged duties do not find support in case law or statutes, their expert's opinion alone does not suffice as an appropriate authority to justify the expansion of realtor duties.

Appellants assert that their expert's affidavit (which was objected to by Respondents in the lower court), stated that Respondent Loper breached her duty to Appellants by the following: failing to ensure the recommended HVAC inspector was licensed; advising the Appellants that the seller was not required to complete a property condition disclosure statement; creating a roof repair warranty letter using the content of an email outlining the same from Dr. Roofs; asking the seller's roof repairman for his impression of the roof; relaying to the Appellants that the repairman thought the roof was in good condition; and failing to advise the Appellants that she was aware of the identify of an individual who owned the home prior to the seller. Each of these allegations will be examined at length later in this brief. (IBOA, p. 14-15)

At the hearing, the trial court noted, however, that despite Segars' affidavit proffering the above claims, the Appellants' expert was not able to clearly identify any breach of duty at his deposition. The court paraphrased Segars' deposition testimony, stating:

Q: "What's the opinion you have rendered as it relates to Ms. Loper's work?"

A: "Is that she did not exercise reasonable care and diligence in her fiduciary duties.

Q: "In what way?

A: "She had a duty to disclose items -- anything she knew about."

The court then noted that the expert never answered the questions directly. (Supp. R. p. 46, line 21- p. 46, line 24; quoting R. p. 58, line 22- p. 59, line 12)

At the hearing, the Appellants admitted that they were notified they needed a roof and HVAC inspection. (Supp. R. p. 29, lines 4-5) They claimed they relied on Loper to recommend individuals and though Appellants acknowledged she had no duty to make recommendations, they claimed she breached her fiduciary duty by failing to verify the roof repairman and HVAC repairman were qualified. (Supp. R. p. 36, line 20- p. 37, line 5) The Appellants also argue that Respondents failure to relay knowledge of the prior home owner's identity amounted to a breach of her fiduciary duty. (Supp. R. p. 53, line 20- p. 54, line 19) Lastly, the Appellants refer to an incident in which Respondent Loper used an email from the roof repairman that provided a warranty for his roof repair to create a letter for the file. Respondent Loper cut and paste the email warranty into a letter format. Appellants admit that prior to closing on the house, they were aware that Loper had used an email to create the letter and they continued finalizing the purchase with this information. (Supp. R. p. 46, line 4-16)

To fully understand Appellants' arguments, it is important to highlight some factual background. The original inspection report advised the Appellants to obtain a roof inspection and also highlighted roof repairs to be conducted. The seller obtained a roofer, Dr. Roofs, to perform the repairs. While the roofer was performing repairs for the seller, Respondent Loper asked the repairman for his impression of the roof. By the Appellants' own account, the repairman indicated he thought the roof was in good condition and Respondent Loper merely relayed his impressions to the Appellants. (Supp. R. p. 29, line 20- p. 30, line 7) The Appellants never obtained roof inspection as recommended by the inspector. They elected instead to rely on the impressions of the seller's repair contractor. They are now seeking to hold Respondent Loper responsible for communicating the impressions of the repairman to them and indicate that

this communication of the repairman's impressions relieved them of their statutory duty to obtain an independent inspection.

Likewise, the HVAC inspector, Defendant Mooneyham, advised the Appellants that there were problems with the ductwork, but the Appellants did not hire him, or anyone, to further explore or fix the problems. (Second Supp. R. p. 7, lines 3-12) Appellants seek to hold Respondents responsible for recommending the HVAC inspector, yet they do not want to be held responsible for failing to fully investigate or make an effort to address the alleged problem with the ductwork after they were advised of the same.

The Appellants conceded that they were advised by the inspection report to obtain additional inspections. (Supp. R. p. 64, lines 16-17) They further conceded the buyer had a duty to verify the inspectors are qualified. (Supp. R. p. 64, line 24- p. 65, line 3) Moreover, the Appellants concede that their contracts with Respondents state that they cannot rely on Respondents for inspections. (Supp. R. p. 65, line 4- p. 66, line 21) The Appellants' err, however, in their belief that a realtor's recommendation of a third party alleviates the buyer's statutory duty to oversee the inspections.

Additionally, despite conceding that the buyer has the duty regarding property inspections, Appellants want to expand the duty of realtors to include verifying the truth of information relayed by third party contractors obtained for the purpose of assessing the property. Interestingly, however, the Appellants do not wish this duty to apply to Appellant Raymond, a licensed real estate agent who received a commission on the sale of the property at issue. Appellant Raymond's duty to inspect the property is rooted in South Carolina statutes, South Carolina case law, and his own argument attempting to place an expanded fiduciary duty on real estate agents.

In Chastain, the South Carolina Court of Appeals examined a similar case involving allegations from the buyer against a realtor when their home flooded after the purchase. In that case, the property disclosure statement indicated there had been some flooding activity in the past, but the buyers felt realtor had been aware of a more significant flooding history in the area than was disclosed. The Court found the buyers had not presented any evidence that a genuine issue of material fact existed as to each element of the claims. "First, Buyers have not provided any evidence that Realtor knew of any inaccuracies in the Disclosure. Second, Buyers stated under oath they were unaware of any evidence that Agent had knowledge of any false, incomplete or misleading information in the Disclosure." Chastain v. Hiltabidle, 381 S.C. 508, 521, 673 S.E.2d 826, 833 (Ct. App. 2009)

> A real estate licensee is "not obligated to discover latent defects in property or to advise the agent's clients on matters outside the scope of the agent's real estate expertise." S.C.Code Ann. § 40–57–137(F) (Supp.2007); *see also* S.C.Code Ann § 27–50–80 (Supp.2007) (stating a real estate licensee has no duty to inspect the onsite or offsite conditions of the property and any improvements).
>
> Additionally, a real estate licensee is not liable to a purchaser if: (1) the owner provides the purchaser with a disclosure form that contains false, incomplete, or misleading information, and (2) the real estate licensee did not know or have reasonable cause to suspect the information was false, incomplete, or misleading. S.C.Code Ann. § 27–50–70 (Supp.2007); *see also* S.C.Code Ann. § 40–57–137(F) (stating a real estate company is "not liable to a buyer for providing the buyer with false or misleading information if that information was provided to the licensee by his client and the licensee did not know or have reasonable cause to suspect the information was false or incomplete").
>
> Taken together, these sections provide that a real estate licensee does not have a duty to inspect or investigate the physical condition of a piece of property for the purpose of confirming or denying statements made by a seller in a disclosure statement. Rather, the Legislature places the duty of performing such an inspection or investigation squarely on the shoulders of the buyer. *See* S.C.Code Ann. § 27–50–80 ("This article does not limit the obligation of the purchaser to inspect the physical condition of the property and improvements that are the subject of a contract covered by this article.").

> Here, Buyers were put on notice by Sellers' statements in the Disclosure that the Property had some history of flooding. To place on Realtor and other real estate licensees the burden of further investigating the accuracy of such statements would require them to have expertise in plumbing, electrical and construction codes. Because we do not believe this was the intent of the Legislature, we affirm the trial court.

Id., 381 S.C. 508, 519–20, 673 S.E.2d 826, 832 (Ct. App. 2009)

At the hearing, the trial court repeatedly asked Appellants to identify a material fact withheld by Respondents for the purpose of supporting their Complaint allegations. When pressed, Appellants could not identify a material fact withheld by Respondents. Judge Hood asked Appellants to identify "something that she knew that she did not disclose... that you can prove." (Supp. R. p. 54, lines 2-5) Appellants responded that Respondent Loper failed to advise Appellants that she knew the identity of a woman who owned the home before the seller. (Supp. R. p. 54, lines 6-23) In rejecting this as a material fact, the trial court noted that this information is a matter of public record and equally available to Appellants. (Supp. R. p. 56, line 24- p. 57, line 2)

Appellants further acknowledged the following:

> Appellants' counsel: "We're not arguing that she knew there was a defect in the house and failed to disclose it.
>
> The court: "Because she didn't."
>
> Appellants' counsel: "No. We're not arguing that."

(Supp. R. p. 57, lines 7-10)

The Appellants state that instead, they are arguing Respondents failed to "vet" the inspectors. (Supp. R. p. 57, line 15) In the Complaint, the Appellants attempted to expand the scope of negligent misrepresentation by claiming the Respondents had a "duty to see that only

accurate information was communicated to Plaintiffs." (R. p. 23, Para. 74) The Appellants' position that Respondents were responsible for verifying the accuracy of inspection reports and the effectiveness of repairs is refuted by South Carolina law.

> (G)(1) A licensee shall treat all parties honestly and may not knowingly give them false or misleading information about the condition of the property which is known to the licensee. A licensee is not obligated to discover latent defects or to advise parties on matters outside the scope of the licensee's real estate expertise. Notwithstanding another provision of law, no cause of action may be brought against a licensee who has truthfully disclosed to a buyer a known material defect.
>
> (2) No cause of action may be brought against a real estate brokerage firm or licensee by a party for information contained in reports or opinions prepared by an engineer, land surveyor, geologist, wood destroying organism control expert, termite inspector, mortgage broker, home inspector, or other home inspection expert, or other similar reports.
>
> (3) A licensee, the real estate brokerage firm, and the broker-in-charge are not liable to a party for providing the party with false or misleading information if that information was provided to the licensee by the client or customer and the licensee did not know the information was false or incomplete.

S.C. Code Ann. § 40-57-350 (G)(1)

S.C. Code Ann. § 27-50-80 also makes it clear that inspection obligations fall squarely with the buyers and the statute specifically holds this is not a duty of the realtor.

> **SECTION 27-50-80.** Obligation of purchaser to inspect.
>
> This article does not limit the obligation of the purchaser to inspect the physical condition of the property and improvements that are the subject of a contract covered by this article. The real estate licensee, whether acting as listing agent or selling agent, has no duty to inspect the onsite or offsite conditions of the property and any improvements.

The Appellants also claimed, in essence, that Respondents had an obligation to verify whether or not the seller adequately remedied items on the inspection report and also had an obligation to verify the veracity of the disclosed conditions. Again, South Carolina law refutes

the Appellants' belief that Respondents could or should be tasked with vetting the property's condition or the effectiveness of repairs made during the sale process.

> **SECTION 27-50-70.** Listing agent to notify owner of disclosure obligations; liability for refusal or inaccuracy of disclosure statement.
>
> (A) A listing agent or any real estate licensee operating for any party in a residential real estate transaction must inform in writing each owner covered by the listing agreement of the owner's obligations prescribed in this article. If the listing agent performs this duty, he is not liable for the owner's refusal or failure to provide a prospective purchaser with a disclosure statement.
>
> (B) This article does not conflict with or alter the duties of the real estate licensee pursuant to the regulations of the commission. The real estate licensee, whether acting as the listing agent or selling agent, is not liable to a purchaser if:
>
> (1) the owner provides the purchaser with a disclosure form that contains false, incomplete, or misleading information; and
>
> (2) the real estate licensee did not know or have reasonable cause to suspect the information was false, incomplete, or misleading.

Respondents submitted a motion and supporting memorandum to the lower court that identified each cause of action brought by the Appellants and outlined their failure to meet the burden of proof for each of these causes of action. Appellants did not respond to these claims in writing, but did have an opportunity to present their case at the Motion for Summary Judgment hearing. At the hearing, the Appellants elected to argue only a portion of the grounds for the Motion for Summary Judgment. The above section attempts to address each of the arguments raised and preserved by Appellants at the hearing. Respondents submit the trial court properly rejected these arguments at the hearing and request this Court affirm the lower court.

III. EVEN IF ARGUMENTS RAISED BY APPELLANTS FOR THE FIRST TIME IN THE MOTION FOR RECONSIDERATION WERE PRESERVED, APPELLANTS CANNOT DEMONSTRATE THE BURDENS OF PROOF FOR THEIR CAUSES OF ACTION

Respondents submit that the remainder of the issues raised on appeal, but not presented prior to the trial court's order granting the Motion for Summary Judgment, are not preserved. However, in the event that this Court wishes to address these arguments on the merits, Respondents address the same.

A. Appellants failed to demonstrate Respondents breached a duty

Though the Appellants' Initial Brief on Appeal addresses the Complaint's causes of action, they do not specify their evidentiary support for all of the causes of action. Rather, they identify the burden of proof and then merely state they have previously provided the evidence supporting the same. While it is not clear what is meant by these vague assertions of previously provided evidence, the Appellants do set forth ten alleged breaches of duty earlier in their brief. As noted, six of these allegations appear in Segar's affidavit. In the event the court examines these allegations as support for the causes of action, which Respondent argues is not proper due to Appellants' lack of articulating the same, Respondents address these allegations regarding breaches of duty individually before analyzing the causes of action.

1. Respondents allegedly recommended the HVAC inspector without vetting his qualifications and licensing status;
2. Respondents allegedly requested the seller's roof repairman perform an inspection of the roof without "vetting" his qualifications and licensing status;
3. Respondent Loper created a letter from an email authored by the seller's roof repairman and warrantying his repair work;

4. Respondents allegedly informed Appellants they were not entitled to a property condition disclosure statement;
5. Respondents allegedly withheld the identity of a prior owner of the home;
6. Respondents allegedly represented the roof was three years old and in good condition;
7. Respondents allegedly "Push[ed] for and arrang[ed] for inspectors of their own choosing whose competency which she vouched;"
8. Respondents allegedly did not tell the Appellants they had not checked the licensing status of inspectors;
9. Respondents allegedly stated that the home inspector had been thorough and they should not be overly concerned with the results; and
10. Appellants claim that home inspector came for the re-inspection without his report and Respondents allegedly determined what inspector should examine.

(IBOA, p. 19-20)

The first allegation alleges that Respondents should have ensured the HVAC inspector's licensing status and qualifications. The Appellants have also described this as a requirement for Respondents to "vet" the inspectors. South Carolina statutes have made it clear that the responsibility for inspectors falls on the buyer. South Carolina case law has additionally stated that the buyer cannot rely on the seller for information that should be obtained via buyer's due diligence. Respondents' contracts also specifically state that they are not responsible for inspections. Respondents had no duty to "vet" inspectors and Appellants have not demonstrated any legal authority that would indicate otherwise. Chastain v. Hiltabidle, 381 S.C. 508, 673 S.E.2d 826 (Ct. App. 2009) In fact, South Carolina law states, "The real estate licensee, whether

acting as listing agent or selling agent, has no duty to inspect the onsite or offsite conditions of the property and any improvements." S.C. Code Ann. § 27-50-80.

The Appellants' second allegation claims that the Respondents failed to vet the roof repairman. As discussed, the inspection report informed the Appellants of roof defects and further advised them to get a roof inspection. The seller hired a repairman to fix the roof. While the seller's repairman was on the roof, Respondent Loper asked him for his impressions of the roof. Respondent Loper then relayed the repairman's impressions to the Appellants. (Supp. R. p. 29, line 20- p. 30, line 7) The Appellants claim that Respondent Loper said the roof repairman called the roof "good," yet the repairman was actively fixing roof defects when asked for his opinion. Additionally, the inspection report advised the roof had both active leaks and prior repairs that could fail with time. (R. p. 311, para. 1.0) The Appellants failed to do proper due diligence as assigned to them by South Carolina law and they seek to hold Respondent Loper for issues that would have been uncovered if they had executed their buyer responsibility to have the roof inspected. Moreover, as discussed, there is no duty in South Carolina law for a realtor to "vet" a seller's repairman. Under their logic, the realtor would be responsible to hire her own inspector to inspect the work done by the buyer and/or seller's inspectors. And, how then does a realtor vet the quality of work performed by their own independent inspector? It exceeds the reasonable bounds of what a realtor is able to do and has been definitively rejected by South Carolina law. "A real estate licensee is 'not obligated to discover latent defects in property or to advise the agent's clients on matters outside the scope of the agent's real estate expertise.' S.C.Code Ann. § 40–57–137(F) (Supp.2007)" Chastain v. Hiltabidle, 381 S.C. 508, 519, 673 S.E.2d 826, 832 (Ct. App. 2009)

In the third claim, Appellants allege that Respondent Loper created a false document when she took an email from the seller's roof repairman and cut and paste the email into letter format. The content of the document verified that the repairman warrantied the work he performed. Prior to closing, the Appellants discussed the letter with Respondent Loper and she told them the method by which she created the document for the closing file. The Appellants accepted the document and proceeded with closing. (Supp. R. p. 46, lines 4-16)

In their fourth claim, the Appellants claim that the Respondents erroneously advised them that they were not entitled to a property condition statement disclosure from the seller. This is disputed, but we will address the claims as though they could be proven for the sake of appellate analysis. In addition, Respondents assert this argument is not preserved where Appellants did not argue this issue to Judge Hood at the hearing. The seller had no information regarding the house as he never lived there and never had it inspected. If he had completed a report, it would have remained blank. (R. p. 299, lines 3-24) Appellants don't dispute this. Additionally, Appellant Raymond signed a contract that explicitly waived the seller's obligation to complete a property disclosure form. (R. p. 287, para 12(b)) Appellant Raymond alleges he was not clearly informed as to the law on this matter, but as an agent receiving a commission on the sale of the property, he was equally tasked with knowing the property disclosure laws. "When selling to himself, a broker must meet the extremely high standards of his fiduciary obligation." Darby v. Furman Co., 334 S.C. 343, 348, 513 S.E.2d 848, 850 (1999) Additionally, Appellants have not alleged any additional information that the property disclosure statement might have yielded had the seller completed it. All property defects highlighted in the Complaint were either specifically identified in the inspection report as defects or fall within one of the many areas of the home that the inspection report advised additional inspections for. So, even if one were to assume that

Respondents were not properly advised of the seller's requirement to complete a disclosure statement, which is disputed, this claim fails where there is no allegation that the disclosure statement would have provided material information, where all defects or needs for further inspection were identified in the inspection report, and where Appellant Raymond had an independent obligation to be versed in property disclosure requirements.

The Appellants' fifth allegation centers on the Appellants' belief that Respondent was required to relay knowledge of the identities of prior owners. The Appellants do not allege what, if any, material information would have been yielded from obtaining the identity of a prior owner. Further, the trial court noted this information is a matter of public record and readily available to a buyer. (Supp. R. p. 56, line 9- p. 57, line 2; p. 60, line 16- p. 61, line 2) Additionally, the Appellants testified that they obtained information regarding the seller's original purchase of the home from tax records. (R. p. 210, line 14- p. 212, line 22) These tax records likely contained the identity of the prior owners of the homes. As a result, not only was the information available to the Appellants, it appears from their own testimony that they had the information on hand. The trial court properly determined that the Respondents did not have an obligation to relay the identity of the individuals who owned the property before the seller without some indication as to why this information would be material. The trial court did not err and the Appellants have failed to show otherwise.

The Appellants' sixth allegation claims that Respondent Loper stated the roof was three years old and in good condition. Any information regarding the roof presented by Respondent Loper to the Appellants was information presented to her by another party and she relayed the same to the buyer. Respondent Loper could not have verified the truth of any statements regarding the condition of the roof without an independent inspection. The Appellants were

advised to get a roof inspection and declined to do so. Further, even if one were to assume Respondent Loper said the roof was three years old and "good," which is disputed, South Carolina law has stated that you cannot rely on the realtor's property impressions. McLaughlin v. Williams, 379 S.C. 451, 665 S.E.2d 667 (Ct. App. 2008) The Appellants additionally had a statutory responsibility to obtain all requisite inspections. Their failure to do so does not task Respondents with the responsibility to determine the quality of the roof as a matter of law.

In their seventh allegation, the Appellants allege Respondents "pushed for and arranged for" inspectors. The Appellants never hired a roof inspector, though they make several allegations related to the seller's roof repairman and refer to him as an inspector. They hired an HVAC inspector and obtained the name of the inspector from Respondent. The HVAC inspector advised there were holes in the HVAC duct work that required additional examination and repair. The Appellants declined to hire anyone to evaluate or repair the identified damage to the HVAC. Providing the buyers with the name of an inspector does not violate a fiduciary duty and does not remove their ability to select their own inspector as Appellants' argued to the trial court. (Supp. R. p. 52, line 5- p. 53, line 19) South Carolina law places the inspection burden on the buyer and a recommendation from the Respondent does not alleviate that burden.

In their eighth allegation, Appellants allege Respondents withheld the fact that they had not checked the inspectors' licensing. This is a new and unpreserved argument. At the hearing, Appellants allege Respondents failed to vet the inspectors. They argued Respondents had a duty to check, but didn't. Now, Appellants allege Respondents withheld information related to licensing. The change is subtle, but significant. Again, Respondents have the burden for obtaining inspectors. If a realtor recommends inspectors, the buyer has the responsibility to

select and approve the inspector. If the buyer desires to know the status of the inspector's license, the buyer has the obligation to verify the same.

In the ninth allegation, Appellants claim Respondents made statements to the effect that the original home inspector had been overly thorough and they did not need to be concerned with the inspection report. Even if this were true, which is disputed, realtor commentary does not alleviate a buyer's statutory inspection obligations.

Lastly, as to the tenth allegation, the Appellants claim that the Respondents breached a duty by withholding the fact that the inspector came to the re-inspection without his report and the realtor advised him of areas for re-examination. Again, the realtor does not have a duty to oversee the inspections of a home for a buyer. This is the buyer's responsibility by South Carolina law. Their failure to execute their responsibility does not result in a breach of duty by their real estate agent.

B. Appellants failed to demonstrate Actual or Constructive Fraud

Having examined the alleged breaches of duty, Respondents now examine the trial court's ruling that Appellants failed to support their causes of action. The trial court properly found the Appellants could not meet the burden of proof for actual or constructive fraud against Respondents. "Fraud is not presumed, but must be shown by clear, cogent, and convincing evidence....Further, Rule 9(b), SCRCP provides: 'In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.'" Ardis v. Cox, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993) Due to its clear and convincing evidence burden of proof, demonstrating fraud requires more than the "mere scintilla of evidence." It requires a heightened standard or review to withstand a motion for summary

judgment. "In cases requiring a heightened burden of proof, the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment." Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011)

> It is well settled that, in order to recover in an action for fraud and deceit, based upon representation, the following elements must be shown by clear, cogent and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; (9) the hearer's consequent and proximate injury. Failure to prove any one of the foregoing elements is fatal to recovery. Carter v. Boyd Construction Company, 255 S.C. 274, 178 S.E.2d 536; Moye v. Wilson Motors, Inc., 254 S.C. 471, 176 S.E.2d 147.

O'Shields v. S. Fountain Mobile Homes, Inc., 262 S.C. 276, 281, 204 S.E.2d 50, 52 (1974).

The Appellants did not show the most basic elements of fraud. First, they did not identify an affirmative false representation made by Respondents. Instead, the Complaint argued that Respondents failed to disclose material information, which amounted to a false representation. However, when asked what material fact Respondents failed to disclose, Appellant Raymond stated that he did not know and Appellants' counsel solely argued it was the identity of a former owner. (R. p. 250, line 18- p. 251, line 1; Supp. R. p. 53, line 25- p. 55, line 2) In their brief, however, Appellants expand their argument to state the false representations were statements about the age and condition of the roof, the letter from the roof repairman warrantying his repair, failure to relay the identity of a prior owner and failure to "vet" the inspectors. These arguments are not preserved. (IBOA, p. 20-21) These latter two arguments identified by Appellants as false statements also fail where the failure to take an action does not amount to a false representation. Further, the Appellants openly conceded that Respondents did not knowingly fail to disclose a defect. (Supp. R. p. 57, lines 7-10; *see also* Supp. R. p. 54, lines 2-23) Appellants

have further failed to support an argument that Respondents intended for them to act on the alleged, disputed false representations.

Appellants also cannot show "the hearer's ignorance of its falsity." As argued in the Respondents' motion, the Complaint outlined numerous issues that the Appellants claimed were not known to them, but later conceded they were aware of the issues prior to closing. (R. p. 245, lines 2-7; R. pp. 247- 248; Second Supp. R. p. 7, lines 3-12; R. p. 240, lines 3-25; Second Supp. R. p. 3, line 22- p. 5, line 13) Where each representation alleged by the Appellants was presented to them prior to closing, they could not recover for fraud. The Appellants have tried to reframe their fraud argument on appeal, differing from the argument presented in the Complaint, but it still fails. The inspection report advised the roof had defects and they admitted knowing Respondent Loper made the letter prior to closing. (Supp. R. p. 46, lines 4-16) Allegedly failing to identify the prior owner or vet inspectors are not false representations that can support this cause of action.

Further, the Appellants cannot show the right to rely on the representation, where the inspection report, as well as numerous disclaimers in Respondents' contracts, precluded them from relying on Respondents' commentary regarding the condition of the property. South Carolina law states that a buyer cannot rely on a realtor's statements regarding a condition of the home where the information is verifiable by the buyer and/or is conflicted by the inspection report. Schnellman v. Roettger, 368 S.C. 17, 627 S.E.2d 742 (Ct. App. 2006), aff'd as modified, 373 S.C. 379, 645 S.E.2d 239 (2007).

When asked what false representation Respondents made, the Appellants were not able to identify any representations, other than Respondent Loper's casual commentary that it was an attractive roof and the roof was three years old. (R. p. 220, lines 9-17; p. 237, lines 17-23)

However, South Carolina case law has found that a real estate agent's comments on seriousness of inspection report issues and an allegedly incomplete disclosure statement do not raise issues of fact where the inspection report clearly indicated additional problems required investigation. McLaughlin v. Williams, 379 S.C. 451, 665 S.E.2d 667 (Ct. App. 2008). In McLaughlin, the Court found that the Plaintiff could not rely on real estate agent's comments or the disclosure statement when he had the benefit of an inspection report advising him of the property's condition. As a result, the Court granted a Motion for Summary judgment and dismissed Plaintiff's claims of negligent misrepresentation and fraud.

In the matter at hand, the Appellants claim they decided to disregard the inspection findings and rely upon Respondents for information regarding the home's condition. As the trial court advised them, any such reliance was misplaced. (Supp. R. p. 64, line 24- p. 65, line 6) In Schnellman v. Roettger, both the South Carolina Court of Appeals and the South Carolina Supreme Court examined an issue where a homeowner sued over a real estate agent's alleged misrepresentation of the home's square footage during the sale negotiations. Both courts held that the buyers' reliance on the agent's square footage representations was unreasonable. Schnellmann v. Roettger, 368 S.C. 17, 627 S.E.2d 742 (Ct. App. 2006), aff'd as modified, 373 S.C. 379, 645 S.E.2d 239 (2007). In making this determination, the court examined the listing disclaimers, which stated that the buyers should measure the home's square footage and that square footage estimates were deemed reliable, but not guaranteed. Id.

The Court found that the buyers' reliance on the square footage listed was not justifiable where disclaimers advised them against relying upon it and the buyers neglected to avail themselves of several methods of independently verifying the square footage. The Court noted that "It is well established that 'there can be no liability for casual statements, representations as

to matters of law, or matters which plaintiff could ascertain on his own in the exercise of due diligence.'" Id. (citing Robertson v. First Union Nat'l Bank, 350 S.C. 339, 348, 565 S.E.2d 309, 314 (Ct.App.2002) (quoting West v. Gladney, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct.App. 2000)

The Buyer Agency Contract explicitly outlined Respondents' role as an agent and not an inspector, engineer or other professional service provider. Moreover, by signing the contract Appellant Raymond agreed to hire more appropriate professionals for advice concerning the condition of the property.

> 12. Professional Counsel: Buyer acknowledges that Broker is being retained solely as a real estate agent and not as an attorney, tax advisor, lender, appraiser, surveyor, structural engineer, home inspector or other professional service provider. Buyer agrees to seek professional advice concerning the condition of the property, legal, and other professional service matters.

(R. p. 277)

Respondents' role as a broker and not an advisor as to the condition of the property was also emphasized in the contract disclaimers. Appellants agreed to hold the Broker "harmless from liability as a result of incomplete/inaccurate information provided to Broker by Buyer or Seller" and "harmless from liability as a result of Seller's failure to provide a complete Seller's Property Condition Disclosure statement." (R. p. 275, para. 4(A)(4)-(5)) These disclaimers alerted the Appellants to their obligation to obtain inspections and the fact that they could not rely on information provided by Seller.

The trial court properly held the Appellants could not show actual fraud where they did not identify false representations that they relied upon and, even if had shown these things, they would have no right to rely upon them where the inspection report clearly advises them of the

defective property conditions. Respondents respectfully request this Court affirm the lower court.

Appellants also assert an allegation of constructive fraud, which requires the same elements as actual fraud minus the intent. The South Carolina Court of Appeals differentiated constructive fraud from actual fraud and set forth the following:

> To establish constructive fraud, all elements of actual fraud except the element of intent must be established. *O'Quinn v. Beach Associates,* 272 S.C. 95, 249 S.E.2d 734 (1978). Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud while intent to deceive is an essential element of actual fraud. The presence or absence of such an intent distinguishes actual fraud from constructive fraud. *Giles v. Lanford & Gibson, Inc.,* 285 S.C. 285, 328 S.E.2d 916 (Ct.App.1985). However, in a constructive fraud case, where there is no confidential or fiduciary relationship, and an arm's length transaction between mature, educated people is involved, there is no right to rely. *Poco-Grande Investments v. C & S Family Credit, Inc.,* 301 S.C. 322, 391 S.E.2d 735 (Ct.App.1990). This is especially true in circumstances where one should have utilized precaution and protection to safeguard his interests. *Id.*

Ardis v. Cox, 314 S.C. 512, 516–17, 431 S.E.2d 267, 269–70 (Ct. App. 1993)

The Appellants conceded there was no intent at the hearing (Supp. R. p. 57) but, regardless, as discussed above, the Appellants cannot meet the remaining burdens of the test for fraud. The inspection report definitively refutes any allegations of fraud as a matter of law, which is supported by the above-discussed case law. Therefore, the trial court did not err in granting the Motion for Summary Judgment as to actual and constructive fraud.

C. The Appellants failed to demonstrate Negligent Misrepresentation

In the Complaint, the Appellants claimed that Respondents negligently misrepresented that defective conditions did not exist and that appropriate repairs had been made.

As reflected below, under South Carolina law, Negligent Misrepresentation is a six prong test, which the trial court properly held the Appellants failed as a matter of law.

> To state a claim for negligent misrepresentation a plaintiff must show (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in

> making the statement; (3) the defendant owed a duty of care to communicate truthful information to the plaintiff; (4) the defendant breached that duty; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as a result of such reliance. *Redwend Ltd. P'ship v. Edwards,* 354 S.C. 459, 473, 581 S.E.2d 496, 504 (Ct.App.2003).

Schnellmann v. Roettger, 368 S.C. 17, 20–21, 627 S.E.2d 742, 744 (Ct. App. 2006), aff'd as modified, 373 S.C. 379, 645 S.E.2d 239 (2007).

At the hearing, Respondents argued that Appellants could not demonstrate negligent misrepresentation where they have not alleged any affirmative false statements made by Respondents. Respondents relayed testimony to the trial court where Appellants admitted they did not know what false representations the Respondents had made. (Supp. R. p. 18, lines 13-15; p. 19, lines 5-14) When the trial court pressed Appellants to support their allegations with specificity, the Appellants never identify a false statement made. Appellants admitted that they were not aware of any defect that Respondents knew about, but failed to communicate to them. (Supp. R. p. 57, lines 4-8)

The property condition defects raised by the Appellants in the Complaint were noted in the inspection report as potential problem areas requiring further inspection. For the remaining Complaint allegations pertaining to square footage and sewer system, the Appellants admitted they didn't know what, if any, the alleged discrepancy of the square footage was and admitted they were aware of the sewer system prior to closing. (R. p. 217, lines 2-9; p. 229, line 11- p. 231, line 12; p. 238, line 7- p. 239, line 3; p. 254, line 16- p. 255, line 3)

Both at the trial court level and at the Appellate level, Appellants attempt to expand the scope of negligent misrepresentation by claiming the Respondents had a "duty to see that only accurate information was communicated to Plaintiffs." (R. p. 23, Para. 74) The Appellants'

position that Respondents were responsible for verifying the accuracy of inspection reports and the effectiveness of repairs is refuted by South Carolina law. S.C. Code Ann. § 27-50-80.

The Appellants also claim, in essence, that Respondents had an obligation to verify whether or not the seller adequately remedied items on the inspection report and also had an obligation to verify the veracity of the disclosed conditions. Again, South Carolina law refutes the Appellants' belief that Respondents could or should be tasked with vetting the property's condition or the effectiveness of repairs made during the sale process. S.C. Code Ann. § 27-50-70.

Like Schnellman, the Appellants' reliance on any alleged assertions by Respondents is unjustified. When appearing before the trial court, the Appellants could not demonstrate that Respondents made a false representation. In his deposition, Appellant Raymond testified that Respondents' "representations" amounted to providing the inspection report to the Appellants.

> Q: Did Ms. Loper ever share with you her understanding of a home inspection report or represent to you the condition of the home inspection report or the condition of the home?
>
> A. Just through the inspection report.
>
> ....
>
> Q. All right. Do you have any knowledge today that she didn't share with you something that she knew about?
>
> A. I don't know. I don't know.
>
> Q. Well, you sued her in this case. What did you sue her for?
>
> A. I don't know.
>
> Q. Well, you received this HouseMaster Home Inspection Report after the first failed contract, correct?
>
> A. The contract, the HouseMaster report, was before -- yes -- before we cancelled out of the first contract.
>
> Q. Because you cancelled out of the first contract based upon this report, correct?
>
> A. Yes, yes.

(R. p. 243, line 2- p. 244, line 14)

On Appeal, the Appellants also claim Respondents had an affirmative duty to verify the accuracy of the roofer repairman's impressions of the roof. They further claim Respondents erroneously informed them that the seller was not required to complete a property disclosure statement, but do not indicate why the same would be material where the seller testified he had no information to disclose. The Appellants again try to use the roof repair warranty letter as support for this cause of action, but the method of the letter's creation was known to Appellants prior to closing. Again, the Appellants elected not to get a roof inspection, despite being advised to do so. Instead, they chose to rely on general impressions of a seller's roof repair contract and are attempting to legally bind Respondents for relaying the repairman's impressions to them under an argument that by relaying the repairman's impressions, Respondents removed the Appellants' ability to meet their statutory responsibility to obtain their own inspection. Lastly, they claim that Respondents failure to "vet" the buyer's HVAC inspector and the seller's roof repairman, amounted to a negligent representation by omission. Respondents do not have a duty to vet inspectors. The vetting required under Appellants theory would be endless where vetting could include criminal background checks, whether they had been the subject of civil lawsuits, educational background and the like. The trial court properly held negligent misrepresentation had not been demonstrated as a matter of law and the Appellants have failed to show otherwise.

D. Appellants failed to demonstrate Breach of Contract

The Complaint did not specify which contract between Respondents and Appellant Raymond was breached nor did they specify any underlying contractual provision. At their depositions, Appellants could not identify the contract or contract term that Respondents allegedly breached. (R. p. 221, line 4- p. 225, line 16; R. p. 253, lines 6-21)

The Complaint stated that Respondents breached the contract by "misrepresenting the square footage of the Property, recommending and allowing an unlicensed individual to perform inspections and recommend repairs to the Property, recommending an individual who performed the roof inspection and repairs in a substandard manner, and misrepresenting that the Property was on public sewer." Testimony highlighted in the Motion for Summary Judgment evidenced that Appellants did not know what, if any, discrepancy there was in square footage. They likewise admitted to being aware of the sewer system prior to closing.

At the hearing, the Appellants continued to neglect to identify which contractual provision was breached. Any later arguments specifying a breach of an identified contractual provision are not preserved for appeal herein.

On Appeal, the Appellants argue that the breaching provision was the Respondents duty to represent the Appellants in a diligent and affective manner stemming from the Buyer Agency Contract and the duty to take no action adverse or detrimental to Appellants' interest in the transaction from the Designated Agency Agreement. As these provisions appear for the first time in the Motion for Reconsideration, they are not preserved for review. The Appellants had numerous opportunities to identify the contractual provisions underlying their breach of contract claims prior to the trial court's ruling, but failed to do so, despite receiving the Respondents' pre-hearing brief noting that they had yet to identify their support for this cause of action.

On appeal, the Appellants also attempt to introduce a new argument by alleging a breach of warranty of good faith and fair dealing, but this is a distinctly different argument not articulated in the Complaint or at the hearing and cannot be raised for the first time after the case was dismissed. The trial court ruling should stand where the Appellants failed to address the

breach of contract claim with specific contractual provisions. Their attempt to correct this error in the Motion for Reconsideration and appeal is not timely and is not preserved.

> There exists in every contract an implied covenant of good faith and fair dealing. *Tharpe v. G.E. Moore Co.*, 254 S.C. 196, 174 S.E.2d 397 (1970). However, there is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do. *First Federal Savings and Loan Ass'n. of South Carolina v. Dangerfield,* 307 S.C. 260, 414 S.E.2d 590 (Ct.App.1992)

Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995). Even if the breach of an implied covenant of good faith argument were preserved, the contracts at issue specifically disavow Respondents from any responsibility for inspections and repairs. Respondents have not breached any provision of the contract and the contract expressly states the Respondents could not and would not take responsibility for the property inspections and repairs. In addition to being unpreserved, Appellants have failed to demonstrate a breach of good faith.

Appellants cannot show, as a matter of law, that recommendations for inspectors and/or repairmen breached the contract where Respondents had not contractually agreed to assume responsibility for the work of third parties and South Carolina law explicitly states that property repairs and improvements are the buyer's, and not the agent's, responsibility. As a result, Respondents respectfully request this Court affirm the lower court's ruling regarding breach of contract.

E. Appellants failed to demonstrate Breach of Contract Accompanied by a Fraudulent Act

The Complaint claimed that Respondents fraudulently intended to breach the contract and advised the Appellants to proceed with the purchase of the property with the knowledge that the repairs had not been properly performed. However, at the hearing, Appellants admitted they did

not have any evidence that Respondents were aware repairs had not been properly performed. (Supp. R. p. 57, lines 4-10) And, importantly, where the Appellants did not attempt to demonstrate their support for this cause of action until the Motion for Reconsideration, their arguments on appeal are not preserved. Regardless, even if preserved, the cause of action would fail.

> In order to recover for breach of contract accompanied by a fraudulent act, a plaintiff must establish: (1) a breach of contract; (2) that the breach was accomplished with a fraudulent intention, and (3) that the breach was accompanied by a fraudulent act. *Smith v. Canal Ins. Co.,* 275 S.C. 256, 269 S.E.2d 348 (1980).

Minter v. GOCT, Inc., 322 S.C. 525, 529–30, 473 S.E.2d 67, 70–71 (Ct. App. 1996)

In Minter, the Court found there was no evidence of an independent fraudulent act to accompany the breach of contract where defendant opened a new location after being advised by plaintiff that action would be a breach of contract. The Court found this could evidence fraudulent intent, but not an independent fraudulent act.

When asked to identify the fraudulent act required to support this claim, Appellants could not identify a fraudulent act and admitted they did not understand the allegation. (R. p. 226, line 5- p. 228, line 15; R. p. 256, line 1- p. 257, line 10)

Even if Appellants were able to establish a breach of contract, the Appellants still have not alleged an independent fraudulent act. Even in their brief, Appellants simply argue that they have presented "ample evidence of incidents of fraudulent conduct" without any specificity as to an independent fraudulent act. Even if one assumes they are vaguely referencing the same actions underlying the breach of contract claim, these acts do not meet the criteria for independence. As a result, the trial court ruling should be affirmed.

F. Appellants failed to demonstrate Negligence

The Appellants claimed that Respondents owed them "a duty to act in compliance with Plaintiffs' instructions, to discover all material information which could affect Plaintiffs' interests in the real estate transaction with Corley, to disclose all material facts to Plaintiffs which were relevant and material to the transaction with Corley, and to protect Plaintiffs by exercising reasonable skill and diligence in the transaction of the business entrusted to them by Plaintiffs." (R. p. 26, para. 93)

Once again, the Appellants argued that South Carolina should expand a realtor's duties to include inspecting the inspections and repairs performed by third parties. Specifically, the Complaint contended Respondents committed negligence in the following manner: misrepresented the square footage of the property; recommended and allowed an unlicensed person to perform inspections and repairs; recommended a roofer who performed a substandard inspection and repair; misrepresented that the property was on public sewer; failed to inspect and confirm the HVAC and roof repairs and inspections were done properly; advised Appellants to close on the house without confirming Corley had completed his obligations; placed the interest in the commission ahead of the Appellants' interest; and failed to use a reasonable degree of care, caution and diligence.

(R. p. 20)

By the hearing, the Appellants had conceded they did not know what, if any, the square footage discrepancy was and also admitted they were aware of the sewer system prior to closing. (R. p. 217, lines 2-9; p. 229, line 11- p. 231, line 12; p. 252, lines 3-6) As a result, at the hearing, they focused on their core allegation that Respondents failed to "vet" the seller's roof repairman and the HVAC inspector. In their brief, Appellants' analysis of negligence simply

incorporates breaches "exhaustively presented" in the brief without any specification. The Appellants have not identified a recognizable duty and a specific act or omission that breached this duty. At other points in their brief, the Appellants have alleged various "duties" which find no support in South Carolina law. These include the alleged duty to "act in compliance with Plaintiff's instructions," the alleged duty to vet inspectors, the alleged duty to affirmatively discover all material information, and the alleged duty to verify the accuracy of all information presented to the buyer by third parties. The Appellants failed to demonstrate to the trial court that a legal duty was breached by the Respondents and even on appeal the Appellants do not identify a recognizable duty and breach thereof in support of their negligence argument.

In Nelson v. Piggly Wiggly, the South Carolina Court of Appeals set forth that in order to prevail on a negligence claim, a Plaintiff must show: the defendants owed her a duty of care; the defendants breached that duty by a negligent act or omission; and she suffered damage as a proximate result of that breach. Nelson v. Piggly Wiggly Cent., Inc., 390 S.C. 382, 391, 701 S.E.2d 776, 780 (Ct. App. 2010) (citing Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d 710, 712 (2000)).

Respondents noted that they did not have a contractual or fiduciary duty to "to act in compliance with Plaintiff's instructions" as the scope of this alleged duty is too wide to be reasonable. Additionally, South Carolina Code Ann. § 27-50-80 refutes Appellants' notion that an agent has a duty to discover all material information related to the real estate transaction. Rather, it is the buyer's statutory duty to arrange for and evaluate inspections and improvements. Appellants' claim that Respondents had a duty to disclose all material facts to Appellants which were relevant and material to the transaction with Corley, but, again, this exceeds the scope of Respondents' contractual or statutory duties. The Appellants attempted to expand the scope of

Respondents' obligations from known material facts to all material facts without supporting authority. They also continue to claim that Respondents have a duty to "vet" inspectors and verify the quality of third party inspections and repair work. The trial court properly rejected these arguments and the Appellants have failed to demonstrate the court's holding was in error.

The Complaint alleged that Respondents failed to use a reasonable degree of care, caution and diligence, but failed to identify standards of care, caution or diligence that were breached. In opposition, Respondents presented an affidavit from real estate expert Donald Griffin. (R. p. 354- 356) Griffin states that he has reviewed the file maintained by Respondents and examined the allegations in the Complaint. He has also reviewed the South Carolina Code of Laws Title 40, Chapter 57 governing real estate brokers and Title 27, Chapter 50 entitled the Residential Property Condition Disclosure Act. After a review of the file in comparison with South Carolina law, Griffin found Respondents complied with both bodies of law. Additionally, Griffin reviewed the contracts signed by Appellant Raymond and Respondents and found that Respondents "complied with the lawful terms of the Dual Agency Agreement." Griffin's affidavit additionally stated,

> It appears from a review of the file maintained by Defendants Loper and NextGen, as well as the applicable South Carolina statutes, that Defendants Loper and NextGen used a reasonable degree of care, caution and diligence in representing the Plaintiffs. Additionally, it appears that Defendant Loper and NextGen's representation of the Plaintiffs met customary real estate standards regarding duties of loyalty, obedience, disclosure, confidentiality, reasonable care, diligence, and accounting. Moreover, it appears that Defendant Loper and NextGen's representation of the Plaintiffs complied with South Carolina law.
>
> I did not detect any negligence on behalf of Defendants Loper and NextGen Real Estate, LLC, as it related to the manner in which this transaction occurred and was documented.

(R. p. 356)

When asked how Respondents failed to use the degree of care, caution and diligence that a reasonable real-estate agent would have used, Appellant Raymond Malejko testified he did not know how Respondents were negligent. (R. p. 258, lines 1-6) Raymond admitted that he did not read the inspection report in its entirety. Further, he acknowledged, "No, I didn't expect Ms. Loper to inspect any of the repairs." (R. p. 245, line 21- p. 246, line 22)

Respondent Loper testified that she did not advise the Plaintiff to proceed with the purchase of the property, nor did she have any knowledge of any defective repairs performed on the property. She further testified that her representation of the Appellants and Defendant Corley was done in good faith and fair dealings with both parties' best interests in mind. (Second Supp. R. p. 9, lines 10- 23)

At the hearing, Appellants admitted they did not have any evidence that Respondents withheld known material facts or had any knowledge of defective repairs. When pressed for "something they could prove" the Appellants only identified that Respondents knew the identity of a prior owner of the property who may or may not have insight into the history of the property and did not relay this person's identity to the Appellants. In rejecting this argument, the lower court noted that historical property ownership is a matter of public record. (Supp. R. p. 53, line 25- p. 55, line 2)

The Appellants failed to provide sufficient support for their claim of negligence and, as such, the lower court properly dismissed their claim as a matter of law. They attempted to create duties that do not exist. They also made general allegations of breached duties without support for the same. They did not identify any action, conduct or omission by Respondents that constitutes a breach of duty. Further, Appellant Cristine is not a party to the real estate contracts and lacks a legal relationship with Appellants sufficient to support a duty owed to her. The

lower court granted the Motion for Summary Judgment as to Negligence and Appellants have failed to demonstrate an error of judgment.

G. The Appellants failed to demonstrate Breach of Fiduciary Duty as a matter of law and the trial court did not err in finding the same.

The Appellants claimed that Respondents did not act in good faith or with due regard to the interest of the Appellants. The South Carolina Supreme Court outlined a real estate agent's fiduciary duty in Darby v. Furman Co.

> 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. *Hamby v. St. Paul Mercury Indemn. 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. *Bost v. Bankers Fire & Marine Ins. Co.,* 242 S.C. 274, 283, 130 S.E.2d 907, 911-12 (1963); *see also Designer Showrooms, Inc. v. Kelley,* 304 S.C. 478, 405 S.E.2d 417 (Ct.App.1991) ("A broker owes a duty to its principal to keep it fully and properly informed of all material facts.").

Darby v. Furman Co., 334 S.C. 343, 346–47, 513 S.E.2d 848, 849–50 (1999)

The Complaint did not provide specific support for the breach of fiduciary duty claim, but merely refers to the larger Complaint in general for actions constituting breach of fiduciary duty. When asked to explain the support for the breach of fiduciary duty claim, Appellant Cristine could not identify a breach, but simply implied that Ms. Loper had an obligation to verify the condition of the home. (R. pp. 232-233) She conceded that she did not know whether or not Realtors had any knowledge of the property having a mold condition. (R. p. 237, lines 4-13) When asked for his support of the breach of fiduciary duty accusation, Appellant Raymond stated he did not know and it was "all lawyer stuff." (R. p. 250, lines 1-25)

As stated previously, at the hearing, the only material fact that the Appellants alleged was withheld was a prior owner's identity. Not only was the owner's identity a matter of public

record, the Appellants have failed to articulate what, if anything, knowledge of this owner's identity would have yielded. On appeal, Appellants' expand their argument, which Respondents assert is not proper and not preserved, to state that the breach of fiduciary duty included failing to ensure competency of inspectors, failure to inform Appellants the inspectors were not vetted (note: at the hearing, Appellants argued Respondents failed to vet inspectors, in this portion of their brief, they revise this argument in a substantive and unpreserved way to say they failed to advise the inspectors were not vetted); "fabrication of a roofing letter;" and misrepresentation regarding their entitlement to the property disclosure statement. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) These grounds, not pled in Complaint and not preserved for appeal, should not be considered on appeal.

The "fabrication of a roofing letter" as discussed previously in the brief was an effort by Respondent Loper to document the warranty that the seller's roof repairman gave to his repairs. Her method of documenting the warranty was known to the Appellants prior to closing.

The property disclosure statement argument was not articulated at the hearing and was not properly preserved for appeal. Additionally, even if one were to assume their allegation regarding the property disclosure statement were true, which is disputed, Appellant Raymond, a licensed realtor receiving a commission on the sale, waived the requirement for a property disclosure statement in writing. Further, the Appellants' failed to even allege anything that would have been disclosed on the property disclosure statement when the seller had no knowledge of the property and the inspection report addressed all property issues identified in the Complaint.

Appellant Raymond was also a licensed real estate agent that received a commission on the sale of the property underlying the Complaint. As a result, all of the fiduciary responsibilities alleged would apply to Appellant Raymond as well. "When selling to himself, a broker must meet the extremely high standards of his fiduciary obligation." Darby v. Furman Co., 334 S.C. 343, 348, 513 S.E.2d 848, 850 (1999) Where the Appellants have failed to substantiate this claim or identify any material facts knowingly withheld by Respondents, even outright admitting their inability to do so at the hearing, the trial court properly dismissed this cause of action.

IV. TRIAL COURT USED PROPER STANDARD WHEN DENYING MOTION FOR RECONSIDERATION

Appellants appear to claim that the trial court's citation to a District Court case, Dockins v. Benchmark Commc'n, 180 F.R.D. 294, 295 (D.S.C. 1998), reflected an erroneous analysis in the denial of the Motion for Reconsideration. The Appellants argue the trial court's order indicates the court did not properly reconsider their earlier arguments. A review of the records reveals, however, that Appellants attempted use the Motion for Reconsideration as a vehicle for introducing numerous arguments not brought to the court's attention prior to the court's order granting the Motion for Summary Judgment.

> "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) *566 (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, 565–66, 633 S.E.2d 505, 510 (2006)

The trial court's properly denied the Appellants' Motion for Summary Judgment and the Appellants have failed to demonstrate otherwise.

CONCLUSION

Respondents request this Court affirm the lower court where Appellants cannot demonstrate a genuine issue of material fact. In addition, the Appellants could not demonstrate, as a matter of law, the causes of action contained in the Complaint. Further, the trial court properly found Appellant Raymond waived all allegations against Respondents and Appellant Cristine lacked the requisite privity to maintain causes of action stemming from the contract.

Respectfully submitted,

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May 2, 2018.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS
THE HONORABLE ROBERT E. HOOD
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2017-001939
CIVIL ACTION NO. 2016-CP-40-1536

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

APPELLANTS,

versus

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,

DEFENDANTS,

Of whom Janet Loper and NextGen Real Estate, LLC are the

RESPONDENTS.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies this Final Brief complies with Rule 211 (b), SCACR.

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May 2, 2018