STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	FOR THE NINTH JUDICIAL CIRCUIT
Ronald E. Price And Diana R. B. Price,	)	CASE NO. 04-CP-08-1855
	)	
Plaintiffs,	)	
	)	**ORDER DENYING FOXES MOTIONS FOR JNOV, NEW TRIAL AND TO ALTER OR AMEND THE FINAL ORDER AFTER TRIAL ON THE MERITS**
vs.	)	
	)	
Belinda Fox, et. al.	)	
	)	
Defendants,	)	
	)	
	)	

This matter came before me for a hearing on September 24, 2018 by way of motions by the Defendants Gerry and Belinda Fox ("Foxes") for judgment notwithstanding verdict ("JNOV") pursuant to Rule 50(b) SCRCP, for a new trial pursuant to Rule 59(a) SCRCP and to alter of amend this court final order after a trial on the merits filed June 29, 2018. Present at the hearing were Paul Ferrara and Nadia Baig for the Foxes and J. Derrick Jackson for Ronald and Diana Price who were also present. After carefully considering the detailed briefs of counsel, the previous evidence and testimony at trial and the arguments of counsel, the court denies these motions for the reasons discussed herein.

I. JUDGMENT NOTWITHSTANDING VERDICT (JNOV)

The court believes this type of motion is generally considered exclusive to jury trials allowing the judge -in essence- to overrule the jury in certain very limited circumstances. However, to the extent the Foxes arguments may be reclassified or considered by the court under Rules 52(b) or 59(e) SCRCP, the court will address each of them.

A. PLAINTIFFS' DAMAGES ARE FULLY SUPPORTED BY THE RECORD AND EXPERT TESTIMONY.

The Foxes argue that the Plaintiff's proven damages were speculative and not certain. The court disagrees.

For damages to be recoverable, the evidence should be sufficient to "enable the court or jury to determine the amount thereof with reasonable certainty or accuracy." *Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981). "While neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required." *Id.* *Armstrong v. Collins*, 366 S.C. 204, 225-26, 621 S.E.2d 368, 379 (Ct. App. 2005).

The Prices offered the expert testimony of Edward Carter who was qualified by the court as an expert in residential appraisals. Mr. Carter owns his own appraisal firm and has been performing appraisal for 20 years. He testified he was familiar with appraising lots in residential subdivisions. Mr. Carter has several professional designations. Mr. Carter prepared a detailed report of his findings which was offered into evidence (P#38) and Mr. Carter testified at trial. He concluded that the value of the Prices property as represented to them was $145,410 but with all the conditions misrepresented by the Defendants was only worth $62,880, a difference of $82,530. Mr. Carter explained his methodologies at trial and in his report. The Prices as owners of the property testified that they agreed with this damage analysis.

The Foxes attempt to manufacture speculation by focusing on a single phrase used in a letter dated November 1, 2005 by the Prices previous counsel to a different appraiser. The Foxes allege "However, page 62 of Plaintiffs' Exhibit 38, hereinafter "Carter's Report," is in direct conflict with the Court's finding of fact regarding the wetlands on the Plaintiffs property. Carter's report makes the faulty assumption that

Plaintiffs' 7.86-acre property contains "one-third to one-half wetlands." This is not true, and Mr. Carter did not make any faulty assumption about the wetlands.

The Foxes ignore several significant points which render this argument moot. First, the letter containing the reference to "one-third to one half wetlands" is dated November 1, 2005. The Prices wetlands delineation letter from the Army Corp of Engineers (showing the 2.0 acres of wetlands) is dated November 7, 2005 after that letter. Thus, the precise amount of wetlands was not available to the Prices previous counsel at the time he wrote the letter but was available once the Prices received their wetland delineation report a few days later. His report shows that Mr. Carter was fully aware of the precise 2.0 acres of wetlands in reaching his conclusions on damages. There was no faulty assumption or direct conflict in is report. The wetland delineation showing the 2.0 acres was included in his report. Furthermore, under the heading Property Description, Usable Site Size, Mr. Carter states "+- 5.681 Acres upland and +- 2.00 Acres Wetlands" and references the wetland delineation letter.

Indeed, the transcript shows that Mr. Ferrara cross-examined Mr. Carter on this point and tried to get him to value just the 2.0 acres wetlands separately but he refused noting that property was not sold that way but rather at a blended rate. Upon redirect, Mr. Carter also confirmed the accuracy of the Army Corp's delineation as being "pretty right on" based on his experience.

The court also notes that the alleged speculative phrase was not Mr. Carter's but the Price's previous counsel in a letter to a different appraiser. Furthermore, the Prices were the only party to submit evidence on this issue.

For all these reasons, the court denies this argument and affirms that the Prices damages are fully supported by the record and expert testimony.

B. **THE FOXES ARE FULLY LIABLE FOR GILBERT'S REPRESENTATIONS AS AGENT AND PARTNER**.

The Foxes argue they should not be held liable because the actual misrepresentations were made by Gilbert their agent and partner. This is an old argument with a new coat of paint. The Foxes contend the Prices failed to show that Gilbert was "authorized" to make representations on behalf of the partnership. This argument is not supported by the record and is a misstatement of the law.

First, the record contains ample evidence that Gilbert was "authorized" to make representations. Gerry Fox allowed Gilbert to "do all the work" in exchange for a split of the profits. (Dep. 54) Belinda Fox testified in her deposition that Gilbert was the one who dealt with prospective buyers (Dep. 38) The Foxes specifically allowed Gilbert to market and sell the properties. (Dep. 77). Ms. Price testified that Gilbert told her Belinda Fox was his partner, they work together, and he was her salesman. Furthermore, the acts of Gilbert are consistent with that of a development partner selling lots within a subdivision.

Second, the Foxes misstate the law and what the Prices must prove to establish liability for Gilbert's misrepresentations. The Foxes argue the Prices must show that Gilbert was authorized to make representations for the partnership. Under the law, the opposite is true, the Defendants must not only show that Gilbert was not authorized but also that the Prices knew he was not authorized. Every partner is an agent of the partnership. S.C. Code Ann. § 33-41-310 "The act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter and the person with whom he is dealing has knowledge of the fact that he has no such authority. S.C. Code Ann. § 33-41-310

(*Emphasis added.)* In this case, Gilbert apparently did have such authority and there is no evidence that the Prices had any knowledge of facts to the contrary.

An admission or representation made by any partner is evidence against the partnership. (S.C. Code Ann. § 33-41-330) Notice or knowledge of any partner of any matter relating to partnership affairs, operates as notice to or knowledge of the partnership (S.C. Code Ann. § 33-41-340) For any wrongful act or omission of any partner which causes loss or injury to any person, the partnership is liable therefore to the same extent as the partner so acting or omitting to act. (S.C. Code Ann. § 33-41-350.) All partners are liable jointly and severally for everything chargeable to the partnership. (S.C. Code Ann. § 33-41-370).

For all these reasons, the court denies the Foxes motion on this ground.

C. THE COLLATERAL SOURCE RULE PROHIBITS THE FOXES FROM CLAIMING THEIR DAMAGES WERE PAID BY THE PRICES TITLE INSURANCE.

Clothed as an election of remedies argument, the Foxes argue they are entitled to the benefit of the Prices' title insurance despite not being a party to that contract and not paying any of the premiums. The Foxes contend that the Prices elected their remedy by pursuing a title insurance claim for some of the same damages. The Foxes argue the Prices are recovering twice for the same damages; however, as this court found in the order, the collateral source rule applies and prohibits such an argument. This exact argument was considered and rejected in the following case:

"Grainger proposes that the general rule disallowing an injured party from recovering twice for his damages should be applied in this instance. We find no persuasive reason to distinguish underinsurance proceeds from other insurance proceeds that are subject to the collateral source rule." *Estate of Rattenni v. Grainger*, 298 S.C. 276, 278, 379 S.E.2d 890, 890 (1989)

"The collateral source rule provides that compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the amount of damages owed by the wrongdoer. *Rattenni v. Grainger*, 298 S.C. 276, 379 S.E.2d 890 (1989); Young v. Warr, 252 S.C. 179, 165 S.E.2d 797 (1969); *Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1967). This rule has been liberally applied in South Carolina to preclude the reduction of damages. *See Otis Elevator v. Hardin Construction Co.*, S.C , 450 S.E.2d 41 (1994)(contractual right to indemnification not defeated by fact that loss was actually paid by an insurance company); *Rattenni v. Grainger*, *supra* (tortfeasor's liability for damages not reduced by underinsurance proceeds); *Powers v. Temple*, *supra* (tortfeasor's liability for damages not reduced by disability payments from employer); *New Foundation Baptist Church v. Davis*, 257 S.C. 443, 186 S.E.2d 247 (1972)(tortfeasor's liability for damages not reduced by value of gratuitous repairs). The only requirement for qualification as a collateral source is that the source be "wholly independent of the wrongdoer."

"Other jurisdictions have specified a source is wholly independent, and therefore a collateral source, when the wrongdoer has not contributed to it, *see Kistler v. Halsey*. Colo., 173 Colo. 540, 481 P.2d 722 (Colo. 1971), and when payments to the injured party were not made on behalf of the wrongdoer, *see Maduff Mortgage Corp. v. Deloitte*, *Haskins & Sells*, 98 Ore. App. 497, 779 P.2d 1083 (1989)" *Citizens & S. Nat'l Bank v. Gregory (In re W.B. Easton Constr. Co.)*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995)

In this case, the compensation received by the Prices from their title insurance company was from a source wholly independent of the Defendants (the title policy). The Defendants did not contribute to the Prices title insurance premiums and the compensation made by the title insurance company was not made on behalf of the Defendants.

The Foxes also contend that this is a windfall to the Prices. However, the Foxes ignore that to rule otherwise would provide a windfall to them.

The collateral source rule acts to prevent a benefit directed to the injured party from resulting in a windfall for the tortfeasor. *Dixon v. Besco Eng'g, Inc.*, 320 S.C. 174, 182, 463 S.E.2d 636, 640 (Ct. App. 1995). A tortfeasor cannot take advantage of a contract between an injured party and a third person, no matter whether the source of the funds received is "an insurance company, an employer, a family member, or other source." *Johnston v. Aiken Auto Parts*, 311 S.C. 285, 287, 428 S.E.2d 737, 738 (Ct. App. 1993); *see Dixon*, 320 S.C. at 181, 463 S.E.2d at 640. "It is the tortfeasor's responsibility to compensate the injured party for all the harm that he causes, not the net loss the injured party receives." *Dixon*, 320 S.C. at 182, 428 S.E.2d at 640. *Pustaver v. Gooden*, 350 S.C. 409, 413, 566 S.E.2d 199, 201 (Ct. App. 2002)

This court denies the Foxes motion on this ground as the collateral source rule applies and the Foxes should pay for their own damages.

D. GILBERT'S MISREPRESENTATIONS WERE FALSE WHEN MADE AND DID RELATE TO PRESENT OR PRE-EXISTING FACTS.

The Foxes make a conclusory argument that the Plaintiffs failed to prove that the misrepresentations Gilbert made were false when made. However, the record demonstrates that this claim lacks merit.

SEPTIC TANK

Gilbert misrepresented to the Prices that their lot would perk and could support a septic tank, but at the time he made this representation he already knew their lot would not perk and could not support a septic tank. As found by the court, (Order, ¶11) On February 7, 2002, DHEC sent Gilbert a letter informing him that several lots in Eagle Harbor, including Lot 20 which the Prices would purchase "do not meet current minimum standards for any type subsurface treatment and disposal system currently offered by DHEC regulations." DHEC further advised Gilbert that "Gray mottles occur

in the soil at the depth the water table is expected to rise. Our soil borings indicated these color patterns within 12 inches of the soil surface of the proposed lots…" [including Lot 20]. This shows that Gilbert knew that Lot 20 had a high-water table within a foot of the soil surface. DHEC states in this letter, "This limitation is so severe that an [sic] type of septic tank system would almost certainly fail to function in this type of soils. Also, I know of no reasonable way to improve the drainage capability of the soil." P#42)

SUBDIVISION

As found by the court (Order, ¶20), the Prices questioned the need for purchasing such a large tract (7.861 acres) but Gilbert represented that the tract could be subdivided to finance the construction of their house. Gilbert represented that the property could be subdivided into two lots, and three lots with homeowner's association approval. However, this representation was not true when made. In truth, the lot could not be subdivided because it would not support a septic tank. As found by the court (Order, ¶ 73-74) , "The Prices requested an administrative review by DHEC and asked, "Please confirm our understanding that the permit denial we received from Columbia prevents us from subdividing our lot for *residential* use, and please tell us the conditions that would need to exist (or changes that would need to happen) for us to sell half our lot as "residential" or meet DHEC standards, and therefore give us the ability to subdivide for residential sale." (P#30) DHEC responded by certified mail on May 17, 2005, "Unfortunately, this property would not pass for a septic system when originally subdivided. This is the reason for the small lot across Haney Branch Road, to accommodate the drain field for your residence. Therefore, this property could not be subdivided any further using septic systems. The only way I know to subdivide this property at this time would be to have public sewer access." (P#30)

The Foxes argue and offered evidence that Lot 20 could be subdivided but not for any residential use and no homes could be constructed on the subdivided lots. It

would be patently misleading to suggest to prospective homeowners that the large lot they were purchasing in a new subdivision could be subdivided but never tell them they could not resell the subdivided lots for residential use. There is no evidence Gilbert or anyone else qualified or limited the representation to non-residential use when the representation was made.

RESTRICTIVE COVENANTS

Gilbert further represented that the lot would be part of a gated, restricted community with a valid homeowner's association, and associated covenants, restrictions, architectural guidelines and other benefits which would enhance the value of their property. (Order, ¶22). The representation was false when made because there were no valid restrictive covenants encumbering Phase II at the time and there are still no valid covenants for Phase II.

LACK OF AMENTITIES

Gilbert promised various amenities would be built for the boy's home that could also be used by residents of Eagle Harbor Phase II. This is the only misrepresentation which relates to future events or unfulfilled promises.

TESTING/WETLANDS

Gilbert represented to the Prices that testing had been done and everything was fine. (Order, ¶4) By definition, something that "has been done" relates to a pre-existing fact. This representation was false because everything was not fine as the soil had a very high-water table which would not support a septic tank. Furthermore, pursuant to DHEC regulations implementing the Clean Water Act, the Prices had the reasonable expectations that Gilbert and the Foxes would follow the law and perform wetlands delineations as part of their application for a permit under the Clean Water Act and Comprehensive Stormwater Prevention Plan (CSWPP). (S.C. Code Ann. § 48-14-30; S.C. Code Ann. Regs. 72-305; 33 U.S.C.S. § 1344). They did not. The Prices were informed by letter from the Army Corp of Engineers that their property contained 2.0 acres of

wetlands. (P#43) There is no evidence that Gilbert disclosed to the Prices that their lot contained wetlands or that the soil had such a high-water table. These were present or pre-existing facts.

The Foxes also appear to misstate the law. The Foxes argue that "The Order does not find and the Plaintiff's failed to prove that Gilbert actually knew that the statements were false when made." While the court disagrees and asserts there is evidence that Gilbert knew the representations were false[1], ultimately it does not matter as that is not required for negligent misrepresentation. One of the distinguishing characteristics of negligent misrepresentations from outright fraud, is that fraud requires "scienter" or knowledge of the falsity of the representation and intent that the other person rely on the falsity. This is not required for negligent misrepresentation.

II. THERE ARE NO GROUNDS FOR A NEW TRIAL

A. The Foxes are liable for the unfair and deceptive acts of their agent and partner.

The Foxes argument on this point is not clear. The argument heading sets forth the argument that the Foxes should not be liable because Gilbert's acts were not within the scope of the agency of the partnership. If this is the argument, then it must fail for the reasons set forth above in the similar argument made under the JNOV motion. There is ample evidence that Gilbert was authorized by the partnership and Foxes to sell lots in the subdivision and deal with prospective buyers. *Cp. State ex rel. McLeod v. C & L Corp.*, 280 S.C. 519, 528, 313 S.E.2d 334, 339 (Ct. App. 1984) *("C* & L authorized Wayne Cooper to sell lots in Green Briar. Wayne Cooper in turn authorized the salesmen to assist him. The misrepresentations were made during negotiations for sale of the lots and thus were made while the salesmen were acting within the scope of the salesmen's and Wayne Cooper's actual authority. As principals, both C & L and Wayne

[1] See for example the letter from DHEC to Gilbert stating that Lot 20 would not support a septic tank because of the poor soil.

Cooper, are liable regardless of their knowledge.")

The Foxes then make an incorrect statement of law. The Foxes argue "In order to hold the Foxes liable under the South Carolina Unfair Trade Practices Act, there must be testimony that the Foxes consented to Gilbert's acts." The Foxes do not cite any support for this assertion and its contrary to case law.

"Furthermore, the theory of ratification is not necessary to hold C & L liable. Wayne Cooper and his salesmen were acting with authority from C & L when they sold the lots. Regardless of any subsequent ratification, a principal is liable to third persons for the frauds, deceits, concealments, misrepresentations, negligences and other malfeasances and omissions of duty of his agent acting within the scope of his agency, although the principal did not authorize, participate in, or know of such misconduct. *Reynolds v. Witte*, 13 S.C. 5 (1879); *Williams v. Commercial Casualty Insurance Co.*, 159 S.C. 301, 156 S.E. 871 (1931). The same rule is applicable to the misrepresentations of subagents. *See*, Restatement (Second) of Agency § 264 (1958). For this reason, it is immaterial whether C & L ratified the misrepresentations." *State ex rel. McLeod v. C & L Corp.*, 280 S.C. 519 *, 313 S.E.2d 334, (S.C. Ct. App. 1984).

"In our opinion actual knowledge is not required under the Act to hold a principal liable for the misrepresentations of his agent. At common law actual knowledge is not necessary to hold a principal liable, if misrepresentations are made by the agent while acting within the scope of his agency. *See, West v. Service Life & Health Insurance Co.*, 220 S.C. 198, 66 S.E. (2d) 816 (1951); *see also*, Restatement (Second) of Agency § 261, comment a (1958). The Act should not be construed to increase the plaintiff's burden of proving liability. Its purpose is to give additional protection to the victims of unfair trade practices, not to make a case harder to prove than it would be under common law principles. Consistent with this policy, the federal courts hold that actual knowledge of the principal is not necessary to hold him liable for the acts of his agent committed within the scope of authority. "Goodman *v. Federal Trade Commission*,

244 F. (2d) 584 (9th Cir. 1957). *State ex rel. McLeod v. C & L Corp*., 280 S.C. 519 *, 313 S.E.2d 334, (S.C. Ct. App. 1984).

In short, as Gilbert's partner's the Foxes are liable for his acts including his bad acts. The Foxes placed Gilbert in the position to deal with the Prices and commit the unfair and deceptive acts. Gerry Fox allowed Gilbert to "do all the work" in exchange for a split of the profits. (Dep. 54) Belinda Fox testified in her deposition that Gilbert was the one who dealt with prospective buyers (Dep. 38) The Foxes specifically allowed Gilbert to market and sell the properties. (Dep. 77). Ms. Price testified that Gilbert told her Belinda Fox was his partner, they work together, and he was her salesman.

The court also notes that the definition of "person" under the Unfair Trade Practice Act, includes a partnership," (a) "Person" shall include natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations and any other legal entity. S.C. Code Ann. § 39-5-10

For all these reasons, the Foxes motion is denied and there is no basis for a new trial on this ground.

B. Plaintiffs' damages are fully supported by the record and expert testimony and there is not basis for a new trial.

This argument appears to be identical to the Foxes argument under their JNOV motion and is denied for the same reasons set forth in part I., A. supra. In short, the Prices offered expert testimony as to their damages and their expert Edward Carter was fully aware of the 2.0-acre wetland delineation and included it in his report. Further, the Prices as owners corroborated this testimony and the Defendants failed to offer any contradictory evidence.

III. EXCEPT AS QUALIFIED BELOW, THE MOTION TO ALTER OR AMEND IS DENIED.

A. Equitable Indemnification

The Foxes argue that they are entitled to be equitably indemnified against Danny Gilbert for any damages that they pay because of the representations of their co-defendant and partner Danny Gilbert. As the Foxes have not paid any damages pursuant to the judgment, the court finds this premature; however, the court will consider a subsequent motion for equitable indemnification if and when the Foxes pay damages under the judgment.

Res judicata does not apply

1) The Foxes are not in "privity" with Investors Title Insurance Company ("Investors Title").

The Foxes argue that the Price's settlement with Investor's Title which resulted in a stipulation of dismissal is res judicata as to them in the present lawsuit. The court fully addressed this in the order denying the motion to dismiss on this ground. (Order, pp. 16-18). The Foxes were not parties to that suit. The Foxes now claim that they were in "privity" with Investors Title Insurance Company. This argument lacks merit.

The term "privy," when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right. One in privity is one whose legal interests were litigated in the former proceeding. *H.G. Hall Construction Co., Inc. v. J. E. P. Enterprises*, 283 S.C. 196, 321 S.E.2d 267 (Ct. App. 1984). *Roberts v. Recovery Bureau*, 316 S.C. 492, 496, 450 S.E.2d 616, 619 (Ct. App. 1994). Privity is not established from the mere fact that persons may happen to be interested in the same question or in proving or disproving the same state of facts or because the question litigated was one which might affect such other person's liability as a judicial precedent in a subsequent action. 46 Am. Jur. 2d *Judgments* § 532 at 685-686 (1969). One whose interest is almost identical with that of a party, but who does not claim through him, is

not in privity with him. 50 C.J.S. Judgments § 788 at 327 (1947). *Roberts v. Recovery Bureau*, 316 S.C. 492, 496, 450 S.E.2d 616, 619 (Ct. App. 1994).

A proper example of privity would be that of a guardian and ward. *First Nat'l Bank v. United States Fid. & Guar. Co.*, 207 S.C. 15, 35 S.E.2d 47 (1945). An adjudication against the guardian in that capacity would be binding on the ward. In this case, the Foxes and Investors Title are not so identified with one another that they represent the same legal right. The Prices rights against Investors Title arise out their title insurance policy and not any tortious conduct. Furthermore, the Foxes cannot assert a claim through Investors Title. Finally, no legal interests were litigated in the prior action and there was no real final judgment for res judicata purposes.

2) <u>The Transfer of Rights is a contractual provision does not establish privity and that was expressly waived.</u>

The Foxes attempt to base their privity argument on the "Transfer of Rights" provision (Condition 7 of the title insurance policy) This is curious for a couple of reasons. First, as this a contractual document between the Prices and Investors Title, the Foxes are a stranger to the contract and have no rights to claim under its provisions. Second, as the right to be transferred include the rights to bring an action against the Foxes it is hard to understand how this could create the same legal right or interest between the Foxes and either the Prices or Investor Title. Finally, Investors expressly waived, and the Prices expressly preserved these rights as part of the settlement.

c. Investors Title hereby waives any and all subrogation rights it would otherwise be entitled to pursuant to the terms of the Policy. Investors Tile expressly waives its rights under condition 7 of the Policy, "Transfer of your Rights" as shown on Exhibit 1 incorporated by reference. Specifically, the waiver of subrogation and transfer rights shall include but not be limited to the following civil actions now pending or previously pending in Berkeley County (Case No. 04-CP08-1855); (Case No. 04-CP-08-1150); (2014-CP-08-00052). (Court Exhibit 1, Item 4 (c)).

If somehow the Foxes are in privity and "step in the shoes" of Investors Title, they do so subject to this waiver and the terms of the settlement which expressly survive the execution of settlement. The terms of the settlement also expressly excluded the Foxes and other Defendants from any release.

The parties expressly agree that the following persons or entities that are or may be part of litigation by the Prices in other cases (See Item 4(c)) are not included in this release and are not Released Parties: Danny Gilbert, Elizabeth Gilbert, Belinda Fox, Gerry Fox a/k/a Gerry D. Fox, Eagle Harbor, Inc., EHHOA, Inc., Troy L. Winn, Sarah C. Winn, Heritage Classic Homes, Inc., Metro Contracting, Inc. and Concerned Citizens of Eagle Harbor, Inc.

(Court Exhibit 1, paragraph 6).

3) There was never a final judgment or adjudication of any issues on the merits for res judicata purposes.

In their settlement agreement, the parties agreed in part as follows:

E. The case was appealed to the Court of Appeals and by certiorari to the South Carolina Supreme Court which issued a remittitur and by order dated November 20, 2013 awarded costs to the Prices as Petitioners in the amount of $2,582.38. The parties acknowledge as a final judgment will not be rendered and the case was settled, that these costs will not be paid by Investors Title.

2. **Non-Admission of Liability** . Nothing in this Agreement shall constitute or be construed as an admission of liability on behalf of Investors Title or the Prices, their agents, affiliates, assigns, parents, successors, subsidiaries, and/or successors, or an admission as to the validity of the allegations in the Civil Action or the Answer.

Thus, it is clear the parties never intended the Stipulation of Dismissal with prejudice to serve as a final judgment on any of the issues in that case.

The Foxes cite *Jones v. City of Folly Beach*, 326 S.C. 360, 483 S.E.2d 770 (Ct. App. 1997) as support for their argument; however, a close examination of that case and the cases it cites therein, refutes rather than supports the Foxes argument.

"In *Lawlor,* the Supreme Court concluded a dismissal with prejudice, unaccompanied by findings of fact and conclusions of law, could not operate to preclude relitigation of issues in a different cause of action. *Lawlor,* 349 U.S. at 327 *Jones v. City of Folly Beach*, 326 S.C. 360, 366, 483 S.E.2d 770, 773 (Ct. App. 1997). Obviously the Stipulation of Dismissal between the Prices and Investors Title did not include any findings of fact or conclusions of law since it was based on a settlement and the parties expressly disclaimed admission of liability.

The Jones court concluded, "Applying these principles here, we observe the final decision in the federal suit was a procedural action dismissing the constitutional claim on a form order containing no findings with regard to the factual issues. It is a final determination on the merits of the cause of action being tried. We further conclude our supreme court has declined to apply the bar of collateral estoppel to speculative comparisons of factual issues not litigated or directly determined in any final decision. *See Dunlap,* 223 S.C. at 150, 74 S.E.2d at 828. Therefore, we conclude the trial court erred by concluding collateral estoppel barred these causes of action. *Jones v. City of Folly Beach*, 326 S.C. 360, 367, 483 S.E.2d 770, 774 (Ct. App. 1997)

The parties are not the same, the claims are different, and the claims were not litigated and determined in a final decision. For all these reasons the court affirms its previous ruling that res judicata does not apply to the suit against the Foxes.

CONCLUSION

For the reasons set forth herein, in the court's final order on the merits, and the arguments and evidence presented over two days of trial, this court denies the motion for JNOV, for a new trial and to alter or amend the judgment.

_____

Dale Van Slambrook
Master-in-Equity, Berkeley County

Dated:_____

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2004-CP-08-01855

RONALD PRICE, ETAL

PLAINTIFF(S)

BELINDA FOX, ETAL

DEFENDANT(S)

	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☑ See attached order (formal order to follow) ☐ Statement of Judgment
ORDER INFORMATION: SEPTEMBER 11, 2018 HEARING CONTINUED TO OCTOBER 9, 2018 DUE TO INCLEMENT WEATHER.

This order does not end this Case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.

Presiding Judge / Master in Equity	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Tobias Ward	
PO Box 6138	
Columbia, SC 29260	
ATTORNEY(S) FOR THE PLAINTIFF(S)	**ATTORNEY(S) FOR THE DEFENDANT(S)**
	CLERK OF COURT

Court Reporter:

Berkeley Common Pleas

Case Caption: Ronald E Price , plaintiff, et al VS Belinda Fox , defendant, et al

Case Number: 2004CP0801855

Type: Master/Order/Form 4

AND IT SO ORDERED!

s/Dale E. Van Slambrook #3079