

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,

)
)
) Plaintiffs,

CASE NO. 04-CP-08-1855

vs.

Belinda Fox, et. al.

)
)
)
) Defendants,

ORDER AFTER TRIAL
ON THE MERITS

2018 JUN 29 PM 3:49
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

FILED
JPD

Knight's Redi-Mix, Inc.,

)
)
) Plaintiff,

CASE NO. 04-CP-08-1150

vs.

Heritage Classic Homes, Inc.,
Ronald E. Price, Diana R. B. Price,
And Western Surety Company,

)
)
)
) Defendants,

ORDER AFTER TRIAL
ON THE MERITS

and

Ronald E. Price, Diana R. B. Price,

)
)
) Third Party Plaintiffs,

vs.

Danny L. Gilbert, Individually,

)
)
)
) Third Party Defendant.

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This matter came before me for a non-jury trial on May 3rd and May 4th, 2018¹. The Plaintiffs' Ronald and Diana Price (Prices) were represented by Derrick Jackson. The Defendants Belinda Fox and Gerry Fox (Foxes) were represented by Paul Ferrara, and the Defendants Danny Gilbert (Gilbert), Heritage Classic Homes, Inc. (HCH), Eagle Harbor, Inc. (EHI) and Eagle Harbor Phase II Development Partnership (Partnership) were represented by Carl Hubbard. After carefully considering the testimony, the demeanor of the witnesses, the exhibits, the pleadings and argument of counsel, this court makes the following findings of fact and conclusion of law pursuant to Rule 52(a) of the South Carolina Rules of Civil Procedure.

PROCEDURAL HISTORY

Knight's Redi-Mix (Knights) commenced an action for foreclosure of a mechanic's lien for concrete delivered to the Prices construction site (1150). The Prices answered, counterclaimed for negligence, filed a cross-claim against HCH and a third-party complaint against Gilbert for negligence, breach of contract and unfair trade practices. HCH counterclaimed against Knights for negligence, breach of contract, breach of warranty and indemnification. HCH also cross-claimed against the Prices for breach of contract, attorney's fees and quantum meruit. Gilbert filed an answer denying liability. Knights' claims and related counterclaims were resolved prior to trial leaving only the breach of contract claims between the Prices, HCH and Gilbert. (the "Construction Litigation").

The Prices filed a separate lawsuit (1855) against Belinda Fox and Danny Gilbert alleging fraud, negligent misrepresentation and unfair trade practices relating to the sale and purchase of Lot 20 in Phase II of Eagle Harbor Subdivision (Eagle Harbor).

¹ The trial was scheduled to begin at 1pm on Wednesday, May 2nd with the mechanic's lien case filed by Knight's Redi-Mix; however, prior to that date the parties informed the court that part of the case was settled by mutual releases. Steve Smith represents Knight's Redi-Mix.

This complaint was amended to add EHI as a Defendant. The factual allegations in the complaint concern misrepresentations that were made to the Prices about their lot and Eagle Harbor Subdivision. Also, the Prices contend that Gilbert, and the other Defendants failed to comply with applicable local and federal regulations concerning the development which caused them damage.

Both 1150 and 1855 were referred by order of reference to the Master-in-Equity for Berkeley County. Subsequently, by consent order, 1150 and 1855 were consolidated for trial.

The Prices subsequently filed a motion to amend and supplement their 1855 complaint to add Gerry Fox, Troy and Sarah Winn², Heritage Classic Homes, Inc. and Eagle Harbor Phase II Development Partnership. In their Second Amended Complaint, the Prices dropped their causes of action for fraud, and civil conspiracy, and added a cause of action for breach of fiduciary duty alleging the development partners breached their duty to develop the subdivision in accordance with all applicable governmental regulations, to properly setup and fund an Eagle Harbor Homeowners Association, Inc., and to adequately construct common area improvements including the roads and to transfer the common area improvements to the owners in good condition. The Prices seek an affirmative injunction requiring the Partnership and Partners to cause the roads to be restored to adequate standards, and to provide segregated funds account for the roads continued maintenance for a reasonable time. The court granted this Prices' motion to amend and supplement their complaint.

Subsequently, the Winns filed a motion to dismiss the Prices supplemental complaint or for joinder concerning the Prices' claims related to the common areas of Eagle Harbor. This court denied that motion but required the Prices to join as parties

² The Winns were granted summary judgment as to the Prices individual claims but not the road litigation claims. The Winns are represented by Richard Hyman.

all existing and former owners of lots in Eagle Harbor Subdivision as well as Concerned Citizens of Eagle Harbor, Inc. (CCEHI)³ and EHHOA, Inc.⁴ (the "Road litigation"⁵).

This court held a status conference on March 20, 2018 at which all the parties and their counsel were present. The parties agreed at the status conference to proceed to trial on the Prices construction litigation claims and partnership development claims, but to bifurcate the road litigation and defer that to a later time. An order for bifurcation was entered on March 28, 2018 excusing from trial CCEHI, the Winns and the other lot owners besides the Prices.

The case was called for trial on May 3rd, 2018 on all other claims except the road litigation.

FINDINGS OF FACTS⁶

1. In the summer of 2001, the Foxes, EHI, HCH and Gilbert formed a partnership to develop Phase II of the Eagle Harbor Subdivision.
2. Pursuant to this partnership, the Foxes acquired certain real property which would become part of Phase II of the Eagle Harbor Subdivision and shared the expenses of the development including the roads. Gilbert would be the marketing Partner and market and sell the lots and manage the development. (P#41: G. Fox, 77; B. Fox 38))
3. The Partners would then split the profits after the lots were sold and expenses were paid. (P # 32-34, 41: G Fox Dep. 18, 32, 46, 49, 53, 54, 80, 91; Gilbert 49, 50 and 52)

³ CCEHI is represented by Hamlin O'Kelly.

⁴ EHHOA, Inc. has legal title to the roads and as alleged by the Prices is a shell corporation with no members other than its incorporater, Gilbert.

⁵ The Prices filed a 3rd Amended Complaint to add these parties as well as an alternative claim for damages if injunctive relief was not granted as to the roads.

⁶ To the extent these findings of fact include conclusions of law they shall be so deemed and to the extent the conclusions of law include findings of fact they shall be so deemed.

4. According to Gilbert's calculations on November 10, 2002, the Foxes could expect \$730,954 in income from the lot sales, and a net profit of \$324,153 which would be split evenly with Danny and Liz Gilbert. (P#32)
5. On August 13, 2001, Belinda Fox acquired by deed of Bennie Harvey Ordell approximately 62 acres of land to subdivide as part of Eagle Harbor Phase II subdivision. This deed was recorded in Deed Book 2382 at Page 143 on August 21, 2001.
6. The purchase money for the buying the 62-acre tract came out of a joint account of the Foxes but title was placed in Belinda Fox's name for asset protection reasons. (P# 41: G. Fox 42, 45, 85)
7. On August 13, 2001, Danny Gilbert signed an Application for Subdivision Approval with DHEC for Eagle Harbor Phase II. He signed as Executive Director but listed his individual name and omitted EHI in item 4 where it requests Name of Company. (P# 35)
8. Right above Gilbert's signature on this application is a warning that "no lot in the subdivision can be sold, rented, or leased, or any lot further subdivided until and unless subdivision approval is granted by the Department." (P#35)
9. On August 23, 2001, B.B. Bozardt of DHEC sent Gilbert a letter concerning his applications for subdivision approval for Phases I and II of Eagle Harbor. In this letter, Gilbert was specifically warned that development of a subdivision using on-site wastewater treatment systems without prior knowledge of the soil conditions is "very risky." Mr. Bozardt further noted that "at no time in our conversation did you mention developing this property into individual lots" and that "I was amazed to roads under construction and land being cleared." (P#42)
10. Neither Gilbert, EHI nor the Foxes applied to DHEC or Office of Coastal Resource Management (OCRM) for a permit before clearing the land and constructing roads. Nor did they submit a Stormwater Management Plan. (P#42, #45, ¶10-13).

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)

12. By March 7, 2003, and despite the prohibition against selling lots prior to subdivision approval by DHEC, Gilbert on behalf of the Partnership had closed the sale, contracted to sell or gift, 16 of the 20 lots in Phase II. (P#32)

13. The Foxes were aware of and approved of Gilbert's marketing of their property and he acted as their agent and as a marketing agent of the partnership. (P#41: G. Fox, 77; B. Fox 38)

14. In the summer of 2003, the Prices were looking for a house of suitable location to build a house. Mr. Price had moved to South Carolina to work at SPAWAR Systems Center Atlantic in Charleston.

15. They learned about Eagle Harbor from Doug Cotton and his daughter and met Gilbert at an office in Eagle Harbor Subdivision.

16. Gilbert, in his role as marketing Partner, showed the Prices Lot 20 and a master plan of Eagle Harbor. (P#1).

17. Gilbert held himself out as a developer with the requisite, knowledge, experience and skill to develop the subdivision.

18. Neither Gilbert nor EHI owned Lot 20 or the other Lots they sold for the Foxes and Winns and are not licensed to sell real estate.
19. Gilbert, in his role as marketing Partner, made several material representations to the Prices concerning the subdivision and Lot 20.
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.
21. Also, despite the letter he received from DHEC, Gilbert represented to the Prices that the lot would perk. When the Prices inquired what that meant, he told them they could put a septic tank on the property.
22. 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.
23. Gilbert promised various amenities would be built for the boy's home that could also be used by residents of Eagle Harbor Phase II.
24. Gilbert represented to the Prices that testing had been done and everything was fine.
25. At no time did Gilbert disclose to the Prices that their lot contained wetlands or that the soil had such a high-water table.
26. This condition was not readily apparent as it had been very dry when the Prices first looked at the property and their lot was still wooded.
27. Gilbert's representations were false, and misleading all which Gilbert knew or should have known if he had exercised the requisite skill and knowledge of a true developer and had followed applicable federal, state and county regulations pertaining to the subdivision.

28. Gilbert made similar representations to other purchasers of lots in the subdivision who also relied on the representations in purchasing lots.
29. Gilbert as a marketing partner who would split the profits and the partnership itself had a pecuniary interest in making these representations.
30. On or about September 13, 2003, the Prices, in justifiable reliance on the representations of Gilbert entered into an Agreement to Buy and Sell Lot 20 for \$90,400. (P#2)
31. Gilbert signed the contract for Belinda Fox. Gilbert explained that the owner of Lot 20, Belinda Fox was his Partner.
32. Typed into the contract as the closing agent for the Prices was Attorney, Jeff Spell, who Gilbert testified was his good friend and in fact according to a letter authored by Gilbert on September 29, 2003, represented Gilbert at the same time in a dispute with the Winns related to the development. (P#51)
33. Gilbert also referred the Prices to National City Mortgage (NCM) for their construction financing.
34. Gilbert informed the Prices that he was a qualified residential builder and persuaded the Prices to allow him to construct their new residence.
35. On September 13, 2003, the Prices entered into a Standard Form AIA Stipulated Sum Construction Contract (the Contract) with Gilbert to construct their home on Lot 20. (P#5)
36. Gilbert provided the initial costs estimates for the Stipulated Sum of \$160,175; however, NCM suggested a greater cushion so the Stipulated Sum was increased to \$185,175. The Prices agreed to the increase. (P#5, Item 4.1)
37. Gilbert drew up site plans on his computer and showed the Prices where the septic tank would go. (P#41: Gilbert 69).
38. The Prices closed the sale of Lot 20 on November 25, 2003. Jeff Spell was not present, but the closing was covered by another attorney.

39. The Prices received the deed to Lot 20 on November 25, 2003 from Belinda Fox which was duly recorded on December 3, 2003. (P#3)

40. As part of the disbursements at closing, Heritage Classic Homes, Gilbert's wholly owned company received \$41,020.22. Gerry Fox testified that this was Gilbert's share of the profit. (P#41: G. Fox, 88-89). Gilbert also received \$2,000 in earnest money which he directed that the Prices pay to him prior to the closing.

41. Pursuant to the Contract, the Prices house was to be finished (substantial completion) by February 25, 2004. This date was extended from February 1, 2004 because the closing took place later than anticipated. (P#5, 3.1, 3.2). Time was of the essence in the contract. (P#6, 8.21)

42. By email to Gilbert dated December 1, 2003, Mr. Price requested that Gilbert provide a schedule and sequence of events as "We have 90 days from 24th of November to move in." (P#8)

43. On December 29, 2003, Gilbert told the Prices in an email that the building permit had been approved and that "Currently we are waiting on the design of your septic tank system to be completed by DHEC." Ms. Price responded the next day that she was "concerned about the timeline." (P#9)

44. This email was false and misleading in that the building permit should not have been issued without septic tank approval, DHEC had not issued a septic tank permit, and DHEC could not approve a septic tank for the Prices site because it would not support an onsite septic tank. Gilbert was aware of this because of the DHEC's prior letters.

45. Gilbert began demanding that the Prices pay him his first draw; however according to the requirements of NCM (P#5, Attachment 1) a copy of the septic tank permit was required among other items listed.

46. On January 9, 2004, Mr. Price emailed Gilbert asking for copies of the building permit and septic tank permit, he further noted that the Prices were following the NCM

requirements, he also requested that Gilbert "be more attentive in keeping us informed during the rest of the construction process."

47. On or about January 22, 2004, the Prices received a copy of a letter from the Berkeley County Permitting Manager addressed to Gilbert. This letter informed Gilbert to immediately stop construction on the project because he had not been issued a septic tank approval letter by DHEC in violation of S.C. Code of Regulations §61-56 Section III C. The Berkeley County Permitting Manager also noted that Gilbert's subcontractor for plumbing did not pick up or apply for a permit on this project and that the subcontractors for electrical and mechanical work have not picked up their permits.

(P#13)

48. Gilbert has been subsequently cited by Berkeley County Code enforcement for other instances of failing to obtain the proper building and related permits (P#48) and had permits denied for not submitting required information with six months. (P#48)

49. Upon receipt of this information, the Prices wrote Gilbert a letter the same date, January 22, 2004. In this letter the Prices highlighted several problems to Gilbert including unreasonable cost increases. For example, the Boozer Building System package had increased from \$23,000 to \$55,000 (a 144% increase) and Gilbert's failure to obtain a septic tank permit resulting in further delays. The Prices reiterated that they were prepared to listen to Gilbert on how he would fix these problems and achieve timely progression of their home. (P#12)

50. Also, on January 22, 2004, Ms. Price herself applied a septic tank permit from DHEC which was issued on February 12, 2004. The court notes that the permit application contains language warning that construction cannot begin until a permit for construction of a sewage disposal system has been issued. (P#14, p.6)

51. During this same period of late January 2004, Gilbert installed a foundation for the Price's home. This foundation was inspected by Hank Jackson from the Berkeley



County Building Inspectors Office. The foundation failed inspection because the soil had not been compacted and a vapor barrier installed.

52. The Prices met the Gilbert on January 26, 2004 to discuss the problems with construction and were told by Gilbert, "I'm done."

53. Thereafter, on January 30, 2004, the Prices gave Gilbert and HCH written notice of the termination of the construction contract for cause under the terms of the contract. (P#16)

54. On February 9, 2004, the Prices hired John F. Kahler, III as construction manager to finish the construction of their home. Based on Kahler's estimates the stipulated sum for the contract had to be increased to \$209,050. (Def HCH #1)

55. After Gilbert's termination, Gilbert threatened the Prices with a lien unless they paid him what he believed they owed him. By letter dated February 9, 2004, the Prices asked Gilbert to "Please do not try to create obstacles in us proceeding with our Home." (P#17)

56. Gilbert now wearing his developer hat and as President of Eagle Harbor, Inc. told the Prices in a letter dated February 19, 2004 that the President of Eagle Harbor Home Owners Association "has not been given the authority by the Developer, (Declarant) Eagle Harbor, Inc. to handle such matters. Any future issues, including ARC requirements should be handled directly by me..." (P#18)

57. Gilbert then threatened the Prices in this letter with fines or "other measures" if the Prices did not pay a \$500 application fee and have their plans approved by his architect. Gilbert notes in the letter that "The matter was delayed until payment for construction was made by you...." Gilbert also states, "It is because of my relationship with the Architect and because I am the developer that construction was started on your home. But, we still must adhere to covenants." Covenants, which the court notes and will discuss in the Conclusion of Law are not valid. (P#18)



58. The following day, on February 20, 2004, Danny Gilbert, pro se, individually filed and recorded a Mechanic's Lien against the Prices in the amount of \$23,709.75. Ms. Price testified she does not recall being served with a statement of account. (P#19)

59. On February 26, 2004, DHEC wrote the Prices informing them that DHEC was revoking the Prices 2/12/2004 septic tank permit because Eagle Harbor Subdivision has yet to obtain permission from SCDOT to allow four separate borings under Leisure Drive for four separate lots in the subdivision. DHEC also noted that it still needed a final approved plat for the subdivision. (P#39)

60. In a separate letter to Gilbert on this same date, DHEC informed Gilbert of these same requirements to obtain a SCDOT encroachment permit for Leisure Drive and final plat approval. DHEC reminded him that DHEC had sent him a letter back on 2/07/02. DHEC also noted "Final approval of a plat by Berkeley County Planning Commission does not constitute final approval under S.C. DHEC Regulation 61-57...Section V, Paragraph (A) states, "No lot shall be sold in any subdivision where the on-site systems are proposed ...unless the owner or agent has received written approval by this department."

61. On April 3, 2004, the Prices wrote Gerry Fox about the lack of response by EHI and the numerous problems they were having with Gilbert and the development. In that letter, the Prices specifically mention the responsibilities of the developers to the buyers, their accumulation costs because of the delays in getting their septic tank permit, the ARC fee and the concern in the community over the validity of the covenants. (P#44)

62. While waiting on their septic tank issue to be resolved, Kahler recommend that the Prices have their concrete slab and concrete masonry walls inspected to determine if they could be used. Mr. Price had also observed after a strong wind that one of the concrete pillars had fallen over.

63. The Prices hired Albert J. Schweikhardt, PE to inspect the concrete slab and concrete masonry pillars. He did so on April 19, 2004 and prepared a written report. Mr. Schweikhardt noted several construction deficiencies in both the concrete slab and the concrete masonry walls including improperly positioned rebar, lack of joints, improper grade, unstruck mortar joints, unstable walls and piers (at least one collapsed pier) random cracking, the slope in the storage area exceeded requirement and the height of the walls also exceeded requirements. In his summary, he recommended that the slab and walls be replaced. (P#36).

64. Prior to his termination, Gilbert offered to allow the Prices to temporarily store various appliances they had purchased and some motorcycle parts in a storage building owned by EHI. After Gilbert was terminated, Gilbert refused to allow the Prices access to retrieve their property. The Prices had to send Gilbert a demand letter to allow them to retrieve their property. (P#21)

65. On May 18, 2004, DHEC granted "Final approval for Phase II, Eagle Harbor S/D ... for at least one three (3) bedroom single family dwelling for Lots 1 thru 16, and Lots 18 thru 20." This was a prerequisite for the Prices to legally begin construction on their home after an almost six months delay after their closing on the property.

66. On May 19, 2004, the Prices bonded off Gilbert's lien with Western Surety pursuant to the provisions of S.C. Code Ann. §29-5-110. (P#20)

67. On August 6, 2004, the Prices hired Todd Seibels as construction manager to manage the completion of the construction of their home⁷. (P#31).

68. Ms. Price kept copies of the receipts and expenses related to construction which she kept in a large black notebook which she brought to trial and was available for examination.

⁷ Mr. Price testified he had a disagreement with Mr. Khaler on the job site resulting in Mr. Khaler's termination as construction manager.

69. She transferred these expenses to a summary spreadsheet and with the help of her counsel created a summary extract of these expense. (P#23 & P#24).

70. After completion of their home, the total costs of construction for which the contractor was responsible was \$283,011.83. This exceeded the Prices Stipulated Sum contract with Gilbert by \$97,836.83. (P#23)

71. On October 25, 2004, Gilbert and EHI recorded a Declaration of Covenants, Conditions and Restrictions for Eagle Harbor ("Covenants"). The Declarant was EHI as the alleged owner of property described in the attached Exhibit A. The property described in Exhibit A references the Final Plat for Phase II.

72. At the time these Covenants were recorded, most if not all the Lots of Phase II had already been sold and deeded to the purchasers including the Prices Lot 20. Also, EHI never owned the property it was trying to restrict. (P#32)

73. 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)

74. 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)

75. On September 20, 2005, the Prices requested a wetland delineation from the Regulatory Division of the Army Corp. of Engineers, Charleston District, Corp. of Engineers. (P#25)

76. The Army Corp. responded to the Prices request on November 7, 2005 and determined that "The property in question contains approximately 2 acres of federally defined freshwater wetlands or other waters." The approximate boundaries of wetlands are depicted on a copy of the survey plat the Prices submitted from their closing. (P#43)

77. On February 16, 2006, Gilbert applied to SCDOT for an encroachment permit for the entrance to Eagle Harbor subdivision at the intersection of the public Haney Branch road and the private Champions Drive. SCDOT granted this permit on February 28, 2007 subject to attached Special Provisions required to bring the entrance to SCDOT standards. Rather than perform the work required, Gilbert cancelled the permit. (P#46-47)

78. The Prices retained the services of Edward Carter, MSA, MFLA, MRA to determine the difference in value of their land if the representations by Gilbert on behalf of the partnership had been true (the land can support a septic tank for more than one single family residence and thus is subdividable into 2 or 3 lots, was not burdened by 2 acres of wetlands, had valid restrictive covenants and viable home owners association) and the value if the representations were not true. Mr. Carter is a South Carolina Certified Residential Appraiser and is qualified as an expert. (P#38, pp. 47,61)

79. Mr. Carter prepared a report listing his findings and determined that the difference in the fair market value based on Gilbert's misrepresentations was \$82,530 (\$145,410 -\$62,880) (P#38, pp. 42-43). The Prices agreed with his value. No testimony as to value was offered by the Defendants. The court agrees with Mr. Carter's analysis and accepts his findings.

CONCLUSIONS OF LAW

Based on these findings, the court makes the following conclusions of law:

MOTION TO DISMISS/RES JUDICATA

As a preliminary matter the court will address the motion to dismiss filed by the Foxes on the eve of trial. The Foxes contend that this action should be dismissed because the Prices filed and settled a separate lawsuit against their title insurance company (2007-CP-08-0458) under the Prices title insurance policy alleging some of the same type of damages as alleged against the Defendants in this case (1855). The court concludes that this argument is not correct as a matter of law and denies the motion.

At trial the court held an *in camera* proceeding to hear the evidence concerning the title insurance suit, the settlement and the dismissal of that suit as the settlement portion was subject to confidentiality clause.

Res judicata may be applied if (1) the identities of the parties are the same as in the prior litigation, (2) the subject matter is the same as in the prior litigation, and (3) there was a prior adjudication of the issue by a court of competent jurisdiction. Johnson v. Greenwood Mills, Inc., 317 S.C. 248, 250-51, 452 S.E.2d 832, 833 (1994). The doctrine of res judicata is not an "ironclad bar," however, to a later lawsuit Clark v. Aiken Cnty. Gov't, 366 S.C. 102, 109, 620 S.E.2d 99, 102 (Ct. App. 2005). In this case, the Prices and the title insurance company were the only parties to the prior suit (0458). The Foxes were not parties in that suit, so there was no identity of parties. The primary purposes of the doctrine, commonly known today as claim preclusion, are to bring an end to litigation and prevent a defendant from being forced to defend the same action repeatedly. See 50 C.J.S. *Judgment* §§ 697, 702 (1997). Garris v. Governing Bd. of the State Reinsurance Facility, 333 S.C. 432, 449, 511 S.E.2d 48, 57 (1998) (emphasis added.)

Also, the subject matter and claims are different. In the prior suit, the Prices made claims for title defects under their title insurance policy. In this case, the Prices are making claims against the Foxes and other Defendants for negligent

misrepresentation, breach of fiduciary duty and unfair trade practices. Furthermore, although a dismissal with prejudice can qualify as an “adjudication on the merits.” In this case, the dismissal was the result of a settlement agreement, not a true adjudication which violates the spirit if not the letter of the rule. The court further notes that in the settlement agreement reviewed *in camera* by the court, the parties expressly carved out this suit and the Prices claims against these Defendants from being affected. Finally, the court notes the Foxes did not plead res judicata as an affirmative defense, although the Foxes did reserve additional affirmative defenses in their answer. For all these reasons, the Foxes motion to dismiss and claims based on res judicata are denied.

COLLATERAL SOURCE RULE

The Foxes further argue that even if the court does not conclude that the Prices suit should be dismissed under res judicata that the Foxes and other Defendants are entitled to offset the settlement amount with the title insurance company against any damages which may be awarded against them in this case.

“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. This court concludes the collateral source rule applies and the Defendants may not offset the compensation the Prices received in their settlement of Civil Action 2007-CP-08-0458.

BREACH OF CONTRACT

On September 13, 2003, the Prices entered into a Standard Form of Agreement Between Owner and Contractor (the Contract) with Gilbert⁸ to construct their home on

⁸ Gilbert argues that the contract was with Heritage Classic Homes, Inc. and not Gilbert individually; however, his individual name is listed as Contractor (and not just Heritage Classic Homes)(P#5); he executed a mechanic's lien for himself which he filed and certified as true and accurate that the money under the contract was owed to "Danny L. Gilbert d/b/a Heritage Classic Homes, Inc." (P#19); and perhaps most bluntly, in a letter dated February 19, 2004 addressed to the Prices, Gilbert states in part, "Because to date you have not paid the money owed to me while under contract to build your home..."(P#18). Furthermore, almost all the email and correspondence between the Prices is to Danny Gilbert and not Heritage Classic Homes, Inc. The court rejects the argument that Danny Gilbert, individually is not liable under the Contract.

Lot 20. (P#5) The Stipulated Sum⁹ was originally \$160,175; however, NCM suggested a greater cushion so the Stipulated Sum was increased to \$185,175. (P#5, Item 4.1) Pursuant to the Contract, the Prices house was to be finished (substantial completion) by February 25, 2004. This date was extended from February 1, 2004 because the closing took place later than anticipated. (P#5, 3.1, 3.2). Time was of the essence in the contract. (P#6, 8.21) The contract incorporated by reference other contractual documents including General Conditions of Contract Construction (AIA 201) ("General Conditions").

Gilbert breached the Contract in several ways. Section 3.71 of the General Conditions¹⁰ provides that "the Contractor shall secure and pay for the building permit and other permits and governmental fees, licenses and inspections necessary for proper execution and completion of the Work." Under Section 3.7.2, "The Contractor shall comply with and give notices required by laws, ordinances, rules, regulations and lawful orders of public authorities bearing on performance of the Work. In Section 3.7.4, "If the Contractor performs Work knowing it to be contrary to laws, statutes, ordinances, building codes, and rules and regulations ..., the Contractor shall assume full responsibility for such Work and shall bear the attributable costs."

⁹ Gilbert argues that in reality the Contract was a "Costs plus" contract because of a provision Gilbert inserted in Section 4.1 which references the cost estimate he prepared and attached to the contract and states, "The Owner assumes the responsibility for any costs exceeding the costs in each description." However, the title to the contract clearly states the basis of payment is a Stipulated Sum and it would be misleading to use that type of contract, but then treat it as a cost plus. The Prices reasonably assumed that phrase meant reasonable price fluctuations due to market conditions. In any event, once Gilbert breached the contract he was responsible for any difference. (General Conditions, 14.24)

¹⁰ Hereinafter references to the General Conditions shall be by section number only.

Gilbert applied for and received a building permit without first having a septic tank permit in violation of S.C. Code of Regulations §61-56 Section III C¹¹. Also, Gilbert's subcontractor for plumbing did not pick up or apply for a permit on this project and that the subcontractors for electrical and mechanical work have not picked up their permits. (P#13) As a result, Berkeley County issued a stop work order for the Prices home on January 22, 2004. (P#13) The Prices were not able to resume work on their home until after May 18, 2004, when Gilbert finally had performed the required steps for DHEC to give final approval for the septic plans for the Prices lot. This delayed the Prices construction by almost six months and was several months past the substantial completion date called for in the contract. Section 8.2.1 provides that "Time Limits stated in the Contract Documents are of the essence of the contract. By executing the Agreement, Contractor confirms that the Contract Time is a reasonable period for performing the Work." Under Section 8.2.3, "The Contractor shall proceed expeditiously with adequate forces and shall achieve Substantial Completion within the Contract Time."

In addition to the problems with Gilbert complying with applicable regulations, obtaining necessary permits, and the delay, there were also issues with the quality of the limited work Gilbert and his subcontractors were able to complete. Hank Jackson, then Berkeley County Inspector testified that the initial foundation did not pass inspection because it did not contain a vapor barrier and the soil was not compacted. The Prices engineering expert, Albert J. Schweikhardt, PE testified he inspected the concrete slab and concrete masonry pillars and found several construction deficiencies in both the concrete slab and the concrete masonry walls including improperly positioned rebar, lack of joints, improper grade, unstruck mortar joints, unstable walls

¹¹ Gilbert misled the Prices on this point in his letter dated 12/29/03 when he claimed he was "waiting on the design of your septic tank system to be completed by DHEC."

and piers (at least one collapsed pier) random cracking, the slope in the storage area exceeded requirement and the height of the walls also exceeded requirements. In his summary, he recommended that the slab and walls be replaced. (P#36).

Also, while the Prices understood there could be reasonable cost increases, Gilbert had notified them of several large, material cost increases. For example, one of the principal components of construction was the Boozer Building Systems Package. This increased from \$23,000 to \$55,000, more than double.

The Prices notified Gilbert and testified they were willing to work with him, but Gilbert told them "he was done." This court finds ample justification for the Prices terminating Gilbert for cause under Section 14.2.1 of the contract.

BREACH OF CONTRACT DAMAGES

Having determined that Gilbert breached his contract with the Prices, the court will now consider the damages resulting from that breach. Section 14.2.2.3 allows the Owner to "finish the work by whatever reasonable method the Owner may deem expedient." The Prices did so by hiring John Khaler and subsequently Todd Seibels as construction managers to complete the job. Pursuant to 14.2.4 if the costs of completion exceed the unpaid balance, the Contractor shall pay the difference. The Prices offered into evidence two spreadsheets backed by source documents showing the various construction charges attributed to the Contractor and the Owner. As shown on Plaintiff's Exhibit 23, the total construction costs charged to Contractor are \$283,011.83 less the Stipulated Sum total of \$185,175.00 results in costs of completion exceeding the balance by \$97,836.83.

The Prices also sought reimbursement for interest, storage fees, lodging and rent. The Court declines to award these fees as speculative and in some cases duplicative to costs or expense that the Prices would have incurred in the event the home was completed by Gilbert in a timely fashion.

NOTICE OF OPPORTUNITY AND RIGHT TO CURE

Gilbert argued for the first time at trial that he was entitled to a directed verdict under the provisions of Right to Cure Act.¹² Under the Act, a claimant must give a contractor written notice of a claim and an opportunity to settle the dispute before filing suit. The Prices provided Gilbert a letter on January 22, 2004 in which they raised construction issues with Gilbert. In that letter, the Prices reiterated that they were prepared to listen to Gilbert how we would fix these problems and achieve timely progression of their home. (P#12). However, assuming arguendo without deciding that this letter does not meet the requirements of the Act, Gilbert has a more fundamental problem. The Act specifically prescribes a mechanism for a Contractor if an Owner fails to give the notice required by the Act and then files suit: to file a motion for stay. "If the claimant files an action in court before first complying with the requirements of this article, on motion of a party to the action, the court shall stay the action until the claimant has complied with the requirements of this article." S.C. Code Ann. § 40-59-830

As a result of Gilbert's prior conduct, he could not seek a stay. He told the Prices "he was done." He filed a mechanic's lien against the Prices' property, and he took no action while the Prices proceeded to mitigate their damages and hire other contractors to complete the job. Gilbert waived any right to a stay or seek a cure by his failure to timely assert his rights under the statute for a period of fourteen years.

¹²Sections 40-59-810 to 860 of the South Carolina Code

EXISTENCE OF A PARTNERSHIP

A "partnership" is an association of two or more persons to carry on as co-owners a business for profit. S.C. Code Ann. § 33-41-210. A partnership agreement may rest in parol. It may be implied and without express intention. Wyman v. Davis, 223 S.C. 172, 74 S.E.2d 694 (1953) Halbersberg v. Berry, 302 S.C. 97, 101, 394 S.E.2d 7, 10 (Ct. App. 1990). In this case, there is an abundance of evidence to show that in the summer of 2001, the Foxes, EHL, HCH and Gilbert formed a partnership to develop.



Phase II of the Eagle Harbor Subdivision. Pursuant to this Partnership, the Foxes acquired certain real property which would become part of Phase II of the Eagle Harbor Subdivision and shared the expenses of the development including the roads. Gilbert would be the marketing Partner and market and sell the lots and manage the development. (P#41: G. Fox, 77; B. Fox 38)) The Partners would then split the profits after the lots were sold and expenses were paid. (P # 32-34, 41: G Fox Dep. 18, 32, 46, 49, 53, 54, 80, 91; Gilbert 49, 50 and 52). The Prices offered handwritten documents detailing the shared expenses, expected profits and the split. In a letter dated September 29, 2003, Gilbert details some of the responsibilities with the Winn¹² family related to the subdivision development. (P#51) The subdivision plat for Phase II was signed by Belinda Fox, EHI and Troy Winn. (D. Fox#1) The Prices sent Gerry Fox a letter on February 3, 2004 for help with problems in Eagle Harbor subdivision.

Gerry Fox specifically testified that Phase II was an investment in which he expected to make a profit. He also testified that he had an agreement with Gilbert to develop the property and split the profit. Mr. Fox further testified that Gilbert had to get his permission on what was spent. Gilbert testified that the development was "a joint effort by several folks..." and described EHI as a "oversight developer." (P#41: Gilbert, 49) Plaintiff's Exhibit 33 shows payments to Stantec, the engineer hired for the development from Gerry Fox, Troy Winn and EHI. In a subsequent lawsuit against Stantec (08-CP-10-5699) EHI, Danny Gilbert, Belinda Fox, and Troy Winn were all Plaintiffs and alleged in paragraph 7 that they entered into an agreement with Stantec to provide certain subdivision development services including the development of a Master Plan (P#45). On the Declaration of Covenants and Restrictions, EHI is listed as

¹³Troy Winn was possibly another partner but was granted summary judgment on statute of limitations grounds.

the "Declarant." (P#28) This court concludes as a matter of law, the Foxes, EHI, HCH and Gilbert formed a partnership to develop Phase II of the Eagle Harbor Subdivision.

NEGLIGENT MISREPRESENTATION

In a claim for the tort of negligent misrepresentation where the damage alleged is a pecuniary loss, the essential elements include: (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 see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation. Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 473-74, 581 S.E.2d 496, 504 (Ct. App. 2003). "A duty to exercise reasonable care in giving information exists when the defendant has a pecuniary interest in the transaction." Winburn v. Insurance Co., 287 S.C. 435, 441, 339 S.E.2d 142, 146 (Ct. App. 1985). "The recovery of damages may be predicated upon a negligently made false statement where a party suffers either injury or loss as a consequence of relying upon the misrepresentation." *Id.* These general rules have been applied, in every case this Court has located, to support the recognition of a negligent misrepresentation claim where the misrepresented fact(s) induced the plaintiff to enter a contract or business transaction. See, e.g., Winburn, *supra* (recognizing that under appropriate facts, negligent representations inducing the signing of an endorsement could be actionable); Pittman v. Galloway, 281 S.C. 70, 313 S.E.2d 632 (Ct. App. 1984) (negligent representation inducing the plaintiff's purchase of land is actionable); and First Federal Sav. Bank v. Knauss, 296 S.C. 136, 370 S.E.2d 906 (Ct. App. 1988) (recognizing that under appropriate facts, negligent representations inducing property purchase could be actionable). Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 474, 581 S.E.2d 496, 504 (Ct. App. 2003)

FALSE REPRESENTATIONS

N

In this case Gilbert made several material false misrepresentations to the Prices which induced their purchase of Lot #20 in Eagle Harbor subdivision.

SEPTIC TANK

Gilbert specifically told the Prices all the testing had been done on the property and was fine. Gilbert represented to the Prices that the lot perked and that a septic tank could go on the lot. Gilbert made these representations despite having received a letter from DHEC in 2002 –prior to even meeting the Prices-which specifically said that Lot 20 would not perk, had poor soil conditions and a high-water table. (P#42)

SUBDIVISION

Gilbert told the Prices in response to their statement that they did not need 7.86 acres that they could subdivide it and sell it off and use the money to pay for the construction of their house. However, because the property would not perk and support a septic tank, the Prices cannot subdivide the property for residential purposes.¹³ (P#30, DHEC letter confirming the property cannot be subdivided for residential purposes.)

RESTRICTIVE COVENANTS

The Prices were told before purchasing their property that it would be a restricted community with a valid homeowner's association. However, the covenants for Phase II were not even recorded until almost a year after the Prices had purchased

¹³ The Defendants argue that the lot could be subdivided, but not for residential purposes. This argument lacks merit as clearly the inducement to the Prices for subdividing the lot was, so the lots could be sold to help pay for construction costs. It is unlikely that someone would buy a lot in a subdivision which could not be used for residential purposes. Furthermore, if this was all that was intended it would be fraudulent and misleading not to disclose this material limitation.

their property and even then, the covenants were invalid because EHI the Declarant did not own the property it was trying to restrict. (P#28).

AMENITIES

The Prices, and Merrill and Dianne Cox testified that they were told there would be amenities which could be shared with the Boy's Home but were either never developed or added much later than represented.

WETLANDS

The Prices did not know that their property had wetlands. Indeed, Gilbert's representations that they could subdivide their 7.86-acre lot and then sell the lots to help pay for the construction of their house would lead a reasonable buyer to believe that the lots could be developed. 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 an NPDES permit under the Clean Water Act and Comprehensive Stormwater Prevention Plan (CSWPP) which is required for any construction project of more than one acre. (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)

GOVERNMENTAL REGULATIONS

Gilbert held himself and his partners as developers with the requisite skill or training to properly develop a residential subdivision with multiple lots and roads in accordance with local, state and federal law. However, the evidence shows that neither Gilbert nor his partners were competent to develop Eagle Harbor Phase II.

PECUNIARY INTEREST

The partnership and its partners unquestionably had a pecuniary interest in Gilbert as marketing partner making the false representations to induce lot sales. As

reflected in Gilbert's handwritten projections, the Foxes could expect \$730,904 in total income from lot sales and net profit of \$324,153 which would be split (P#32).

DUTY OF CARE

"A duty to exercise reasonable care in giving information exists when the defendant has a pecuniary interest in the transaction." Winburn v. Insurance Co., 287 S.C. 435, 441, 339 S.E.2d 142, 146 (Ct. App. 1985). Since Gilbert, his partners and the partnership had a pecuniary interest in the lot sales, they also had a duty to represent truthful, accurate information about the lot and the subdivision.

BREACH OF DUTY

As set forth in the false representations discussed supra, Gilbert and the partnership breached their duty to communicate accurate information about the Prices lot and the subdivision, by misrepresenting that the lot would perk and support a septic tank, could be subdivided, would be furnished with amenities and valid, enforceable restrictive covenants, and had good soil, and the testing was fine and that the lot did not have wetlands.

IUSTIFIABLE RELIANCE

A determination of justifiable reliance involves the evaluation of the totality of the circumstances, "including the positions and relations of the parties." Elders v. Parker, 286 S.C. 228, 233, 332 S.E.2d 563, 567 (Ct. App. 1985). West v. Gladney, 341 S.C. 127, 134, 533 S.E.2d 334, 337-38 (Ct. App. 2000) Generally this is an issue of fact to be decided by the trier of fact. " Unlimited Servs., Inc. v. Macklen Enters., Inc., 303 S.C. 384, 387, 401 S.E.2d 153, 155 (1991); see also Starkey v. Bell, 281 S.C. 308, 313, 315 S.E.2d 153, 156 (Ct. App. 1984) ("Issues of reliance and its reasonableness, going as they do to subjective states of mind and applications of objective standards of reasonableness, are preeminently factual issues for the triers of the facts."). As between the parties, the recipient of a fraudulent misrepresentation of fact is justified in relying upon its truth, although he might have ascertained the falsity of the representation had he made an

investigation. *Restatement (Second) of Torts* Section 540 (1979). This is especially true when the facts are not readily discoverable, or the facts are within the peculiar knowledge of the misrepresenting party.

In this case, there are several circumstances which factor into the reasonableness of the Prices reliance on the representations made by Gilbert as a marketing partner. They were moving to South Carolina and not familiar with its laws. Gilbert represented himself as the developer and as representing Belinda Fox. He showed the Prices a Master Plan which showed the Boy's Home, so he appeared trustworthy being associated with a non-profit charitable entity. He also was a licensed residential builder and was going to build their home, so the Prices assumed he had proper knowledge of construction and subdivision development. Gilbert referred the Prices to Jeff Spell to represent them at closing even though Mr. Spell was currently Gilbert's attorney (P#51) in a dispute with Troy Winn and despite that Mr. Spell also represented the partnership in holding construction funds in escrow. The contract provided by Gilbert had Jeff Spell's name typed on it. Mr. Spell failed to attend the closing and did not respond to the Prices calls thereafter. Indeed Mr. Spell tried to represent Gilbert and Eagle Harbor, Inc. in this very suit against the Prices until he was disqualified by this court. (See Order of Disqualification and Plaintiffs' Response to Notice of Appearance on file in this case and attached exhibits).

The misrepresentations were also not readily apparent to the Prices but were within the knowledge of Gilbert and the partnership. For example, Gilbert was aware that the lot would not perk, had a high-water table and could not support a septic tank. Gilbert was aware that EHI did not own the property in Phase II when he recorded the covenants.

This court concludes the Prices were justified in relying on Gilbert's representations.

LIABILITY OF THE FOXES FOR GILBERT'S REPRESENTATIONS

Even though the Foxes did not directly make the representations, both Belinda and Gerry Fox and the Eagle Harbor Phase II Development Partnership are liable for the representations.

According to his deposition testimony, Gerry Fox didn't know if he made an effort to make sure Gilbert was complying with subdivision regulations (P#41, G. Fox, 68), knew about the covenants but made no investigation if they were accurate (P#41, 87), made no investigation to see if the property sold to the Prices could be subdivided (P#41,83), was aware that a drain field would be required for certain lots including the Prices but did not discuss that with them or know if Gilbert did. (P#41, 97).

Every partner is an agent of the partnership. (S.C. Code Ann. § 33-41-310) 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).

THE PAROLE EVIDENCE RULE AND CONTRACTUAL DEFENSES

The Foxes argued at trial that the Prices could not prevail because of certain boilerplate contractual terms set forth in the contract. Specifically, the Foxes argued that the parole evidence rule, the "as is" and other terms in the contract, and the integration clause should prevent the Prices from recovering for negligent misrepresentation. The court disagrees as the Prices are suing for negligent misrepresentation of the marketing partner to induce them to purchase their lot, not breach of the seller's contract. The doctrine of *caveat emptor* does not apply in cases of misrepresentation or fraud.

"In a majority of jurisdictions, the parol evidence rule bars oral testimony in certain contract cases but is not applicable in misrepresentation cases." Rempel v. Nationwide Life Ins. Co., 471 Pa. 404, 370 A.2d 366, 370 (1977). The parol evidence rule has been held inapplicable to tort causes of action (including negligent misrepresentation) since the rule is one of substantive contract law. Formento v. Encanto Business Park, 154 Ariz. App. 495, 744 P.2d 22 (1987). Furthermore, it has been held that "a seller should not be allowed to hide behind an integration clause to avoid the consequences of a misrepresentation, whether fraudulent or negligent." *Id.*, 744 P.2d at 26. We follow the reasoning of the Formento court and hold that neither the parol evidence rule nor the merger or integration clause in the parties' contract prevents Elmwood from proceeding on its negligent misrepresentation theory. Gilliland v. Elmwood Props., 301 S.C. 295, 302, 391 S.E.2d 577, 580-81 (1990)(emphasis added.)

See also cases cited by the court in Slack v. James. Miles Excavating, Inc. v. Rutledge Backhoe & Septic Tank Servs., Inc., 23 Kan. App. 2d 82, 927 P.2d 517 (Kan. App. 1997) (parol evidence admissible to show fraud even where the contract contains provision stating parties have not relied on any representations other than those contained in the writing). See also Allen-Parker Co. v. Lollis, (even specific provisions or stipulations in a contract providing in effect for immunity from or nullification or waiver of preliminary or extraneous misrepresentations are generally ineffective, and do not prevent subsequent assertion of misrepresentations as a basis for fraud). An opposite finding "would leave swindlers free to extinguish their victims' remedies simply by sticking in a bit of boilerplate." Whelan v. Abell, 310 U.S. App. D.C. 396, 48 F.3d 1247, 1258 (D.C. Cir. 1995). A party should not be given the opportunity to free himself from an allegation of fraud by incorporating a generalized non-reliance clause into a contract. Slack v. James, 364 S.C. 609, 618-19, 614 S.E.2d 636, 641 (2005).



Furthermore, the Foxes are liable for their marketing partner's misrepresentations on behalf of their partnership. Neither Gilbert nor the Partnership were named parties to the contract.

DAMAGES FROM NEGLIGENT MISREPRESENTATION

Having concluded that the Defendants are jointly and severally liable for the negligent misrepresentations of Gilbert as marketing partner, the next question are the damages from that misrepresentation.

The Prices retained the services of Edward Carter, MSA, MFLA, MRA to determine the difference in value of their land if the representations by Gilbert on behalf of the partnership had been true and the value if the representations were false. Mr. Carter is a South Carolina Certified Residential Appraiser and was qualified as an expert. (P#38, pp. 47,61)

Mr. Carter prepared a report listing his findings and determined that the difference in the fair market value based on Gilbert's misrepresentations was \$82,530 (\$145,410 -\$62,880) (P#38, pp. 42-43). The Prices agreed with his value. No testimony as to value was offered by the Defendants. The court agrees with Mr. Carter's analysis and accepts his findings.

UNFAIR TRADE PRACTICES ACT

The South Carolina Unfair Trade Practices Act (SCUTPA)¹⁴ provides that: Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.¹⁵

Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive

¹⁴ S.C. Code Ann. § 39-5-10 et. seq.

¹⁵ S.C. Code Ann. § 39-5-20

method, act or practice declared unlawful [by the Act] may bring an action individually, but not in a representative capacity, to recover actual damages.¹⁶

"Trade or commerce" is defined to include "advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and ... any trade or commerce directly or indirectly affecting the people ..." of South Carolina.¹⁷

Misrepresentations related to the sale of lots in a subdivision have previously be found to be unfair trade practices. State ex rel. McLeod v. C & L Corp., 280 S.C. 519, 313 S.E.2d 334 (Ct. App. 1984)

A deceptive act is any act which has a tendency to deceive. deBondt v. Carlton Motorcars, Inc., 342 S.C. 254, 269, 536 S.E.2d 399, 407 (Ct. App. 2000). "Even a truthful statement may be deceptive if it has a capacity or tendency to deceive." Wogan v. Kunze, 366 S.C. 583, 606, 623 S.E.2d 107, 120 (Ct. App. 2005) (citations omitted).

Whether an act or practice is unfair or deceptive within the meaning of the UTPA depends on the surrounding facts and the impact of the transaction on the marketplace. deBondt, 342 S.C. 269, 536 S.E.2d at 407. "An act is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive." Bessinger v. BI-LO, Inc., 366 S.C. 426, 432, 622 S.E.2d 564, 567 (Ct. App. 2005) (cert. pending) (citing Gentry v. Yonce, 337 S.C. 1, 12, 522 S.E.2d 137, 143 (1999)).

In order to bring an action under the UTPA, the plaintiff must demonstrate (1) that the defendant engaged in an unlawful trade practice, (2) that the plaintiff suffered actual, ascertainable damages as a result of the defendant's use of the unlawful trade practice, and (3) that the unlawful trade practice engaged in by the defendant had an

¹⁶ S.C. Code Ann. § 39-5-140

¹⁷ S.C. Code § 39-5-10(b)

adverse impact on the public interest. See S.C. Code Ann. § 39-5-140; *Daisy Outdoor Advertising Co., Inc. v. Abbott*, 322 S.C. 489, 473 S.E.2d 47, 49 (S.C. 1996). The Prices have established all of these elements.

UNFAIR AND DECEPTIVE ACTS

As discussed herein, the record is replete with specific examples of unfair and deceptive acts committed by Gilbert as marketing partner on behalf of the Phase II development partnership. Gilbert marketed and sold lots in Phase II without having the plat for the lots approved by DHEC in violation of Reg. 61-57 (P#40) which expressly prohibited that activity. By March 7, 2003, and despite the prohibition against selling lots prior to subdivision approval by DHEC, Gilbert on behalf of the Partnership had closed the sale, contracted to sell or gift, 16 of the 20 lots in Phase II. (P#32)¹⁸

Neither Gilbert, EHI nor the Foxes applied to DHEC or Office of Coastal Resource Management (OCRM) for a permit before clearing the land and constructing roads. They also failed to perform wetlands delineations as part of an application for an NPDES permit under the Clean Water Act and Comprehensive Stormwater Prevention Plan (CSWPP) which is required for any construction project of more than one acre. (S.C. Code Ann. § 48-14-30; S.C. Code Ann. Regs. 72-305; 33 U.S.C.S. § 1344). (P#42, #45, ¶10-13).

Despite Gilbert's knowledge that the Prices lot would not perk or support a septic tank, and a high-water table, Gilbert represented the Prices lot could have a septic tank and that the Prices lot could be further subdivided. Indeed, Gilbert's testimony was that he showed them on the plans where the septic tank would be located.

¹⁸ Compare *State ex rel. McLeod v. C & L Corp.*, 280 S.C. 519, 313 S.E.2d 334 (Ct. App. 1984)(selling lots early in violation of local subdivision ordinance)

Gilbert referred the Prices to Jeff Spell who was typed into the contract as the closing agent. Gilbert testified Spell was his good friend and in fact actually represented Gilbert at that time in matters related to the partnership.

Gilbert promised the Prices and others there would be amenities and valid, restrictive covenants. The amenities were not developed or where late in being developed and the restrictive covenants were invalid.

IMPACT ON THE PUBLIC INTEREST

Since 1986, South Carolina courts have required that a plaintiff bringing a private cause of action under UTPA allege and prove the defendant's actions adversely affected the public interest. See *Noack Enters., Inc. v. Country Corner Interiors*, 290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1986) (initial case finding requirement of adverse impact on public interest), *cert. dismissed*, 294 S.C. 235, 363 S.E.2d 688 (1987). This is typically shown by evidence that the conduct has the potential for repetition. Plaintiffs in prior cases generally have shown potential for repetition in two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence (e.g., Jones Chevrolet), or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts (e.g., Haley Nursery, Dowd) Daisy Outdoor Advert. Co. v. Abbott, 322 S.C. 489, 496, 473 S.E.2d 47, 51 (1996).

The court has made it clear, however, that those are not the only means for showing potential for repetition/public impact. Rather, each case must be evaluated on its own merits. The court expressly rejected any rigid, bright line test that delineates in minute detail exactly what a plaintiff must show to satisfy the potential for repetition/public impact prong of the UTPA test. Daisy, 473 S.E.2d 47, 51 (1996).

In this case, the adverse public impact is apparent. Gilbert was selling lots and making representations to the public concerning Phase II of Eagle Harbor. According to

Gilbert's application for subdivision approval, Eagle Harbor, Phase II has 23 lots.¹⁹ He sold many, if not all these lots before receiving DHEC approval as required. Gilbert also suggested to other owners to use Jeff Spell, his attorney for their closings. The public also was impacted by the defective covenants as this directly affected the ability of the owners to maintain the common elements. Also, the Prices offered direct testimony of repetition in the testimony of Merrill and Diane Cox, other owners who purchased lots and testified as to the misrepresentations and heavy-handed acts by Gilbert as marketing partner and developer. Merrill Cox recalled a meeting of the owners to try and convince the owners they were bound by the defective covenants. The Prices also reference this in their April 3, 2004 letter to Gerry Fox.

This court concludes that the public impact requirement is satisfied in this case.

DAMAGES

The Prices suffered ascertainable damages as a result of Gilbert and the Partnership's unfair and deceptive acts. The Prices expert Edward Carter, MSA, MFLA, MRA determined the difference in value of their land if the representations by Gilbert on behalf of the partnership had been true and the value if the representations were false. Mr. Carter is a South Carolina Certified Residential Appraiser and was qualified as an expert. (P#38, pp. 47,61)

Mr. Carter prepared a report listing his findings and determined that the difference in the fair market value based on Gilbert's misrepresentations was \$82,530 (\$145,410 -\$62,880) (P#38, pp. 42-43). The Prices agreed with his value. No testimony as to value was offered by the Defendants. The court agrees with Mr. Carter's analysis and accepts his findings.

¹⁹ There is also a Phase 3 in Eagle Harbor Subdivision.

WILFUL VIOLATION

If the court finds that the use or employment of the unfair or deceptive method, act or practice was a willful or knowing violation of § 39-5-20, the court shall award three times the actual damages sustained and may provide such other relief as it deems necessary or proper. S.C. Code Ann. § 39-5-140(a)

For the purposes of this section, a willful violation occurs when the party committing the violation knew or should have known that his conduct was a violation of § 39-5-20. S.C. Code Ann. § 39-5-140(d)

The court finds the violations were willful in this case as Gilbert knew or should have known that his acts and conduct were unfair, in violation of local, state and federal regulations and had the tendency or capacity to deceive and thus violations of the Act.

For example,²⁰ right above Gilbert's signature on the application for subdivision approval is a warning that "no lot in the subdivision can be sold, rented, or leased, or any lot further subdivided until and unless subdivision approval is granted by the Department." (P#35) Despite this, Gilbert sold virtually all the lots in Phase II before final approval was granted by DHEC. Gilbert had specific knowledge from DHEC letters that the soil conditions for the Prices lot were poor and would not support a septic tank system of any type but still represented to the Prices they could have a septic tank and subdivide their property. In an email to the Prices after getting a building permit, Gilbert states "Currently we are waiting on the design of your septic tank system to be completed by DHEC." This email was false and misleading in that the building permit should not have been issued without septic tank approval, DHEC had not issued a septic tank permit, and DHEC could not approve a septic tank for the Prices site because it would not support an onsite septic tank. Gilbert was aware of this because of the DHEC's prior letters.

²⁰ This list is not exhaustive and there are other examples in the record.

Gilbert suggested to the Prices and others to use Jeff Spell as their closing attorney in this case, despite knowing that Spell was his personal attorney and represented the partnership in the development.²¹

On October 25, 2004, Gilbert and EHI recorded a Declaration of Covenants, Conditions and Restrictions for Eagle Harbor ("Covenants"). The Declarant was EHI as the alleged owner of property described in the attached Exhibit A. The property described in Exhibit A references the Final Plat for Phase II. At the time these Covenants were recorded, most if not all the Lots of Phase II had already been sold and deeded to the purchasers including the Prices Lot 20. Also, EHI never owned the property it was trying to restrict. (P#32)

The court finds the violations were willful in this case as Gilbert knew or should have known that his acts and conduct were in violation of the Act.

COSTS AND ATTORNEY'S FEES

S.C. Code Ann. § 39-5-140 provides, "Upon the finding by the court of a violation of this article, the court shall award to the person bringing such action under this section reasonable attorney's fees and costs." Accordingly, the Plaintiff's counsel shall file with this court and serve upon opposing counsel and affidavit as to attorney's fees and costs. Defendants shall have ten days after service to notify opposing counsel of any objections to the fees and costs. If the parties are unable to timely resolve the objections, any party may request a hearing to review.

LIABILITY OF PARTNERSHIP AND OTHER PARTNERS FOR VIOLATIONS OF THE ACT

While the Foxes, Eagle Harbor, Inc. and the Phase II Development Partnership may not have directly made these misrepresentations in violation of the Act. Gilbert as

²¹ The Court takes judicial notice of the record in this case which includes the Amended Order of Disqualification of Jeff Spell who tried to represent Gilbert and his entities in this case over the Prices objections.

their marketing agent did so and the partnership and other partners are liable for his acts in the scope of his agency. In State ex rel. McLeod v. C & L Corp., 280 S.C. 519, 313 S.E.2d 334 (Ct. App. 1984)²² a corporation and real estate agent argued they are not liable under the Act for the misrepresentations of the salesmen, since they were made without their knowledge. The court held this argument lacked merit and stated, 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. February 24, 1984)

In this case, 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 dealt with prospective buyers (Dep. 38) The Foxes specifically allowed Gilbert to market and sell the properties on their behalf. (Dep. 77) Indeed, Gilbert was given a power of attorney from Belinda Fox to attend the closing and sign on her behalf. (Dep. 77).

Every partner is an agent of the partnership. (S.C. Code Ann. § 33-41-310) 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

²² A similar case to the one at bar where salesman made misrepresentations about lots being sold in a development.

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).

The court concludes that the Foxes, Eagle Harbor, Inc. and the Phase II Development Partnership are liable for the violations of their marketing partner in violation of the Act.²³

WHEREFORE, having fully set forth its findings of fact and conclusions of law, the court awards judgment as follows:

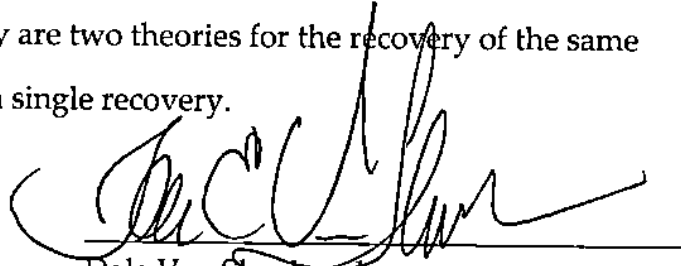
- 1) The Plaintiffs shall have judgment against Danny Gilbert individually, and Heritage Classic Homes, Inc. for breach of contract for the sum of \$97,836.83.
- 2) The Plaintiffs shall have judgment, jointly and severally, against Danny Gilbert, Belinda Fox, Gerry Fox, Eagle Harbor, Inc. and Eagle Harbor Phase II Development Partnership in the amount of \$82,530 in damages for negligent misrepresentation;
- 3) The Plaintiffs shall have judgment, jointly and severally, against Danny Gilbert, Belinda Fox, Gerry Fox, Eagle Harbor, Inc. and Eagle Harbor Phase II Development Partnership in the amount of \$82,530 actual damages trebled to \$247,590 under S.C. Code Ann. § 39-5-140(a) plus reasonable attorney's fees and costs; the Plaintiffs' counsel shall file with this court and serve upon opposing

²³ The court is aware of the "controlling person" liability doctrine set forth in Plowman v. Bagnal, 316 S.C. 283, 450 S.E.2d 36 (1994) (in private actions under the UTPA, directors and officers are not liable for the corporation's unfair trade practices unless they personally commit, participate in, direct or authorize the commission of a violation of the UTPA." Id. 450 S.E.2d 36, 40 (1994); however, the Foxes and Eagle Harbor, Inc. are not directors or officers of a corporation, but partners liable by statute and common law.

counsel an affidavit as to attorney's fees and costs. Defendants shall have ten days after service to notify opposing counsel of any objections to the attorney's fees and costs. If the parties are unable to timely resolve the objections, any party may request a hearing to review.

- 4) The Plaintiffs cannot collect damages for both negligent misrepresentation and unfair trade practices as they are two theories for the recovery of the same damages but are limited to a single recovery.

IT IS SO ORDERED.



Dale Van Slambrook
Master-in-Equity, Berkeley County

Dated: 6/26/18