THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

J.C. Nicholson, Jr., Active/Retired Circuit Court Judge

CONSOLIDATED Under Case No.: 2008-CP-10-2641
And Case No: 2009-CP-10-3441

Appellate Case No.: 2012209606

ZAN, LLC.....Appellant

v.

Ripley Cove LLC, W. H. Knight, Karl A. McMillan, individually and as the principal of Karl A. McMillan, Inc., W.M. Belote, East Coast Trading Co., St. Andrews Title & Abstract Agency, Inc., Chicago Title Ins. Co., and Charles A. Funk & Lillian M. Funk,.....Defendants,

Of whom Ripley Cove, LLC, W.H. Knight, Karl A. McMillan, individually and as the principal of Karl A. McMillan, Inc., W.M. Belote, and East Coast Trading Co. are the.....Respondents.

Zan, LLC.....Plaintiff,

v.

East Coast Trading Co.....Defendant.

FINAL BRIEF OF APPELLANT

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INTRODUCTION

The trial court held Appellant, Zan, LLC ("Zan") has proven its claims for breach of contract and negligent misrepresentation against the Respondents and has rejected each of the Respondents' affirmative defenses. The issue on appeal concerns the trial court's choice of remedy.

STATEMENT OF ISSUES ON APPEAL

a) Whether it was error for the trial judge to decline to rescind the real estate contract between Zan and Sellers and to award a damage sum having no basis in the record?

STATEMENT OF THE CASE

This case arises out of Zan's purchase of a parcel of property and the accompanying boat slip in Ripley Cove Marina, Charleston South Carolina. Edgar Buck and his daughter Susanne Buck Cantey, the principals of Zan, sought to purchase a boat slip large enough to store Mr. Buck's boat the *Rookie IV*. The Sellers East Coast Trading Company, Ripley Cove, LLC, W.H. Knight, and W.M. Belote (collectively referred to as the "Sellers") and the Sellers' agent, Karl A. McMillan,[1] misrepresented the width of the slip. When Mr. Buck discovered the slip was not as represented and that the *Rookie IV* would not fit in the slip, he refused to close. The Sellers then, in order to induce Mr. Buck into closing, represented that Mr. Buck's slip could be widened and that pilings would be placed along the new property line to delineate Mr. Buck's slip after the closing. This agreement was memorialized in a writing at closing, and on this basis, Zan closed on the property, purchasing the slip and the upland parcel for $685,589.78. The Sellers continued to represent to Mr. Buck that the pilings would be placed as agreed for a year after the closing before finally informing Mr. Buck that the pilings would not be placed and the slip would not be widened. Zan then filed suit against

1 Mr. McMillan and his company failed to answer Zan's complaint and were held in default. However, Mr. McMillan

Sellers for negligent misrepresentation, fraud in the inducement, breach of contract, and rescission.[2]

The consolidated cases were tried before the Honorable J.C. Nicholson, Jr. on July 26-28, 2011. Judge Nicholson found in favor of Zan in contract and in tort. Judge Nicholson's final order was filed on February 10, 2012. Zan received written notice of entry of the Order on February 17, 2012 and noticed its appeal on March 14, 2012.

STATEMENT OF THE FACTS

Mr. Buck's boat, the *Rookie IV,* has a beam of 19.6 feet and requires a 20-foot wide dock opening. Mr. Buck sought to purchase a slip wide enough for him to dock the *Rookie IV.* (R. p. 7, ¶ 1). Before Plaintiff signed the contract to purchase the property and slip at Ripley Cove, Mr. Buck visited the property with his real estate agent Lynn Carmody, Susanne Buck Cantey, Mr. Buck's daughter and the managing member of Zan, and the Sellers' agent Karl McMillan. McMillan was the Sellers' agent for purposes of soliciting, listing and showing the property to potential purchasers. (R. p. 7, ¶ 2). Mr. Buck explained his need for 20 feet of clearance to Mr. McMillan, and Mr. McMillan represented that Zan, LLC would be purchasing what is parcel SF-3 and what later became known as slips CS-Bl and CS-B2. Mr. McMillan pointed to the slip and represented that the space between the two-finger piers was one slip when it was actually two slips. Mr. McMillan then represented the slip would accommodate Mr. Buck's boat. Mr. Buck asked for a copy of a plat showing the boat slips and was told he would receive one shortly. (R. p. 7, ¶ 3).

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did appear at trial as a witness for the Sellers.

2 Zan filed two lawsuits, case numbers 2008-CP-10-2641 and 2009-CP-10-3441as the Seller and actual owner of the property were at variance. The confusion was cleared by the filing of a second suit and the consolidated of both. Zan also named the title insurance company, Chicago Title, and the title insurance agent St. Andrews Title Co. ("St. Andrews"). By Order filed October 27, 2011, the trial court entered judgment in favor of Chicago Title and St. Andrews. Plaintiff did not appeal this Order, and Chicago Title and St. Andrews are not parties to this appeal.

On February 3, 2005, Susanne Buck Cantey, for Zan, signed the contract to purchase the real property and boat slip at Ripley Cove for $700,000.00. Closing was scheduled for March 5, 2005. The day before the March 5, 2005 closing, Mr. Buck was given a copy of the plat showing the boat slips. After reviewing the plat, Mr. Buck discovered that he was actually only purchasing slip CS-Bl which was half the width represented by Mr. McMillan; there was not sufficient clearance for the *Rookie IV* in boat slip CS-Bl. (R. p. 7, ¶ 5). Because of this, Mr. Buck refused to close. The Sellers, hoping to salvage the sale, authorized their agent Karl McMillan, to negotiate with Mr. Buck. (R p. 7, ¶ 6) In order to conclude the sale, Mr. McMillan informed Mr. Buck that the Sellers also owned the adjoining property (slip CS-B2) and that it would be no problem to give Mr. Buck the 20-foot clearance he needed and place the pilings between slips CS-Bl (the Buck's slip) and CS-B2 (the adjoining slip) to accommodate the 20-foot clearance represented by the Sellers. (R. p. 8, ¶ 7). Mr. McMillan further represented that he would reduce his commission and the Sellers would reduce the purchase price of the property if Zan would close on these terms. The Bucks agreed and a new closing date of April 5, 2005 was set. (R. p. 8, ¶ 8).

The trial judge found that a condition of the parties' agreement was that the *Rookie IV* must fit into the slip Zan was purchasing. (R. p. 8, ¶ 9).

Despite the failure of the closing, on March 5, 2005, a deed had been signed by the Sellers transferring title to the property to Zan. (R. p. 8, ¶ 10). The trial court held the deed is irregular and incorrect on its face, inter alia, in that it states Zan signed the deed on January 5, 2005, over a month before Zan even signed the contract to purchase the property. (R. p. 8 fn 6).

On the way to the April 5, 2005 closing, Mr. Buck visited the property to see if the pilings had been placed and found they were not. Because of this, Mr. Buck again refused to close. (R. p. 8, ¶ 11).

The closing attorney Dan David[3] asked if Mr. Buck would close if he was given a letter memorializing the agreement and guaranteeing that the Seller would locate the pilings as requested and install them within a reasonable length of time. The Bucks agreed, making clear that the promise to install the pilings where requested was a condition precedent to Zan closing on the property. (R. p. 8, ¶ 12). The represented slip was a sine qua non to the closing. (R. p. 8, ¶ 9). Mr. David then called one of the Sellers, W.H. Knight, to obtain his consent to the agreement. (R. p. 8, ¶ 13).

The trial court found Mr. Knight was authorized by the Sellers to negotiate and enter into contracts on the Sellers' behalf. (R. p. 8, ¶ 13).

Mr. David testified he received consent from Mr. Knight, and wrote the letter confirming the pilings would be put in place. (R. p. 9, ¶ 14).

The trial judge held Zan reasonably relied on Mr. David's letter, which confirmed the parties' agreement. (R. p. 9, ¶ 15).

Up to and after the summer of 2006, Mr. Knight continued to represent that the pilings would be put in place. Mr. Buck received a letter as late as June 2006 from a contractor who had been hired by the Seller to install the pilings. (Order ¶ 16).

In January of 2008, Mr. Buck discovered that the Sellers had sold, over two years before, the adjoining slip and could not perform as agreed. Zan then filed this action asserting claims against

3 Mr. David represented Zan, Chicago Title, and the Sellers at closing.

McMillan and the Sellers for rescission, fraud in the inducement, and negligent misrepresentation. (R. p. 9, ¶ 17).

The *Rookie IV* does not fit in Slip CS-B1 and has never been docked in the slip. (R. p. 9, ¶ 18).

ARGUMENT

1. Standard of Review

Zan sued the Sellers and Mr. McMillan for breach of contract, negligent misrepresentation, and fraud in the inducement, seeking the remedy of rescission, or in the alternative, money damages. See Order pg 9 ("Zan sought rescission or alternatively damages."). An action for rescission is one in equity. *Campbell v. Carr*, 361 S.C. 258, 262–63, 603 S.E.2d 625, 627 (Ct.App.2004). On appeal from an equitable action, the appellate court has a broad scope of review, but will not disregard the findings of the trial court, which saw and heard the witnesses and was in a better position to evaluate their credibility. *Buffington v. T.O.E. Enterprises*, 383 S.C. 388, 680 S.E.2d 289 (2009). However, the issue on appeal concerns a legal question: whether the trial court's failure to award Zan rescission, after finding all the elements of the cause of action met, constitutes reversible error. A legal question in an equity case receives review as in law. *Clardy v. Bodolosky*, 679 S.E.2d 527 (Ct. App. 2009). "Questions of law may be decided with no particular deference to the trial court." *S.C. Dept. of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 654, 667 S.E.2d 7, 12 (Ct.App.2008).

2. What Is Not In Dispute

The trial court held Zan has proven that the Sellers are liable to Zan in contract and in tort:

a. Mr. Buck owns a boat, the Rookie IV, which requires a 20-foot wide dock opening and the purpose of Plaintiff's purchase of the property was to "purchase a slip wide

enough for him to dock the *Rookie IV*." (R. pp. 7-8, ¶¶ 1, 2, 3, 5, 6, 11).

b. There was a valid and binding contract between the Zan and the Sellers and that "a condition of the parties' agreement was that the boat must fit into the slip." (R. p. 8, ¶ 9).

c. When Mr. Buck received a plat of the boat slips and discovered the slip was not as represented and was not wide enough to fit the Rookie IV, Zan canceled the first closing scheduled for March 5, 2005. (R. p. 7, ¶ 5).

d. "The Sellers, hoping to salvage the sale, authorized their agent Karl McMillan, to negotiate with Mr. Buck." (R. p. 7, ¶ 6).

e. "Mr. McMillan is the Sellers' agent and acted at the direction of the Sellers when he initially showed Plaintiff the property and when he contacted Mr. Buck after the failed closing to negotiate for the Sellers." (R. p. 9).

f. "As the Sellers specifically authorized Karl McMillan to negotiate with Mr. Buck in order to close the deal, the Sellers are bound by the representations made by Mr. McMillan." (R. p. 9).

g. Zan was induced by misrepresentation to close on the property. "In order to conclude the sale, McMillan informed Mr. Buck that the Sellers also owned the adjoining property (slip CS-B2) and that it would be no problem to give Mr. Buck the 20-foot clearance he needed and place the pilings in slip CS-B2 (the adjoining slip)." (R. p. 8, ¶¶ 7, 8).

h. "Zan agreed and a new closing date of April 5, 2005 was set." (R. p. 8, ¶ 8).

i. "On the way to the April 5, 2005 closing, Mr. Buck visited the property to see if the pilings had been placed and found they were not. Because of this, Mr. Buck again refused to close." (R. p. 8, ¶ 11).

j. The closing attorney Dan David asked if Mr. Buck would close if he was given a letter memorializing the agreement and guaranteeing that the Sellers would locate the pilings as represented and install them within a reasonable length of time. The Bucks agreed, making clear that the promise to install the pilings as represented was a condition precedent to Zan closing on the property. (R. p. 8, ¶ 12).

k. "Mr. David then telephoned one of the Sellers, Doc Knight, to obtain his consent to the agreement. Mr. Knight was authorized by the Sellers to negotiate and enter into contracts on the Sellers' behalf." (R. p. 8, ¶ 13).

l. "Mr. David testified he received consent for Mr. Knight, and wrote the letter confirming the pilings would be placed." (R. p. 9, ¶14).

m. Zan reasonably relied on Mr. David's letter, which confirmed the parties' agreement. (R. p. 9, ¶ 15).

n. Sellers breached the contract by failing to place the pilings and selling "the adjoining slip and could not perform as agreed." (R. p. 9, ¶ 17). Therefore, as the Sellers no longer owned the adjoining slip CS-B2, they could not widen Zan's slip to give Mr. Buck the 20-foot clearance the Sellers' represented and agreed they would provide in order to induce Zan into closing.

o. The Sellers never applied for a permit to place the pilings. (R. p. 12).

p. "The *Rookie IV* does not fit in Slip CS-B1 and has never been docked in the slip." (R. p. 9, ¶ 18).

q. "Zan sought rescission or alternatively damages." (R. p. 14).

r. The sole reason the trial court declined to award Zan rescission was because: "This case presents a unique situation as there is no issue with the upland parcel the Bucks purchased with the slip. Ordinarily, if part of a contract can be performed, the damages can be fashioned so as to reflect the breach. However, in this case the Master Deed specifically forbids the separation of the upland parcel from boat slip, complicating this Court's task. The Court cannot order the return of the slip with Zan keeping the upland parcel about which there is no quarrel." (R. p. 13).

s. "Plaintiff has plead and proved that the Sellers are liable in tort for negligent misrepresentation." (R. p. 14).

t. "The Sellers and McMillan had a pecuniary interest in the transaction and had a duty to communicate truthful information to the buyer and to not misrepresent the property." (R. p. 14).

u. "Plaintiff's reliance was reasonable and as a consequence, Plaintiff was harmed." (R. p. 14).

There has been no cross appeal filed by the Sellers or McMillan with regard to the above findings by the trial judge. Having found Respondents made material misrepresentations to induce Zan into closing and that there was a breach so fundamental and substantial as to defeat the purpose of the contract, the trial court erred in failing to award rescission.

3. Zan Is Entitled to Rescission

As the trial court held, Zan's motivation for purchasing the particular property at issue was the boat slip that Mr. Buck was led to believe was wide enough to dock the *Rookie IV*. Mr. Buck testified that at the time of the purchase, the *Rookie IV*, a several million dollar boat, was docked in the narrowest section of the Atlantic Intercoastal Waterway and that the *Rookie IV* often sustained damages from the wake created by the constant flow of boat traffic. Zan never would have purchased the property without a slip of sufficient size to dock his boat. In fact, Mr. Buck canceled the initial closing when he discovered the *Rookie IV* would not fit in the slip as platted, and canceled the second closing when he discovered the pilings had not been placed. Only after the agreement to widen the slip and place the pilings was memorialized in writing, did Zan close. The gravamen of the remedy of rescission is the breach must be "so fundamental and substantial to defeat the purpose of the contract." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485 (S.C.App. 2004). As the trial court held the purpose of Zan's purchase of the property was to "purchase a slip wide enough for him to dock the *Rookie IV*" and that Respondents made material misrepresentations in order to induce Zan into closing, rescission was and is the appropriate remedy.

Awarding Zan damages fails to compensate it for the loss it actually suffered as Zan is left with a boat slip that has no value or use to Zan. This case presents a unique situation as there is no issue with the upland parcel the Bucks purchased with the slip. Ordinarily, if part of a contract can be performed, damages might be severable. However, in this case the Master Deed specifically forbids the separation of the upland parcel from boat slip. Zan does not have the option of selling the slip and keeping the upland property, and even if Zan did, the value of the property is derived from the private boat slip attached to it. The trial judge struggled with this unique dilemma, holding:

> The Court cannot order the return of the slip with Zan keeping the upland parcel about which there is no quarrel. Rescission is an equitable remedy which I choose not to grant. Rather, I award damages in the sum of $10,000.00 for the breach of the contract and negligent misrepresentation.

(R. p. 13). Regardless of the fact that there is no issue with the upland parcel, the breach of contract with respect to the agreement to place the pilings is so substantial and fundamental as to defeat the purpose of the contract. *See Brazell v. Windsor*, 384 S.C. 512, 517-18, 682 S.E.2d 824, 827 (2009) (Finding that withholding even $2,000 related to a reverse osmosis system in a real estate closing may constitute a fundamental and substantial enough breach to defeat the purpose of the contract and warrant rescission, as the buyer negotiated for certain provisions in the contract regarding the reverse osmosis system). The trial judge, having ruled all of the elements of rescission were met, was required to grant rescission.

This case should be remanded with instructions to the trial court to award rescission.

4. There is No Basis in the Record for an Award of $10,000.00

The trial judge held, "I award damages in the sum of $10,000.00 for the breach of the contract and negligent misrepresentation."(R. p. 13). "Plaintiff has plead and proved that the Sellers are liable in tort for negligent misrepresentation." (R. p. 14). The trial judge went on to find:

> The measure of damages for negligent misrepresentation is the difference between the value the plaintiff would have received if the facts had been as represented and the value the plaintiff actually received. *Fields v. Yarborough Ford, Inc.*, 307 S.C. 207, 414 S.E.2d 164 (S.C. 1992). The plaintiff is entitled to recover any consequential loss which is the natural and proximate result of the misrepresentation. *Id.* I find the Plaintiff is entitled to $10,000.00 as a result of the Sellers and McMillan's conduct.

(R. p. 14). Zan contracted to purchase the property at issue for $685,589.78; however, Zan cannot use the property.

There are only three places in the record where there is any testimony amount money.

Mr. Buck testified that the property is worth approximately $350,000.00 in today's market,[4] which is consistent with the Sellers expert, Mr. Hartnett's testimony. Mr. Hartnett testified that in early 2010, when he completed his appraisal, the property was worth approximately $530,000.00, but that the values of similar property in the area have decreased about 35% since 2010, making his estimate approximately $350,000.00. (R. pp. 460-468).

Mr. Hartnett was asked if there is any difference in the value of Zan's boat slip CS-B1 as platted versus with the additional two-feet the Seller's agreed to provide, and Mr. Harnett testified that there is no difference in value. (R. pp. 454-459). However, this testimony is not competent evidence as the trial court held the property was useless to Zan as the *Rookie IV* does not fit in the slip and the Sellers' breach related to widening the slip and placing the pilings was so fundamental as to defeat the contract's purpose. Further, as the Sellers have sold the adjoining slip, slip CS-B2, it is impossible to provide Zan was the additional space promised to Zan to induce the closing.

Finally, one of the Sellers, W.H. Knight testified that it would cost approximately $2,500 to place the two pilings. (R. p. 427). Again, this testimony is not competent evidence as the trial court held the property was useless to Zan as the *Rookie IV* does not fit in the slip. Because the Sellers sold the adjoining slip, the pilings cannot be placed to provide 20 feet of clearance as agreed.

In a tort case "[a]ctual damages are such as will compensate the party for injuries suffered or losses sustained." *Mellen* v. *Lane,* 377 S.C. 261, 287, 659 S.E.2d 236, 250 (Ct. App. 2008). The goal is to restore the injured party, as nearly as possible through the payment of money, to the same position he was in before the wrongful injury occurred. *Clark v. Cantrell,* 339 S.C. 369,378, 529

4 *See Abercrombie v. Abercrombie,* 372 S.C. 643, 647, 643 S.E.2d 697, 699 (Ct.App.2007) (recognizing the general

S.E.2d 528, 533 (2000). Similarly, the measure of damages in a breach of contract action is the loss actually or reasonably suffered, and damages serve to place the non-breaching party in the position he would have enjoyed had the contract been performed. *Collins Entertainment, Inc. v. White*, 363 S.C. 546, 611 S.E.2d 262 (Ct. App. 2005).

The only competent evidence of damage is that Zan's loss exceeds $300,000.00. There is no other evidence of value, and the trial court's award of $10,000.00 has no basis in the record.

CONCLUSION

After holding Zan had proven every element of rescission, the trial court had to either grant Zan rescission or award damages that have some basis in the record. The trial Court did neither.

Zan respectfully requests this Court remand this case with instructions to the trial court to grant the remedy consistent with the trial court's finding that all the elements of rescission are met.

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Dated this 20 day of February 2013
Charleston, South Carolina

rule in South Carolina that a property owner is competent to offer testimony as to the value of his property).

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellant complies with Rule 211 (b), SCACR.

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PROOF OF SERVICE

I certify that I have served the Appellant's Final Brief and Final Reply Brief on each Respondent who has filed a brief by hand delivery addressed to their attorney of record as follows:

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