THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BERKELEY COUNTY
COURT OF COMMON PLEAS

Dale Van Slambrook, Circuit Court Judge

Appellate Case No. 2018-001993

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

v.

Belinda Fox and Gerry Fox ..... Appellants.

FINAL BRIEF OF APPELLANT

June 16, 2019

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STATEMENT OF THE CASE

Respondents filed suit in Berkeley County case number 2004-CP-08-1150 against Belinda Fox and Danny Gilbert alleging breach of contract, fraud, and conspiracy relating to the sale and purchase of Lot 20 in Phase II of Eagle Harbor Subdivision. This complaint was subsequently amended to add the builder of the Respondent's home, Heritage Classic Homes, Inc. as a Defendant on October 20, 2005.

Respondents then filed a second motion to amend the complaint on November 30, 2005, to add Gerry Fox to the action, claiming he was in a joint enterprise with the existing Defendants as common partners. Thereafter, Respondents voluntarily agreed to dismiss this motion and a consent order for dismissal was filed on February 7, 2006.

Respondents then filed a third motion to amend (incorrectly labeled the "second motion to amend") to supplement the complaint to add the developers of the subdivision: Gerry Fox, Troy Winn, and Sarah Winn, Heritage Classic Homes, Inc. and Eagle Harbor Phase II Development Partnership. The Court granted the motion to amend on September 8, 2015. In this amended complaint, Respondents abandoned their causes of action for fraud, and civil conspiracy and added a new cause of action for breach of fiduciary duty against the developers of the subdivision: Gerry Fox and Belinda Fox, Troy Winn and Sarah Winn, and Danny Gilbert.

Troy Winn and Sarah Winn filed for summary judgment citing the statute of limitations, which the Court granted on May 6, 2016. Gerry Fox filed for summary judgment on May 9, 2017 citing the statute of limitations. The Court subsequently denied his motion on October 17, 2017. Gerry Fox thereafter filed a motion to reconsider which was denied by Order dated November 28, 2017.

In 2007, in case 2007-CP-08-458 filed in Berkeley County, Respondents file a case against Investor's Title for the same claims as asserted in this action. The Respondents settled that case for One Hundred Twenty-Five Thousand ($125,000.00) Dollars and a stipulation of dismissal was filed with the Court in that action on September 9, 2015.

The case was called for a non-jury trial on May 3, 2018. The Respondents alleged breach of contract, negligent misrepresentation, and violation of the South Carolina Unfair Trade Practices Act against Defendants. The trial court filed an Order of trial on the merits on June 29, 2018 granting judgment against Danny Gilbert, individually and Heritage Classic Homes, Inc. for breach of contract for the sum of Ninety-Seven Thousand Eight Hundred Thirty-Six and 83/100 ($97,836.83) Dollars; judgment against Danny Gilbert, Belinda Fox, Gerry Fox, Eagle Harbor Incorporated and Eagle Harbor Phase II Development Partnership, jointly and severally, for negligent misrepresentation for the sum of Eighty Two Thousand Five Hundred Thirty ($82,530.00); and judgment against Danny Gilbert, Belinda Fox, Gerry Fox, Eagle Harbor Incorporated and Eagle Harbor Phase II Development Partnership, jointly and severally, for violation of the South Carolina Unfair Trade Practices Act, hereinafter "SCUTPA" for the sum of Eighty Two Thousand Five Hundred Thirty ($82,530.00) trebled to Two Hundred Forty-Seven Thousand Five Hundred Ninety ($247,590.00) Dollars under S.C. Code Ann. 39-5-140(a), along with attorney's fees and costs.

Appellants filed a motion to reconsider the trial court's ruling on July 19, 2018. Thereafter, on October 9, 2018, the trial judge denied the motion to reconsider the trial order. Appellants subsequently filed a motion for Respondents to elect their remedy per the trial Court's order on September 27, 2018. The Appellants filed this appeal as the thirty (30) day

deadline to review the trial court's orders was to expire. The trial court has not yet held a hearing on Respondent's election of remedy.

STATEMENT OF FACTS

This case involves alleged misrepresentations surrounding the purchase of a single lot in the Eagle Harbor Subdivision of Berkeley County and a home construction. Eagle Harbor Inc. was the developer of the neighborhood. Belinda Fox owned Lot 20. Danny Gilbert acted as an agent for Belinda Fox in the sale of Lot 20 to the Prices. Danny Gilbert showed Ronald E. Price and Diana R.B. Price Lot 20 several times and advised that Heritage Classic Homes, Inc. could help them build a home on the lot. On or about September 13, 2003, the Prices entered into an agreement to buy Lot 20 from Belinda Fox, in her individual capacity, for Ninety Thousand Four Hundred $90,400 Dollars. (R.A. 883-889). Danny Gilbert signed the contract for Belinda Fox using a power of attorney. (R.A. 884).

The written contract stated in paragraph eight (8) the special conditions: (a) Buyer is purchasing property "as is", (b) Property is to be conveyed to buyer at closing; (c) Buyer to receive copy of the covenants and restrictions from the closing attorney at closing; (d) Property is subject to restrictive covenants attached to the contract; (e) Contract is subject to final subdivision of parent tract by Berkeley County; (f) Buyer is to pay cost of underground utilities (g) Rollback taxes to be estimated by attorney and included in final closing costs; (h) Buyer has the right to withdraw from contract with full reimbursement within 30 days due to job uncertainty; and (I) Developer agrees to allow subdividing of property into 2 separate lots with the possibility of 3 upon approval of Homeowners Association. (R.A. 883-884).

Additionally, the contract stated in paragraph ten (10) that "Buyer, at Buyer's expense shall have the privilege and responsibility of inspecting, environmental concerns, including, but

not limited to hazardous waste, wetland study and radon gas. Buyer shall notify Seller or listing agent in writing by 12:00 noon on October 1, 2003 of any deficiencies revealed by inspection." (R.A. 883-884).

Neither Ronald Price, nor Diana Price notified either Danny Gilbert or Belinda Fox of any deficiencies revealed pursuant to an inspection by October 1, 2003. On November 25, 2003 the Prices purchased Lot 20 in Phase II of Eagle Harbor Subdivision with the representation of attorney Jeffrey Spell, Esq. (R.A. 885-889).

Prior to purchasing the lot, the Prices proceeded to enter into a contract with Danny Gilbert and Eagle Harbor Homes, Inc.to build their home on Lot 20. (R.A. 890-937). After a short time, the project went awry. The Prices were unhappy with the job that Danny Gilbert and his company performed and terminated the contract, without paying him. (R.A. 954). Danny Gilbert then filed a mechanic's lien against the Prices and they counterclaimed for the cost to cover. (R.A. 957-960).

Respondents then filed this action against Danny Gilbert and Belinda Fox for breach of contract, fraud and civil conspiracy. (R.A. 132). In the complaint they alleged that certain statements made by Danny Gilbert, that induced them to enter into the contract, were not true. The Respondents allege that Danny Gilbert advised them that they should buy Lot 20 as it would be big enough to be subdivided into three (3) lots; the lot was located in a subdivision that would be enforced by restrictive covenants; and certain amenities would be available for the homeowner's use. However, Respondents allege that they could not subdivide their lots into three (3) lots because the soil did not perk; that the lot was not part of a valid homeowners association and did not contain covenants, restrictions, architectural guidelines, other benefits, etc. which would enhance the property; that Eagle Harbor failed to comply with applicable

government regulations when developing the land; that lot 20 was partially designated as wetlands; and that a homeowners association was never organized and funded. They allege that as a result of these misrepresentations, they suffered pecuniary losses. (R.A. 401 lines 8-10).

It is undisputed that the Foxes, Eagle Harbor, Inc., and the Phase II Development Partnership did not directly make any misrepresentations of fact. (R.A. 48). Danny Gilbert was the marketing agent for lot 20 and the only Defendant who the Prices had any contact with prior to buying the land. (R.A. 358).

The Prices ultimately built a beautiful home, with another builder, and detached garage on Lot 20. (R.A. 1044-1105). The Prices currently reside in the home and have not applied with Berkeley County or the Eagle Harbor neighborhood to subdivide Lot 20. (R.A. 333, lines 5-8). The Price's filed a title insurance claim with Investors Title in connection with the above alleged misrepresentations. (R.A. 1306-1314). The Price's used the appraisal of Ed Carter, that is trial exhibit 38 in this case, as a basis for the damages and settled the Investors Title case for One Hundred Twenty-Five Thousand ($125,000.00) Dollars in or around September 9, 2015. (R.A. 1294- 1298).

Mr. and Mrs. Price testified at trial along with their appraiser, Ed Carter. Mr. Carter, an admitted residential real estate appraiser expert, offered his report of hypothetical values of damages which were not based upon the testimony presented at trial. The trial testimony established Lot 20 was subject to covenants and restrictions of Eagle Harbor, was sub-divisible, in a gated community, contained some amenities, and had approximately 2.0 acres of fresh-water wetlands encumbering it. Mr. Carter was unable to opine a value of Lot 20 as it existed at the time of closing in 2003 considering the freshwater wetlands.

STANDARD OF REVIEW

When legal and equitable actions are maintained in one suit, an appellate court is presented with a divided scope of review, and each action retains its own identity as legal or equitable for purposes of review on appeal. *Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006). The proper analysis is to view the actions separately for the purpose of determining the appropriate standard of review. *Id.* An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. Id. An abuse of discretion occurs when the trial court's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law. *Id.*

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO DISMISS GERRY FOX AS THE STATUTE OF LIMITATIONS HAD EXPIRED.

The statute of limitations in South Carolina on the matters complained of in the Respondent's Complaint is three years. South Carolina Code Ann. §15-3-530. In South Carolina, the statute of limitations is subject generally to the "discovery rule" rather than rigidly employed. The discovery rule provides that the statute of limitations does not begin to run until a person using reasonable diligence knew or should have known the existence of the claim. *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996). A person using reasonable diligence should have known the existence of a claim if the facts and circumstances of an injury would put a person of common knowledge and experience on notice of that claim. *Cline v. J.E. Faulkner Homes, Inc.*, 359 S.C. 367, 371, 597 S.E.2d 27, 29 (Ct. App. 2004). "The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of

recovery developed." *Wiggins v. Edwards*, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994). Under South Carolina law, "[t]he important date under the discovery rule is the date that a plaintiff discovers the injury, not the date of the discovery of the identity of [the] wrongdoer." *Id.* "If, on the date of injury, a plaintiff knows or should know that she had some claim against someone else, the statute of limitations begins to run for all claims based on that injury." *Id.* "[T]he date when a plaintiff learns of a potential new defendant has absolutely no bearing on the timing of the statute of limitations." *Cline v. J.E. Faulkner Homes*, Inc., 359 S.C. 367, 597 S.E.2d 27, 29 (Ct. App. 2004).

Here, the trial transcript, exhibits, and filed pleadings evidence that Respondents knew they had a claim in 2004 when they filed their complaint. (R.A. 132- R.A. 136). Moreover, as early as November 30, 2005 in the second amended complaint the Respondents alleged a cause of action for misrepresentation stemming out of representations of the lot they purchased being in a gated community, with valid HOA, and subject to covenants and restrictions and architectural guidelines and amenities against Gerry Fox. (R.A. 1261-1275). This amended complaint against Gerry Fox was "inexplicably withdrawn" by consent and dismissed without prejudice in February 7, 2006. (R.A. 1276 and R.A. 731, lines 17-18). Based upon the above, the statute of limitations against Gerry Fox would have run, at the very latest, on November 30, 2008. As such, the Trial Court's Order dated October 17, 2017, over ten years after the statute had ran, denying summary judgment based upon the statute of limitations, was an error of law.

It is anticipated that Respondents may try to assert the relation back doctrine of South Carolina Rules of Civil Procedure 15; however, the relation back doctrine is inapplicable to this action. While Rule 15 of the South Carolina Rules of Civil Procedure generally permits parties to add claims to an existing suit which relate back to the initiation of the suit, Rule 15 has been

unambiguously construed by our Courts as not permitting an additional party to be added and having the same claims relate back against them. *Jackson v. John Doe*, 342 S.C. 552, 537 S.E.2d 567 (Ct. App. 2000).

Additionally, Respondents may assert that Rule 15 permits the substitution of parties to allow Gerry Fox to be added to this action. However, the key issue is whether Plaintiffs substitute a party or add a party. While the former is permissible under very limited circumstances, the latter is not permitted at all unless it is brought within the statute of limitations. The Court of Appeals has held that "the language of Rule 15(c) clearly speaks to a change in party, not the addition of a defendant to an already existing defendant. The addition of a party is not the same as a substitution or change of a party." *Jackson v. Doe*, 342 S.C. 552, 558, 537 S.E.2d 567, 570 (Ct. App. 2000).

This holding was applied in 2009 in the case of *Gause v. Smithers*, 384 S.C. 130, 681 S.E.2d 607 (Ct. App. 2009). In that case, a victim of a hit and run tracked down the car and sued the owner. It was determined, after the statute of limitations had run, that the son of the owner was the driver who hit and ran. The victim then amended the complaint to add the son, claiming that he was merely substituting the son for the father under Rule 15. However, he kept the father in the case. The Court held:

> We conclude this amounted to the addition of a defendant, the action Jackson sought to proscribe in keeping with the plain language of Rule 15(c). We are mindful this produces a harsh result, although Gause's claims against Father remain viable. Nevertheless, we are compelled to affirm the findings of the circuit court. Because the addition of a party is not contemplated by Rule 15(c), we need not address whether Son's being made a defendant was otherwise proper under that Rule. *Id.*

Furthermore, in *Cline v. J.E. Faulkner Homes, Inc.*, 359 S.C. 367, 597 S.E.2d 27, 29 (Ct. App. 2004), the Plaintiff discovered his home was damaged. He sued the contractor, thinking

that the person who damaged the home was an employee of the contractor. After the statute of limitations ran, he discovered that the person who damaged the home was not an employee of the contractor, but rather an independent contractor. He attempted to sue the independent contractor. The Court of Appeals held that the claim was barred by the statute of limitations and the independent contractor could not be added to the suit.

Respondents may also attempt to assert that equitable tolling should be applied to this action to bring Gerry Fox into this action over ten (10) years after the action accrued; however equitable tolling of the statute of limitations in inapplicable. "South Carolina has rarely applied the doctrine of equitable tolling to halt the running of the statute of limitations. Equitable tolling is reserved for extraordinary circumstances." *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 377 S.C. 217, 230 659 S.E.2d 213, 219 (Ct. App. 2008), cert. granted, (Nov. 20, 2008). Nothing can call equity into activity but conscience, good faith, and diligence, Equity aids the vigilant, not those who slumber on their rights. *Hemingway v. Mention*, 228 S.C. 211, 89 S.E.2d 369 (1955).

Respondents have been anything but vigilant in pursuing their claims against Gerry Fox. Respondents uncontrovertibly knew of the claims against Gerry Fox in 2005 and voluntarily dismissed them and having done nothing for over ten (10) years. As such, the Court should not reward Respondents by allowing them to maintain a claim that is over ten (10) years old.

In conclusion, Respondents knew of their claims against Gerry Fox as early as 2005 and were charged with actual knowledge, at a minimum as early as 2004. They had the opportunity to pursue claims against Gerry Fox and instead of doing so, voluntarily dismissed their claims in 2006 and allowed the statute to run. For this reason, the trial court erred in failing to dismiss Gerry Fox from this litigation by Order filed June 29, 2018. This Order must be reversed!

II. THE TRIAL COURT ERRED IN DENYING APPELLANTS MOTION FOR DIRECTED VERDICT FOR VIOLATION OF THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT.

In South Carolina, the South Carolina Unfair Trade Practices Act (SCUTPA) prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. S.C. Code Ann. § 39-5-20(a). in order to succeed on a SCUTPA claim, a plaintiff must show (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 adverse impact on the public interest. *Beattie v. Nations Credit Fin. Servs. Corp.*, 69 F. App'x 585 (4th Cir. 2003); *Havird Oil Co. v. Marathon Oil Co.*, 149 F.3d 283 (4th Cir. 1998).

In private actions under SCUTPA, 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 SCUTPA. *Plowman v. Bagnal*, 316 S.C. 283, 450 S.E.2d 36 (1994). Moreover, it is settled law in South Carolina that, when the master and servant are sued together for the same act of negligence, or willful tort, and the master's liability rests solely upon the servant's conduct, a verdict against the master alone is illogical and cannot stand. *Pettis v. Standard Oil Co.*, 176 S.C. 88, 179 S.E. 894 (1935).

Here, this Respondent cannot maintain a claim against Petitioners for violation of SCUTPA as the evidence presented at trial failed to yield the requisite proof of the first and third elements of the SCUPTA.

There is no evidence that Petitioners engaged in willful and unlawful conduct. In fact, the trial court held that the alleged misrepresentations were not made by Petitioners but rather Danny Gilbert. (R.A. 44 and R.A. 48). As such there was no evidence that the Petitioners,

Belinda Fox and Gerry Fox, actually engaged in an unlawful trade practice. The trial court imputed the acts of Gilbert onto the Foxes based upon agency principals. However, in order to hold the Petitioners liable under the South Carolina Unfair Trade Practices Act, there must be testimony that the Foxes consented or directed Gilbert's unlawful actions. S.C Code Ann. § 39-5-20 (a) requires evidence of unlawful and unfair methods of competition or deceptive acts or practices in the conduct of any trade or commerce. The plain reading of the statute establishes the tort of SCUTPA requires the Respondents to establish willful conduct, not mere negligence by the Petitioners. The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998). In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. *First Baptist Church of Mauldin v. City of Mauldin*, 308 S.C. 226, 417 S.E.2d 592 (1992).

The statute reads: "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 method, act or practice declared unlawful by § 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages." Emphasis added

Here, the Act clearly requires that the unfair, deceptive or unlawful conduct be charged against the person actually committing the wrong. Further, while it is true that our courts have held that principals are liable for the acts of their agents; however, but only when their acts are within the scope of their agency. *Abbot v. Sumter Lumber Co.*, 93 S.C. 131, 76 S.E. 146 (1912). Additionally, when one partner commits a willful and malicious tort not within the scope of the agency or the common business of the partnership, and the other partners did not consent to or

ratify the action, they are not liable for harm thereby caused. *See Schloss v. Silverman*, 172 Md. 632, 192 A. 343 (Md., 1937). As the SCUTPA requires willful conduct, it is necessary that there be proof that the partners of the partnership directed the willful conduct for personal liability to attach.

In the trial of this matter, the evidence did not establish consent or ratification of Gilbert's actions by the Foxes. The trial court found in its Order that Gilbert's conduct was willful and malicious as evidenced by the misrepresentations aforementioned. Further, Gilberts actions were his actions were impliedly consented to by the partners because his actions benefited the partnership. (R.A. 57) However, a careful review of the record evidences there was no testimony that Eagle Harbor, Inc. benefited from Gilbert's misrepresentations. Further, there was no testimony at trial that the Foxes consented to or directed any of Gilbert's actions. While there may be an inference that Gilbert's actions were not carefully monitored by the Foxes, this alone does not meet the requisite intent required for liability pursuant to SCUTPA. It is true that South Carolina Code § 33-41-350 states that a "partnership is liable for harms caused by any partner"; however, that principal only applies when a partner is acting in the partnership's ordinary course of the business or with the authority of his co-partner. Again, Respondents have failed to establish that the partnership's ordinary course of business was to make false representations to sell property in Eagle Harbor or that the Foxes gave Gilbert the authority to make false representations. Again, the trial record is completely devoid of such testimony to establish a basis for the above findings.

Respondents have also failed to establish the adverse impact on the public interest element required to prevail on SCUTPA claim against Petitioners. Again, the trial record also lacks any evidence that the Foxes individual actions had an adverse impact on public interest.

See S.C. Code Ann. §§ 39-5-10 to 39-5-560. The South Carolina Supreme Court has held that to be actionable under the Unfair Trade Practices Act, an unfair or deceptive practice or act must adversely affect the public interest. *Florence Paper Co. v. Orphan*, 298 S.C. 210, 379 S.E.2d 289 (1989); *Noack Enters., Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 351 S.E.2d 347 (Ct.App.1986). Conduct which only affects the parties to the transaction provides no basis for a SCUTPA claim. See *Key Co. v. Fameco Distribs.*, Inc., 292 S.C. 524, 357 S.E.2d 476 (Ct.App.1987). "Without proof of specific facts disclosing that ... members of the public were adversely affected by [the unfair conduct] or that they were likely to be, all we are left with is a 'speculative [claim] of adverse public impact' and that will not suffice for a recovery under the UTPA." *Daisy Outdoor Advertising Co. v. Abbott*, 451 S.E.2d 394, 397 (Ct. App. 1994).

Here, the transaction at issue is a real estate lot purchase, in the Eagle Harbor subdivision in Summerville. Belinda Fox owned Lot 20 and the developer Eagle Harbor, Inc. through its agent Danny Gilbert, acted as an agent in connection with the sale of Lot 20. The contract was "as is" and concerned a vacant lot in a neighborhood. There was no evidence at trial that the developer, Eagle Harbor, Inc., Danny Gilbert, Belinda Fox, nor Gerry Fox were continuing to sell lots in Eagle Harbor any longer. The neighborhood is complete and there are no more lots to sell. The venture is complete. As such, there is zero risk of a future adverse impact to the public. Additionally, there was no evidence at trial that Eagle Harbor, Inc. or the partnership had policies or procedures to misrepresent anything to sell a lot. As such, the third element required for Respondent's SCUTPA cannot be established.

As Respondents have failed to establish all elements required for SCUTPA, the final trial order must be reversed.

III. THE TRIAL COURT ERRED BECAUSE THIS TRANSACTION IS NOT THE TYPE OF TRANSACTION THE GENERAL ASSEMBLY INTENDED TO PROTECT AGAINST WHEN THE SCUTPA WAS CREATED.

Not every business transaction gone awry gives rise to a claim under SCUTPA. The South Carolina legislature intended the SCUTPA to provide redress to claimants against businesses and individuals that routinely engage in unlawful and deceptive conduct. Furthermore, the Court has consistently held that when there is no possibility of future repetitive conduct, the SCUTPA is not applicable. *Key Co. v. Fameco Distribs., Inc.*, 292 S.C. 524, 357 S.E.2d 476 (Ct. App. 1987).

Finally, SCUTPA should not be applied in a business dispute, without clear evidence of unlawful repetitive conduct, to treble damages for a dispute between parties. *See Noack Enters., Inc. v. Country Corner Interiors; Inc.*, 290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1986); *Key Co. v. Fameco Distribs., Inc.*, 292 S.C. 524, 357 S.E.2d 476 (Ct. App. 1987). This was a simple real estate business transaction between Petitioner and Respondent. SCUTPA was not intended to cover this dispute.

Based upon the above public policy, legislative intent, and precedent, the trial court order must be reversed as this transaction is the type not intended to be covered by the SCUTPA.

IV. THE TRIAL COURT ERRED IN FAILING TO HOLD THAT RES JUDICATA BARRED PLAINTIFFS CLAIMS.

Our Supreme Court in *Bagwell v. Hinton*, 205 S.C. 377, 400, 32 S.E.2d 147, 156 (1944), held that the following elements must be shown in order to establish the plea of res judicata: (1) The parties must be the same or their privies; (2) the subject matter must be the same; and (3) a final adjudication. *Jones v. City of Folly Beach*, 326 S.C. 360, 483 S.E.2d 770 (Ct. App. 1997). Further, when an action has been dismissed with prejudice, the judgment operates in subsequent litigation to the same extent as if the action had been tried to a final adjudication. *Id.*

Here, the Appellants settled the same claims with a privy, Investors Title Insurance Company, for One Hundred Twenty-Five Thousand ($125,000.00) Dollars, in case number 2007-CP-08-458. This was evidenced by the settlement agreement (R.A. 1294-1298) and filed stipulation of dismissal. (R.A. 77). Moreover, Respondents filed a motion to amend, although later withdrawn, making it clear that res judicata is applicable. (R.A. 1261-1275).

Belinda Fox and Investors Title were privies. While Investors Title is not the same party as Belinda Fox, she is a privy of Investors Title as evidenced by the language of title policy. One not a party to a prior action can be precluded from relitigating the issue only if he is in privity with a party to the prior action against whom an adverse finding is made. *Roberts v. Recovery Bureau, Inc.*, 316 S.C. 492, 450 S.E.2d 616 (Ct. App. 1994). With regard to res judicata, privity "does not embrace relationships between persons or entities, but rather it deals with a person's relationship to the subject matter of the litigation." *Wyndam v. Lewis*, 292 S.C. 6, 8, 354 S.E.2d 578, 579 (Ct. App. 1987). "Privity" means one so identified in interest with another that he represents the same legal right. *Carrigg v. Cannon*, 347 S.C. 75, 552 S.E.2d 767 (Ct. App. 2001). In *Wade v. Berkeley County*, 330 S.C. 311, 498 S.E.2d 684 (Ct. App. 1998), this court discussed privity by stating:

> Privity deals with a person's relationship to the subject matter of the previous litigation, not to the relationships between entities. To be in privity, a party's legal interests must have been litigated in the prior proceeding. Having an interest in the same question or in proving or disproving the same set of facts does not establish privity. Nor is privity found when the litigated question might affect a person's liability as a judicial precedent in a subsequent action.

Importantly the payment pursuant to the owner's title policy of title insurance and the acceptance by Respondants created privity between Investors Title and Belinda Fox. The policy

case contained language that payment of money to Respondents was in exchange for the right of subrogation. The conditions section of the December 3, 2003 Owners Policy clearly provided:

> "when we settle a claim, we have all the rights you had against any person or property related to the claim. You must transfer these rights to us when we ask, and you may not do anything to affect these rights. With the money we recover from enforcing these rights, we will pay whatever part of your loss we have not paid. We have a right to keep what is left." (R.A. 1299-1305).

As such, a settlement with Investor's Title by Respondents operates as settlement with Belinda Fox as the subrogation right creates the required privity between Belinda Fox and Investors Title. Once payment was accepted by Respondents, privity was established.

Respondents will assert that the settlement agreement between Investor's Title and Respondents did not contain a subrogation right as the settlement agreement specifically stated that Investor's Title waived its right to subrogation that was contained in paragraph 7 of the policy. However, while it may be true that Investor's Title waived its right to subrogation, the Respondents' receipt of payment from Investor's Title nonetheless establishes privity between Belinda Fox and Investors Title per paragraph 7. (R.A. 1304). To hold otherwise would allow Respondants double recovery or a windfall in an amount greater than Respondants settled all of its claims for. It is clear that a party is entitled to damages for redress for a wrong that has been suffered. Our Supreme Court has held that that there can be **no double recovery for a single wrong**. *See Brown v. Felkel*, 320 S.C. 292, 294, 465 S.E.2d 93, 95 (Ct. App. 1995) cert. dismissed, 326 S.C. 36, 482 S.E.2d 564 (1997) (emphasis added).

The second element of res judicata, the same subject matter, is not in dispute. Here, the relationship of Appellant and Investors Title concerns the same legal right and is the exact subject matter. The Respondents have asserted claims against the Appellants. Pursuant to the contract evidenced by the owners Investor's Title policy, Investors Title paid Respondents, for

the same wrong asserted in this action, One Hundred Twenty-Five Thousand ($125,000.00) Dollars. Here, a review of the facts alleged in civil action 2007-CP-08-458 as the same in the instant case. In fact, Respondents initially brought all parties, including Investor's Title, into the instant action. (R.A. 1261-1275). As such, it is uncontroverted that the subject matter is identical in this case and civil action 2007-CP-08-458. (R.A. 1306-1314).

The third element of res judicata requires that this Court bar the recovery in the instant action if there was a final adjudication. A case that is dismissed "with prejudice" indicates adjudication on the merits and, pursuant to res judicata, prohibits subsequent litigation to the same extent as if the action had been tried to a final adjudication. *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955); *Nunnery v. Brantley Constr. Co.*, 289 S.C. 205, 345 S.E.2d 740 (Ct. App. 1986). The filed stipulation of dismissal of September 9, 2015 satisfies the third element of res judicata. (R.A. 77).

In conclusion, all three elements necessary for res judicata are present and the settlement and stipulation of dismissal in 2007-CP-08-458 case operates as a complete bar in the instant action. As such, the trial court's final order must be reversed.

V. THE TRIAL COURT ERRED IN HOLDING RESPONDENTS PROVED ALL ELEMENTS REQUIRED FOR A RECOVERY FOR NEGLIGENT MISREPRESENTATION.

Negligent misrepresentation requires: (1) the defendant to make 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). All six elements must be proven to prevail on a claim of negligent misrepresentation.

This appeal concerns the disputed elements of 1) false representation, 5) justifiable reliance, and 6) pecuniary loss as a proximate result of Respondents reliance upon representations. Elements 2, 3, and 4 above are not in dispute. The trial court found the following representations provided the basis for an award of damages. The representations were: (1) Lot 20 was dividable into two lots, and that the property could be subdivided into three lots with the homeowners' association approval; (2) Plaintiffs could put a septic tank on the property; (3) the lot would be a part of a gated community with valid covenants and restrictions; (4) various amenities would be available for use by the residents; (5) testing had been done; and (6) Gilbert failed to disclose to the Prices that their lot contained wetlands or that the soil had a high-water table. (R.A. 39-45). Each statement will be addressed and argument for each of three aforementioned disputed elements discussed below.

The trial court found that neither Belinda Fox, nor Gerry Fox made the alleged misstatements. (R.A. 48). All alleged misstatements to Respondents were made by Danny Gilbert. Despite this, the trial court held that S.C. Code Ann. § 33-41-310, § 33-41-340, §33-41-350 and § 33-41-370 makes Belinda Fox and Gerry Fox jointly and severally liable as partners. However, South Carolina courts have held that principals are liable for the acts of their agents, but only when their acts are within the scope of their agency. *Abbot v. Sumter Lumber Co.*, 93 S.C. 131, 76 S.E. 146 (1912). Additionally, when one partner commits a tort not within the scope of the agency or the common business of the partnership, and the other partners did not consent to or ratify the action, they are not liable for harm thereby caused. *See Schloss v. Silverman*, 172 Md. 632, 192 A. 343 (Md., 1937). In this case, a careful review of the record evidences there was no testimony that the Foxes consented to or directed any of Gilbert's actions. Moreover, there was no evidence at trial that scope of agency included misstatements in order to sell lots. As such, liability for any alleged misstatements are Mr. Gilbert's or Eagle Harbor Inc.'s responsibility and do not attach to Petitioners.

a) **Misstatement found by trial court: Lot 20 was divisible into two lots, and that the property could be subdivided into three lots with the homeowners' association approval.**

The Court found that Gilbert made material misrepresentations concerning lot 20. He misrepresented "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 homeowners' association approval." (R.A. 26, Para. 20) The argument below evidences that this alleged misstatement was 1) not false and 2) Respondent did not suffer a pecuniary loss as a proximate result of their reliance upon representation.

The trial testimony failed to establish that Mr. Gilbert falsely informed the Respondents, at or prior to the closing on November 25, 2003, that Lot 20 could be subdivided. In order for a claim of negligent representation to be actionable, the representation must relate to a present or pre-existing fact and be false when made. *Fields v. Melrose Ltd. Partnership,* 312 S.C. 102, 105, 439 S.E.2d 283, 285 (Ct. App.1993). "The representation cannot ordinarily be based on unfulfilled promises or statements as to future events." *Id.*

Here, the trial testimony of Ty Adley, a representative from Berkeley County, testified that Lot 20 can be subdivided into three lots so long as the requirements are met. (R.A. 750, line 25- R.A. 751, line 7). Additionally, Mrs. Price testified that she did not apply to have the Lot subdivided with the county, nor attempted to get the homeowner's association approval to subdivide the lots into three separate lots. Clearly, this alleged misstatement was not false as a matter of fact. The fact that the Price's never sought to subdivide the property via Berkeley County does not make the statement a falsity. The Respondents have twisted and confused the point to say that because Lot 20 was not approved for two additional septic systems that it is somehow not sub-divisible. (R.A. 1004-1005). In fact, M. Reid Houston, of DHEC, by letter dated May 17, 2015, evidences that the lot is sub-divisible if public sewer were available. *Id.* Respondent throughout trial admitted that there was no affirmative representation that the additional subdivided lot be buildable with sewer but the Price's thought it so. Clearly, the subdivision of the lot was a statement of future event, which can be completed. Thus, this statement was not false when made.

Additionally, the Respondents failed to prove that they were justified in relying upon material misstatements of Mr. Gilbert. The contract gave notice of what exactly was promised, which was Plaintiff's exhibit 2 at trial, and states "Developer allows property to be subdivided into 2 lots, with the possibility of 3 upon approval of Homeowners Association." Paragraph 10, of the contract states that the Respondents have the "responsibility" to conduct all inspections. Moreover, if the Respondent moved forward with closing and did not complete the required inspections by October 1, 2003, they "waived the privilege of any inspections." (R.A. 883, para. 10). Here, it is undisputed that the Respondent's built a beautiful home on Lot 20 and enjoyed the land as they expected. The fact that the Respondent's never attempted to subdivide the property does not give rise to a cause of action.

Respondent's failed to establish their damages for the alleged subdivision misstatements. The trial testimony of Ty Adley was that Lot 20 was sub-divisible. (R.A. 749, line 23- R.A. 750 line 4); however, Mr. Carter was unable to opine a value of Lot 20 if it were sub-divisible with wetlands. (R.A. 479 line 19 & R.A. 480 line 1). Respondents presented an expert who rendered an opinion of value based upon hypotheticals that were not present in this case. (R.A. 471, lines 11-17). As such, Respondents failed to adequately prove their damages as a proximate result the misrepresentation. Respondent has the burden of proving its damages with certainty. Damages may not be left to mere speculation or conjecture. 22 Am. Jur. (2d) Damages Section 177 (1965). *See South Carolina Finance Corp. v. West Side Finance Co.*, 236 S.C. 109, 123, 113 S.E.2d 329, 336 (1960). Here, Respondents attempted to establish damages through Ed Carter who did a report based upon certain hypotheticals which were not present in this case. (R.A. 471, lines 11-17). Page 6 of the report evidences extraordinary assumptions and hypothetical conditions. (R.A. 1049) All of which are not dispositive to damages in this case as the report is too speculative. The report has 5 assumptions which were not present on Lot 20 as established at trial. (R.A. 1104- R.A. 1105). As such, his report fails to meet the rigors demanded by our Courts to prove damages and it was an error of law for the trial court to rely upon Mr. Carter's report.

b) Misstatement found by trial court: Gilbert misrepresented the lot would perk.

The trial court held that it was a misrepresentation of fact that Lot 20 would perk. (R.A. 26, para. 21). The Court also found that "Gilbert represented to the Prices that the lot perked and that a septic tank could go on the lot." (R.A. 26, para. 21). Mrs. Price testified at trial that Danny said you could put a septic tank on lot 20. (R.A. 338, lines 22-24).

Here, the trial testimony failed to establish the falsity of statements at or prior to closing on Lot 20. The misstatements alleged are that Danny said the Prices could put a septic tank on the property. This was clearly so that the Prices could have a fully functioning septic system for their home. The testimony at trial established that DHEC did issue a preliminary approval and ultimately a final approval on May 18, 2004. As such, Danny Gilbert's statement that Lot 20 was able to have a septic system service the Lot was not false. Again, the statement by Mr. Gilbert was of a future event and the statement was proven true as evidenced by exhibit 42. (R.A. 1144). Further the representation cannot be promises or statements as to future events. *Id.* As articulated above, Mr. Gilbert was unaware at the time of closing that there was an issue with the DHEC permit for lot 20. In fact, DHEC was not even aware it had an issue with the septic on Lot 20, as it previously issued a permit on February 12, 2004. If DHEC was unaware of the problem with the permit, how could Mr. Gilbert be aware?

Additionally, Respondents bear some responsibility in not confirming that DHEC would approve a septic system for the size home they designed. The entire transaction for Lot 20 was contingent upon "drain field site- soil test" as described in paragraph 21 of the contract. (R.A. 884). Moreover as stated above paragraph 10 of the contract states that the Respondents have the "responsibility" to conduct all inspections. Moreover, if the Respondents moved forward with closing and did not complete the required inspections by October 1, 2003, they "waived the privilege of any inspections." (R.A. 883). Respondents merely suffered a delay in construction and should bear the responsibility for any delay in obtaining the septic permit. Moreover, as the home had obtained a certificate of occupancy prior to the issuance of the septic permit, there really was no delay damage. Again, Respondents failed to establish damages that were the proximate result of their reliance upon the representations. *See Redwend.*

c) **Misstatement found by trial court: Gilbert misrepresented the lot would be part of a gated community with valid covenants and restrictions.**

The trial court held that it was a misrepresentation of fact that Lot 20 would be in a gated community with valid restriction and covenants. (R.A. 26, para. 22). Mrs. Price testified "this facility was going to be a gated facility." (R.A. 336, lines 18-19). Ed Carter, the Respondents appraiser expert testified that the "Eagle Harbor neighborhood is gated" (R.A. 490, line 4). Moreover, the appraiser testified that the neighborhood was gated but the gate was open. (R.A. 490, lines 4-10).

Again, in order for a claim of negligent representation to be actionable, the representation must relate to a present or pre-existing fact and be false when made. *Fields v. Melrose Ltd. Partnership,* 312 S.C. 102, 105, 439 S.E.2d 283, 285 (Ct.App.1993). "The representation cannot ordinarily be based on unfulfilled promises or statements as to future events." *Id.* Here, the community ultimately was gated and so it is factually impossible that the statement was ever false when made.

The statements concerning the covenants and restrictions of Eagle Harbor were also true when made and not false or misleading. Mrs. Price testified at trial "when we bought the lot, there were no covenants or restrictions on it." (R.A. 506, lines 1-2). Moreover, the Court's exhibit 2 evidences that Jeffrey Spell, Esq. opinioned that there were covenants and restrictions which attached to Lot 2 which were recorded at book 3125, at page 178 in the Berkeley County Register of Deeds. (R.A. 1301). Further, Mr. Gilbert testified that he was of the opinion that the covenants and restrictions were valid at the time of closing (R.A. 771, lines 17-19). Here, the trial court made an erroneous error of fact as well as an error of law. The Court's exhibit 2, the Owner's Title Policy, is the best evidence of whether covenants and restrictions attached to Lot 20 at the time of closing. Clearly, Jeffrey Spell, Esq. as attorney for the Respondents was of the opinion that the covenants for Eagle Harbor attached to Lot 20, the Price's should also be charged with the same knowledge. Clearly recording amounts to notice, whether known or unknown, because the means of information are at hand. *See Epps v. Mccallum*, 139 S.C.481, 499 (1927).

d) **Misstatement found by trial court: Gilbert misrepresented the lot amenities to be constructed in the neighborhood of Eagle Harbor.**

The trial court held that it was a misrepresentation of fact that lot owners, including Lot 20, would be able to use the amenities built for the boy's home. (R.A. 26, para. 23). Mrs. Price testified at trial "there would be hiking trails and they were going to try to build a gymnasium, and they had a lake there. And that the boy's home would use that and so would the people in the neighborhood be able to use that as well. (R.A. 336, lines 19-24).

Again, the representation must relate to a present or pre-existing fact and be false when made. *Fields at* 105. "The representation cannot ordinarily be based on unfulfilled promises or statements as to future events." *Id.* Here, the community amenities were an alleged apparent promise to construct in the future. As such this statement is not actionable. The trial court admitted, in its Order denying a motion for judgment notwithstanding the verdict, this alleged misrepresentation was "the only misrepresentation which relates to future events of unfulfilled promises." (R.A. 9). Moreover, a former neighbor also admitted there were some amenities such as horse trails in the neighborhood although the trails were not fully fenced in. (R A. 498, lines 15-22).

e) **Misstatement found by trial court: Gilbert misrepresented "testing was done and everything was fine" with Lot 20.**

The trial court held that it was a misrepresentation of fact that testing was done and everything was fine. (R.A. 26, para. 24). The Court further ruled that Lot 20 had a high water table and would not support a septic system. Mrs. Price testified that Gilbert "said that the test had been done and it was okay." This testimony was in response to the soil conditions of the property. (R.A. 338, lines 17-24).

Again, this alleged misrepresentation was not false when made. A review of the trial exhibits reveals the same. The trial court presumably mistakenly relied upon an old Department of Health and Environmental Control, hereinafter "DHEC", letter, from 2002 that was received by Mr. Gilbert prior to the septic system's ultimate approval. Moreover, the recorded plat on lot 20 reveals that the septic drain field was offsite on lot 21 as recorded on September 26, 2002 (R.A. 1209). Trial exhibit 35 established that in 2002 DHEC performed an analysis stating its concerns with Lot 20; however, prior to closing on Lot 20, DHEC had preliminarily approved an

off-site septic system for Lot 20 as the recorded plat shows and had no more soil concerns regarding lot 20. (R.A. 1026-1027). In fact, DHEC issued a permit to the Respondents on 2/12/2004 as evidence of the preliminary approval by DHEC of the septic system. (R.A. 965 and R.A. 1025). However, the only remaining item of concern was a Department of Transportation encroachment permit to pass the septic line under Leisure Lane. (R.A. 1106). Thus, the statements by Gilbert in the fall of 2003 were not false when made. There is no evidence that Mr. Gilbert had knowledge that DHEC require an encroachment permit before receipt of the letter date February 26, 2004. Again, the statement by Gilbert was not known at the time to be false or misleading and was later discovered after the closing of lot 20.

Additionally, Respondents again bear some responsibility in not confirming that all soil and required DHEC testing was completed. The argument in section I(b) above is applicable here as well. Additionally, as the home was completed, although delayed, Respondents waived any objection by moving forward with closing without verifying the above. Again, Respondents have failed to establish damages that were the proximate result of his reliance upon the representation. *See Redwend.*

f) Misstatement found by trial court: Gilbert failed to disclose to the Prices that their lot contained wetlands or that the soil had a high water table.

The trial court held that it was an omission of material fact for Petitioners not to discover 2 acres of wetlands on Lot 20 prior to closing. (R.A. 26, para. 25). The trial court relied upon S.C. Code Ann. § 48-14-30, Regulation 72-305, and 33 U.S.C.S § 1344 to establish the standard of care and its breach thereof by Petitioners. This was an error of law and fact.

The trial courts reliance on South Carolina Code § 48-14-30 and Regulation 72-305 in order to establish the standard of care in this case against Petitioners is an error of law and fact.

First, the error in finding of fact is that DHEC found that Eagle Harbor, Inc. was the developer of the subdivision known as Eagle Harbor that contained Lot 20, which is the subject of this suit (R.A. 1205-1206) (R.A. 1207-1208). Thus, the finding of fact that Gerry Fox and Belinda Fox individually were developers is erroneous. Eagle Harbor, Inc. is a going concern and is not dissolved. (R.A. 445 line 24 to R.A. 446 line 2). As such, the incorporation is

responsible for actions it undertakes. Respondents further testified that they are not asserting that Belinda Fox, nor Gerry Fox, are agents of Eagle Harbor, Inc. (R.A. 641, lines 17-25).

The error of law committed by the trial court is that S.C. Code Ann. §48-14-30 and Regulation 72-305 only provides that a developer of land must apply for a permit prior to land disturbance. While violation of S.C. Code § 48-14-30 and Regulation 72-305 is unlawful, it does not provide a basis for the breach of standard of care in this case on the issue of whether Belinda Fox had a duty to investigate the existence of freshwater wetlands prior to sale of her lot. Further, there was no testimony at trial that Lot 20 was ever disturbed prior to closing. The alleged omission/misstatements concerning wetlands had to have occurred prior to closing on November 25, 2003. There is absolutely no proof of that in the record.

The trial courts reliance on 33 U.S.C.S § 1344, known as the Clean Water Act, to establish a breach of the standard of care is also incorrect. Plaintiffs Exhibit 27 evidences that the 2 acres of wetlands were freshwater wetlands and clearly fresh water wetlands are not "navigable waters of the U.S." and as such are not covered by the United States Clean Water act per *Rapanos v. U.S*, 547 U.S. 715 (2006). It is clearly the law of the United States that wet areas that are not tributaries or open waters do not meet the US Army Corps of Engineers regulatory definition of "wetland". As such, 33 U.S.C.S. § 1344 does not apply to the 2 acres of freshwater wetlands that may have been contained on the Prices lot.

Additionally, any actionable statements or omission must be of a present known fact and be false when made. *Fields at* 105. Here, the statement or omissions regarding wetlands were not known prior to closing on Lot 20. Belinda Fox was not aware of wetlands on Lot 20 prior to closing (R.A. 759, lines 9-13). Danny Gilbert was not aware of any problems with the wetlands at the time of closing. (R.A. 789 lines 13-17). Moreover, Eagle Harbor Inc. was not aware of any wetlands in the entire neighborhood until 2004, which was after the Lot 20 closing. (R.A. 759, lines 9-16).

Respondents did not act as reasonable, prudent buyers of a vacant lot in this case. Respondents were on equal footing with Belinda Fox and Gerry Fox with respect to wetlands. The contract in paragraph 10 states "buyer, at buyer's expense, shall have the privilege and responsibility of inspecting; environmental concerns, including but not limited to... wetland

study.... Buyer shall notify seller or listing agent in writing by 12 o'clock noon on October 1, 2003 of any deficiencies revealed by inspection. If buyer fails to notify seller or the listing agent of the results of such inspection on or before they stipulated, buyer shall be deemed to have waived the privilege of any inspections." Further, paragraph 11 of the contract states "this written instrument, including the additional terms and conditions set forth, expresses the entire agreement and all promises, cabinets, and warrantees between the buyer and seller. Only a subsequent written instrument signed by both parties can change it. Both buyer and seller hereby acknowledge that they have not received or relied upon any statements, which are not expressly stipulated herein."

Here, the Respondents did not act reasonably. Respondents proceeded forward with closing despite being on direct notice that they had the responsibility to conduct a wetland study. Moreover, it is clear that Respondents ultimately undertook their duty to act with reasonable care after closing as evidenced by their application to confirm the existence of fresh water wetlands in 2005. (R.A. 1163 & R.A. 1157-1162). "There is no liability for casual statements, representations as to matters of law, or matters which plaintiff could ascertain on his own in the exercise of due diligence." *AMA Management Corp. v. Strasburger*, 309 S.C. 213, 420 S.E.2d 868 (Ct. App. 1992) Moreover, reliance can be justified only if the relationship of the parties is such that the defendant occupies a superior position to the plaintiff with respect to knowledge of the truth of the statement made. *O.C. Gruber v. Santee Frozen Foods, Inc.*, 309 S.C. 13, 419 S.E.2d 795 (Ct. App. 1992). However, it is clear there can be no reasonable reliance on a misstatement if the plaintiff knows the truth of the matter. *Id.* at 20. Here, the trial transcript evidences that no one had superior knowledge of wetlands. Moreover, had Respondents acted reasonably, in requesting a wetland delineation, in the first place, it would have either renegotiated the sales price or not proceeded with closing on Lot 20. In fairness, Respondents should not be allowed to not act unreasonably, or to recover damages, albeit double damages, in this case.

In summary, the existence of wetlands was unknown to Petitioners at the time of closing and it was not reasonable for Respondents not to carefully examine the lot prior to closing. As such, Petitioner should not be liable for any omission on this point.

In conclusion concerning the alleged misrepresentation of I (a-f) above, Respondents failed to establish each of the alleged misrepresentations to be actionable, under the law, as all required elements are not met for each statement. As such, Petitioners request this court to reverse the trial court's order.

VI. THE TRIAL COURT ERRED IN ALLOWING APPELLANT DOUBLE RECOVERY FOR THE SAME WRONG.

The doctrine of election of remedies involves a choice between two or more different and coexisting modes of procedure and relief afforded by law for the same injury. *Tzouvelekas v. Tzouvelekas*, 206 S.C. 90, 33 S.E.2d 73 (1945). Its purpose is to prevent double redress for a single wrong. Use of the doctrine is limited to cases where a double recovery by the plaintiff is threatened. *Save Charleston Foundation v. Murray*, 286 S.C. 170, 333 S.E.2d 60 (Ct. App. 1985). When one set of facts entitles the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both; however, the plaintiff may not recover both. *Id.* The plaintiff should have a full opportunity to prove his claim to some form of relief, but he should not receive a double recovery. *Id.* The invocation of one remedy constitutes an election of remedies that will bar another remedy consistent therewith where the suit upon the remedy first invoked reached the stage of final adjudication. *Id*; See *Brown v. Felkel*, 320 S.C. 292, 294, 465 S.E.2d 93, 95 (Ct. App. 1995) cert. dismissed, 326 S.C. 36, 482 S.E.2d 564 (1997).

Our Supreme Court has held that that there can be no double recovery for a single wrong. This is the basic purpose of the election of remedies doctrine. Id. A defendant may raise the issue of election of remedies at any stage of the case. Moreover, in order to carry out the doctrine's purpose, the trial judge should on his own motion require election if he lets both causes of action proceed to trial. *See Nichols*, 279 S.C. at 341, 306 S.E.2d at 619 (holding trial judge acted

properly in striking verdict on one cause of action to prevent double recovery). *Inman v. Imperial Chrysler-Plymouth, Inc.*, 303 S.C. 10, 15, 397 S.E.2d 774, 777 (Ct. App. 1990).

Here, the Respondents claimed damages for the negligent misrepresentation and violations of the Unfair Trade Practices Act against the Appellant. However, the same damages asserted by Respondents have been recovered in case number 2007-CP-08-458. The testimony at trial was that the Prices received One Hundred Twenty-Five Thousand ($125,000.00) Dollars for their claims associated with loss of value based upon misrepresentation, invalid covenants, and other monetary damages associated with their purchase of lot 20 from Belinda Fox. (R.A. 1859-1863). In this case, the Court has found that Price's suffered actual damages of Eighty-Two Thousand Five Hundred Thirty ($82,530) Dollars for their loss of value and use of land. As the Prices already received One Hundred Twenty-Five Thousand ($125,000.00) Dollars, in case number 2007-CP-08-458 for the same injury, they cannot recover twice for the same wrong. To do so would provide a windfall to the Prices.

Equity requires that the Respondents not be allowed to recover twice for the same wrong. The Trial Court stated in its Order that the Appellants did not pay the Respondents' title insurance policy premium and as such, it should not be allowed to benefit from the title insurance company litigation. However, the subrogation rights in paragraph 7 of the policy prevent the inequitable result that has occurred. Here, Respondents received One Hundred Twenty-Five Thousand ($125,000.00) Dollars in exchange for its claims relating to Lot 20 alleged misrepresentations. However, the Court should have focused on the inequitable result of the Prices recovering an additional Forty-Two Thousand Four Hundred Seventy ($42,470.00) Dollars which is the difference between this Court's award of actual damages and the prior settlement amount. If the Prices had not negotiated the subrogation claim with Investor's Title,

the maximum damages recoverable by the Investor's Title would have only been One Hundred Twenty-Five Thousand ($125,000.00) Dollars against Belinda Fox. However, as the Prices retained the subrogation interest, they were allowed to recover Two Hundred Seven Thousand Five Hundred Thirty ($207,530.00) Dollars for the same damages. Clearly that result is violative of South Carolina law and is inequitable. Moreover, "Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible." *Ex Parte Dibble*, 279 592, 310 S.E.2d 440 (Ct. App.1983). This Court should vacate and/or modify the trial court's order to comport with equity.

VII. THE TRIAL COURT ERRED IN FAILING TO REQUIRE RESPONDENTS TO ELECT A REMEDY.

The doctrine of election of remedies is based on the proposition that "when a party has two remedies proceeding upon opposite and irreconcilable claims of right, the one adopted excludes the other. If a party should invoke a remedy appropriate to a certain state of facts, and there should exist another remedy appropriate to a different state of facts, inconsistent with an repugnant to the first state of facts, his invocation of the first remedy is an election which by the bare commencement of the action will bar his right to invoke the other remedy." *Walker v. McDonald*, 136 S.C. 231, 134 S.E. 222 (1926). Here, despite the trial court's order, Respondents failed to elect their remedy. This action is improper and has resulted in the Berkeley County Clerk entering judgment amounts for negligent misrepresentation and SCUTPA. (R.A. 18). To allow this action to stand would be unlawful and the trial court should be directed to modify the filed Form 4 in this case.

CONCLUSION

Based upon the arguments presented above, Petitioners request that this Court issue an Order reversing the trial court's order and remand this case for a new trial.

Respectfully Submitted,

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BERKELEY COUNTY
COURT OF COMMON PLEAS

Dale Van Slambrook, Circuit Court Judge

Case No. 2004-CP-08-1855

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

v.

Belinda Fox and Gerry Fox, ... Appellants.

CERTIFICATE OF COUNSEL

I certify that this final brief of Appellant complies with Rule 211 (b) SCACR.

June 16, 2019

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